Claim No: XXXX

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF FIRST INSTANCE

BEFORE H.E. JUSTICE ALI AL MADHANI

BETWEEN

GAVIN

Claimant

and

GAYNOR

Defendant

Hearing: **22 October 2015**

Counsel: Jade Laktineh (Latham & Watkins LLP) for the Claimant

Michael Black QC (XXIV Old Buildings) for the Defendant

Judgment: **3 April 2016**

JUDGMENT OF H.E. JUSTICE ALI AL MADHANI

JUDGMENT

UPON hearing Counsel for the Appellant and Counsel for the Respondent on 22 October 2015

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

IT IS HEREBY ORDERED THAT:

1. The Defendant's application is granted on the grounds of Abuse of Process and the Claimant's claim is therefore stayed pending the decision of the Court of Appeal for Ninth Circuit on whether the arbitration between the parties in California, USA should proceed.

2. No order as to costs.

Issued by:

Natasha Bakirci

Assistant Registrar

Date of Issue: 3 April 2016

At: 12pm

REASONING

Introduction

1.On 4 June 2015, the Claimant, Gavin, filed an Amended Claim Form seeking an order pursuant to DIFC Law No. 1 of 2008, Section 17(3)(b) (the "DIFC Arbitration Law") appointing an arbitrator under the Arbitration Agreement contained in Clause 13.5 of the 20 May 2007 Stored Value Card Processing, Service and Marketing Agreement (the "SVC Agreement") made with the Defendant, Gaynor On 28 July 2015, the Defendant indicated an intention to contest the jurisdiction of the DIFC Courts in its Amended Acknowledgement of Service.

2. The SVC Agreement at issue requires the Defendant to provide store value card services to the Claimant for use by customers in the UAE. The Defendant is managed by and affiliated with Gaynor, a California based company that develops and operates technology platforms around the world. In May 2009, the parties began disputing claims relevant to the SVC Agreement. Importantly, Gaynor US and the Defendant brought two suits against the Claimant in the United States District Court for the Central District of California ("California Court") as detailed below.

3. The SVC Agreement includes several clauses relevant to the current dispute. Clause 13.2 identifies that *"[t]he validity, construction and interpretation of [the SVC Agreement] and the rights and duties of the parties hereto shall be governed by the internal laws of the UAE."* Clause 13.3 states that the parties agree to *"submit to the jurisdiction of the courts in Dubai, the UAE."* Clause 13.4 identifies an informal dispute resolution procedure while Clause 13.5 states that *"[a]ny controversy arising out of, or relating to this [SVC] 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."*

Procedural history

4. In July 2011, Gaynor US and the Defendant filed a suit against the Claimant in the California Court. This case, *Gaynor v. Gavin*, Central District of California, No. 11-1062 ("California I") included both tort and contract claims against the Claimant. Eventually, the Defendant voluntarily dismissed its contract claims without prejudice, effectively exiting the litigation. What remains of the California I proceedings is a tort dispute between Gaynor US and the Claimant.

5. In November 2014, the Claimant amended its pleadings in the California I proceedings to include a mandatory, equitable counterclaim against Gaynor US. When the California Court ordered on 5 January 2015 that the counterclaim was required to be heard via arbitration, the Claimant dismissed the counterclaim from the suit without prejudice.

6. Concurrently, in October 2014, Gaynor US filed another suit against the Claimant in the California Court. This case, *Gaynor, Inc. & Gaynor (Gulf), Inc. v. Gavin* , Central District of California No. 14-01679 ("California II"), was initiated by Gaynor US to seek an order compelling arbitration of a claim for declaratory relief regarding the counterclaims that had been previously dismissed from the California I proceedings. The Defendant subsequently joined the California II proceedings as a plaintiff also asking the court to compel arbitration in California.

7. On 8 June 2015, one day after filing its Amended Claim Form in the DIFC Courts, the Claimant filed a renewed motion to dismiss in the California II proceedings claiming that the California Court should dismiss or alternatively stay the California II proceedings in favour of the DIFC proceedings, making reference to an *"ongoing Dubai Arbitration"* in the DIFC. In September 2015, the California Court granted an order compelling arbitration of the claims in California. The Claimant indicated its intent to appeal this order at the earliest possibility.

8. On 28 June 2015, the Defendant filed its Amended Acknowledgement of Service indicating its intention to contest jurisdiction in the DIFC Courts. Both the Defendant and the Claimant filed their arguments with regard to the jurisdiction application, which is now before the Court and at issue in this opinion.

9. Additionally, on 13 August 2015, in the DIFC Courts proceedings, the Claimant submitted to the Defendant a Request to Produce seeking certain documents allegedly demonstrating the Defendant's business activity within the DIFC. The Defendant refused to produce and on 6 October 2015, the Claimant submitted an application for a Document Production Order compelling the Defendant to produce the requested documents. Both parties address this pending document request in their submissions regarding jurisdiction.

The Defendant's submissions

10. The Defendant raises three arguments in support of the claim that the DIFC Courts do not have or should not exercise jurisdiction to appoint an arbitrator in this case. First, they claim that Clause 13.5 of the SVC Agreement is not a valid Arbitration Agreement and thus there is no jurisdiction for the DIFC Courts to appoint a tribunal under the Clause. Second, the Defendant argues that even if Clause 13.5 is a valid Arbitration Agreement, the DIFC Courts do not have jurisdiction to appoint a tribunal under Article 17(3)(b) of the DIFC Arbitration Law. Third, the Defendant argues that if the DIFC Courts find that there is jurisdiction, the Court should choose not to exercise jurisdiction over this claim because the Claimant's application to appoint an arbitrator is an abuse of process. Additionally, the Defendant argues that the Claimant's document requests are irrelevant and that the Court should grant costs on an indemnity basis.

11. The Defendant first claims that Clause 13.5 of the SVC Agreement is not a valid Arbitration Agreement and thus the DIFC Courts have no jurisdiction to appoint a tribunal under this Clause. The Defendant submits that the validity of the Arbitration Agreement is to be determined under UAE Law as the SVC Agreement identifies *"the internal laws of the UAE"* in Clause 13.2 and *"the laws of the United Arab Emirates"* in Clause 13.5. The Defendant claims that this interpretation of the contract is consistent with both DIFC and UAE Law.

12. Thus, the Defendant states, the validity of Clause 13.5 of the SVC Agreement must be determined by reference to the UAE Civil Procedure Code, Federal Law No. 11 of 1992. The requirements under UAE Law that a valid Arbitration Agreement be made in writing and with the intention to submit disputes to arbitration are not at issue in this case. Rather, the Defendant continues, the query concerns what Clause 13.5 actually requires.

13. The Defendant points out that Clause 13.5 does not identify a Seat of Arbitration or a set of rules under which arbitration should be conducted. The Defendant claims that these are basic, requisite, provisions and the Arbitration Agreement cannot be concluded without these mandatory elements as required by Article 141(1) of the UAE Civil Code. The Defendant additionally notes that while the California Court did give effect to Clause 13.5 as a valid Arbitration Agreement, that decision cannot effect the outcome under UAE Law.

14. The Defendant further argues that Clause 13.5 is incapable of performance as there is no guidance on how to establish an Arbitration Tribunal and no direction on a body of arbitration rules to follow. Failure to specify the number of arbitrators is fatal, the Defendant argues, under Article 203(1) of the UAE Civil Procedure Code.

15. Additionally, the Defendant alleges that Clause 13.5 of the SVC Agreement has been cancelled under Article 203(5) of the UAE Civil

Procedure Code by way of the Claimant's counterclaims filed in the California Court. The Defendant claims that filing these counterclaims amounted to a waiver of the Arbitration Clause under UAE Law.

16. Based on these arguments, the Defendant concludes that Clause 13.5 is not a valid Arbitration Agreement and thus there is no jurisdiction for the DIFC Courts to appoint an Arbitral Tribunal under this Clause.

17. The Defendant's second argument alleges that, even if Clause 13.5 of the SVC Agreement is a valid Arbitration Agreement, the DIFC Courts do not have jurisdiction to appoint a tribunal under Article 17(3)(b) of the DIFC Arbitration Law. In support, the Defendant first points out that the DIFC is not provided in the SVC Agreement as the Seat of Arbitration.

18. The Defendant then challenges the Claimant's assumption that the DIFC Courts have jurisdiction over the substantive contract as it is included in the phrase *"the courts of Dubai."* The Defendant points out that the Claimant relies on Article 5 of the judicial authority law No. 12 of 2004 ("Judicial Authority Law") to find DIFC Jurisdiction over the Arbitration Agreement alleging that the contract will be performed wholly or partly in the DIFC. The Defendant contends that this is irrelevant as the Arbitration Agreement is to be performed in the Seat of Arbitration, rather than the substantive place of performance relevant to the rest of the contract. Therefore, the Defendant argues, the appropriate inquiry is whether the DIFC Courts have jurisdiction over the Arbitration Agreement specifically, rather than the substantive contract.

19. The Defendant continues that there is no indication that the DIFC is the Seat of Arbitration. Rather, the Seat may be Dubai or UAE outside of the DIFC. Furthermore, the California Court determined the Seat to be California by its 28 September 2015 Order. The Defendant argues that this should amount to *res judicata* and become binding on the Claimant, alleging that the Order applies to claims made by both the Claimant and the Defendant.

20. The Defendant points out that Article 17(3)(b) of the DIFC Arbitration Law allows jurisdiction by the DIFC Courts only where the DIFC Courts are the courts of the Seat of Arbitration. Article 7 provides that the DIFC Arbitration Law applies only where the Seat of Arbitration is the DIFC, subject to certain specific exceptions. The Defendant contends that Article 17 is not one of the exceptions that may apply if the Seat of Arbitration is not the DIFC. Thus, the Defendant concludes, the DIFC Courts do not have jurisdiction under Article 17(3)(b) of the DIFC Arbitration Law and cannot appoint an arbitrator in this case.

21. Alternatively, the Defendant argues that the DIFC Courts should not exercise jurisdiction over the claim because the Claimant's application is an abuse of process.

22. The Defendant first alleges that the Claimant has not brought this claim for any bona fide reason. The Defendant supports this with reference to the Claimant's previous representation that it would not bring its counterclaims in any proceedings other than the California I proceedings. Furthermore, the Defendant points out that immediately upon filing the Amended Claim Form in these proceedings, the Claimant made allegedly false assertions that there was already an arbitration pending in Dubai.

23. Additionally, the Defendant draws attention to the California proceedings, where the California Court has ordered arbitration to proceed in California on allegedly the same issues that the Claimant seeks to pursue in this claim before the DIFC Courts. The Defendant argues that these proceedings are creating the risk of two conflicting decisions.

24. The Defendant argues that as a common law court, the DIFC Courts have jurisdiction to prevent their procedures from being used for abusive purposes and in violation of *lis alibi pendens*. In support of this contention, the Defendant points to two cases from the UK which deal with instances where the same claim was being heard before courts in two different jurisdictions. In the *Abidin Daver* case ([1984] AC 398, 411-412), the court found that the plaintiff must establish objectively by cogent evidence that there is some personal or juridical advantage available only in the second forum and it is of such importance as to cause injustice to deprive him of the second proceedings. In *Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd* ([1989] 3 All ER 65, 70), the court found that the plaintiff is required to elect which set of proceedings it wishes to pursue. The remaining action must be dismissed, not stayed.

25. The Defendant alleges that the Claimant is in the same position as a plaintiff bringing two actions in two jurisdictions. The Defendant argues that the Claimant cannot avoid this conflict by discontinuing its counterclaims in the California proceedings and seeking to arbitrate the same counterclaim in the DIFC. The Defendant contends that the California II proceedings relate to the same claims and counterclaims as the DIFC claim and the California Court has compelled arbitration in California, creating analogous, conflicting proceedings. The Defendant thus implores the DIFC Courts to dismiss the Claimant's case to avoid *"a recipe for confusion and injustice."*

26. The Claimant has sought document production to determine that the underlying transaction and parties have links with the DIFC. The Defendant argues that the DIFC Courts do not have jurisdiction as argued above and thus the documents are irrelevant to the present proceedings. The Defendant claims that the document production request must fail.

27. Finally, the Defendant claims that, because the Claimant's entire claim is an abuse of process, the DIFC Courts should make an order for costs on an indemnity basis pursuant to DIFC Courts Practice Direction 5 of 2014 on DIFC Courts' Costs Regime.

The Claimant's response and submissions

28. The Claimant maintains the position that the DIFC Courts have jurisdiction over the current claim. The Claimant asks that the DIFC Courts confirm jurisdiction over the matter and proceed to appoint an arbitrator under Article 17(3)(b) of the DIFC Arbitration Law. Alternatively, the Claimant asks that the Court determine that it has no jurisdiction and direct parties to the court of competent jurisdiction in Dubai. The Claimant also seeks other relief as appropriate, including costs.

29. The Claimant makes a number of assertions in support of its position. First, the Claimant argues that the DIFC Courts have jurisdiction to appoint a tribunal under the Judicial Authority Law and DIFC Courts Law No. 10 of 2004 ("DIFC Courts Law"). Second, the Claimant argues that the Arbitration Agreement is valid and that a UAE arbitral remedy is appropriate. Third, the Claimant argues that its counterclaims in the California I proceedings do not amount to a waiver of the right to arbitrate claims under the SVC Agreement. Additionally, the Claimant seeks to

rebut the Defendant's assertions claiming that the arguments of *lis alibi pendens* and abuse of process are without merit. Finally, the Claimant alleges that the Defendant's application contesting jurisdiction is procedurally defective.

30. First, the Claimant alleges that it is clear that the contract claims under the SVC Agreement must be arbitrated and that the DIFC Courts have jurisdiction to appoint a tribunal in this case under the Judicial Authority Law and DIFC Courts Law.

31. In support of this argument, the Claimant points out that the parties expressly agreed to *"submit to the jurisdiction of the courts in Dubai, the UAE,"* as stated in Section 13.3 of the SVC Agreement. According to the Claimant, the DIFC Courts are constitutionally part of the Dubai judicial system. Furthermore, the Claimant alleges that some dealings took place in the DIFC: the Defendant sought to incorporate in the DIFC, sought to raise capital and establish relationships in the DIFC and the Defendant had an address in the DIFC. The Claimant highlights that the Defendant has not contested these claims.

32. With regard to the allegation that there is jurisdiction due to activity within the DIFC, the Claimant seeks to provide further proof by way of its document request. The Defendant has not complied with the Claimant's document request and, the Claimant argues, the Defendant has not properly responded but rather has only claimed that the documents requested are not relevant to the proceedings before the DIFC. The Claimant argues that this failure to comply properly invites the inference that the requested documents would be adverse to the interests of the Defendant.

33. The Claimant notes that the Defendant only argues for the first time in this application that there is no jurisdiction under Article 17(3)(b) of the DIFC Arbitration Law. The Claimant argues that the Defendant ignores Article 27 of the DIFC Arbitration Law which states that *"the parties are free to agree on the Seat of Arbitration. In the absence of such agreement, where any dispute is governed by DIFC law, the Seat of Arbitration shall be the DIFC."* Furthermore, the Claimant states that the DIFC Courts derive jurisdiction not from the DIFC Arbitration Law, but rather from the Judicial Authority Law. The Claimant asserts that the law governing this dispute is DIFC law and thus Article 27 applies. This is because the DIFC Courts Law allows application of such law and also because the parties have agreed to subject their dispute to the laws of the UAE, which includes DIFC law.

34. In sum, the Claimant argues that the DIFC Courts do have jurisdiction to appoint an arbitrator in this case, pursuant to the Judicial Authority Law and the DIFC Courts Law. This is because the parties expressly agreed to *"submit to the jurisdiction of the courts in Dubai, the UAE"* and the DIFC Courts are constitutionally part of the Dubai judicial system. Further, some of the parties' dealings took place in the DIFC, including the Defendant seeking to incorporate in the DIFC, raise capital in the DIFC and use an address in the DIFC.

35. The Claimant secondly argues that the SVC Agreement is a valid Arbitration Agreement and that the Claimant does not lack a UAE arbitral remedy. The Claimant points out that the Defendant argues for the first time in this application that the Arbitration Agreement is not valid. The Defendant's argument regarding the validity of the Arbitration Agreement has changed depending on the proceedings. In the California I proceedings, the Defendant allegedly claimed the Arbitration Agreement was unenforceable but in the California II proceedings, the Defendant allegedly sought to compel arbitration of its contractual claims on the basis of the Arbitration Agreement. The Claimant contends that the same estoppel theory offered by the Defendant should estop them from this new position.

36. Furthermore, the Claimant argues that, in the UAE, the only requirement for a valid Arbitration Agreement is that it be in writing, regardless of whether UAE or DIFC law is applicable. Thus, the Claimant asserts, the Arbitration Agreement is valid.

37. In response to the Defendant's argument that the Claimant has waived its right to arbitration by filing counterclaims in the California I proceedings, the Claimant asserts that this action does not amount to a waiver of the Claimant's right to arbitrate claims under the SVC Agreement. The counterclaims in the California I proceedings were made against Gaynor US and not the Defendant. Furthermore, the Claimant alleges that the counterclaims are different claims than those pending in the ongoing DIFC Arbitration. The Claimant highlights that it was compelled to advance the counterclaims at the risk of losing the right to introduce them against Gaynor US, as required under US Law. Furthermore, the Claimant dismissed the counterclaims without prejudice.

38. The Claimant goes on to rebut the Defendant's claims of *lis pendens* and abuse of process, stating that these arguments are without merit. The Defendant argues that the California proceedings preclude the DIFC Courts from taking jurisdiction over this matter. However, the Claimant states, the Defendant is not a party to the California I proceedings and the Claimant voluntarily dismissed its claims in those proceedings. Furthermore, the Claimant alleges that it has always preserved its right to assert claims against the Defendant in Dubai.

39. The Claimant explains that neither of the California proceedings contain the same claims made by the Claimant in the DIFC Arbitration. In the Demand for Arbitration filed in the DIFC Courts, the Claimant puts forward a breach of contract claim against the Defendant, a claim for declaration of no breach by the Claimant, a claim for declaration of no further obligation by the Claimant and a claim for indemnification. In the California II proceedings, the Defendant sought to compel arbitration in California for claims of breach of contract and breach of the implied covenant of good faith and fair dealing against the Claimant. The Claimant's previous counterclaims are equitable in nature, were brought against Gaynor US in the California I proceedings and were thereafter dismissed by the Claimant without prejudice. These claims were for breach of the SVC Agreement by Gaynor US under an alter ego theory, imposition of a constructive trust over Gaynor US, unjust enrichment of Gaynor US and conversion of funds fraudulently paid. Thus, the Claimant argues, the claims in the DIFC Arbitration are fundamentally different from the claims that the Defendant and Gaynor US are seeking to arbitrate in California. The Claimant concludes that it therefore has a right to assert these claims in the UAE.

40. Additionally, the California Order of 28 September 2015 shows that neither the Defendant nor Gaynor US has obtained relief with respect to the claims asserted in this DIFC Arbitration. The Claimant goes on to state that the California Order is incorrect as it is based on the assumption that the Claimant waived its jurisdiction defences by asserting mandatory counterclaims in the California I proceedings. The Claimant asserts its intention to appeal this Order promptly and its expectation that the United States Court of Appeals for the Ninth Circuit will overturn the order, leaving only the DIFC Arbitration as pending. The Claimant points out that neither of the California proceedings have ruled on the validity of the DIFC proceedings.

41. The Claimant finally argues that the Defendant's application contesting jurisdiction is procedurally defective. First, the Claimant points out that

the application lacks proper form because the reasoning is set forth in the First Witness Statement of David Zifkin rather than the application itself. Second, the Claimant alleges that the Defendant's Rejoinder dated 27 August 2015 is authored by a law firm not registered before the DIFC. Furthermore, the Claimant argues that the Defendant's skeleton argument asserts entirely new arguments and the Claimant had to respond to these arguments in a very short time. Finally, the Claimant alleges that the Defendant failed to comply with Rule 12.10 of the DIFC Courts Rules ("RDC") by failing to serve its evidence with the application notice.

Discussion

42. The Defendant raises their three arguments in support of the claim that the DIFC Courts do not have or should not exercise jurisdiction to appoint an arbitrator in this case in the following order:

a) The validity of the Arbitration Agreement.

b) The availability of jurisdiction in the DIFC Courts.

c) The discretionary rule of abuse of process as a secondary defence.

43. This Court is not bound by the Defendant's presentation of arguments and will proceed to deal with the case starting with the question of whether this Court has jurisdiction to adjudicate the claim. In order to resolve any ambiguity or uncertainty regarding the arbitration clause relevant to this case, the parties must first be before a court of competent jurisdiction.

44. I have summarized the Defendant's arguments above in regards to their jurisdiction claims. They assert that the DIFC Courts have no jurisdiction over the Arbitration Agreement in the SVC Agreement because, as suggested in Article 7 of the DIFC Arbitration Law, Article 17(3)(b) of that same law cannot be applied if the Seat of Arbitration is not the DIFC.

45. The Defendant also contends that the substantive contract is not subject to the jurisdiction of the DIFC Courts because none of the gateways provided in Article 5 of the Judicial Authority Law apply in these circumstances.

46. In order to define the jurisdiction of the DIFC Courts one must first look to the jurisdiction gateways provided in Article 5 of the Judicial Authority Law (Law No. 12 of 2004, as amended by Law No. 16 of 2011):

"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;

(3) 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.

3) The Court of First Instance may hear and determine any civil or commercial claims or actions falling within its jurisdiction if the parties agree in writing to submit to the jurisdiction of another court over the claim or action but such court dismisses such claim or action for lack of jurisdiction.

4) Notwithstanding Clause (2) of Paragraph (A) of this Article, the Court of First Instance may not hear or determine any civil or commercial claim or action in respect of which a final judgment is rendered by another court."

47. In my view, the only way for the Claimant to properly use the gateways of the Judicial Authority Law to compel this Court to accept their application and appoint the Arbitral Panel is for the Claimant to establish one of the following facts with reference to the Article 5 gateways cited above:

a) That one of the parties is a DIFC Establishment or Licensed DIFC Establishment.

b) The action arises out of or relates to a contract or promised contract which is partly or wholly concluded, finalised or performed within the DIFC or will be performed or is supposed to be performed within the DIFC.

c) The action arises out of or relates to any incident or transaction which has been wholly or partly performed within the DIFC and is related to DIFC activities.

d) The DIFC Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations as prescribed by the DIFC Arbitration Law.

48. I shall start with the last point regarding whether the DIFC Arbitration Law confers jurisdiction to this Court to adjudicate the Claimant's case as this is one of the Claimant's fundamental arguments.

49. Article 7 of the DIFC Arbitration Law, DIFC Law No. 1 of 2008 (Scope of application of Law) provides the following:

> "(1) ◆◆ Subject to paragraphs (2) and (3) of this Article, this Law shall apply where the Seat of the Arbitration is the DIFC.
>
> (2) ◆◆◆ Articles 13 14, 15, Part 4 and the Schedule of this Law shall apply where the Seat of Arbitration is one other than the DIFC.
>
> (3) Article 13 shall also apply where no Seat has been designated or determined."

50. This means that all the provisions of the DIFC Arbitration Law, except for Articles 13, 14, 15, Part 4 and the Schedule to the Law, must be applied only when the Seat of Arbitration is the DIFC.

51. The Claimant is requesting that this Court appoint an Arbitral Panel in accordance with Article 17(3)(b) of the DIFC Arbitration Law which requires them, according to Article 7, to first establish that the Seat of Arbitration is the DIFC. The Arbitration Clause (13.5) in the SVC Agreement reads as follows: "*Any controversy arising out of, or, relating to this agreement, or the breach thereof, which cannot be resolved pursuant to section13.4 above shall be submitted to arbitration per the laws of United Arab Gavin.*"

52. In my view, the Arbitration Clause (13.5) alone does not clearly nominate the DIFC to be the Seat of Arbitration and nothing in the entire SVC Agreement refers specifically to the DIFC. Therefore the DIFC Arbitration Law is not sufficient to confer jurisdiction to the DIFC Courts in this case.

53. If the Claimant cannot rely on the DIFC Arbitration Law to confer jurisdiction to the DIFC Courts seeing as the Arbitration Clause in the SVC Agreement is ambiguous and uncertain, then reliance falls on the general rules of jurisdiction provided by Article 5(1) of the Judicial Authority Law. Importantly, it must be determined whether the parties intended to refer their disputes to the DIFC Courts or to the non-DIFC Dubai Courts. Thus, both Clauses (13.3) and (13.5) should be interpreted with this inquiry in mind.

54. That leaves the question of whether, under the provisions of Article 5(A)(1) of the Judicial Authority Law, as amended, this Court has jurisdiction over the substantive dispute in this case in the absence of an Arbitration Clause.

55. Again in order to answer this question the burden of proof requires the Claimant to demonstrate the link between the case and the DIFC in a manner sufficient to establish the facts mentioned above at paragraph 47 (a), (b) or (c).

56. When discussing the Judicial Authority Law's jurisdictional gateways, particularly with regard to the existence of a DIFC Establishment, the Claimant sought to show this Court that the Defendant intended to incorporate in the DIFC and was organising its corporate structure to comply with DIFC rules. In support, the Claimant points to the Confidential Information Memorandum of Gaynor Gulf, the Defendant, specifically at page 12, where it is stated under the subtitle "Migration" that "*the Core Founder will propose within 1 year of Gaynor Gulf incorporation, Gaynor Gulf be `migrated' into the (`DIFC'). It is intended that such `migration' will take place within 3 years following the Closing Date."* The Claimant made reference to Article 7.1 of the same document regarding corporate structure to show this same intention of the Defendant.

57. Additionally, the Claimant refers to the letter dated 18 May 2006 (Gaynor Gulf Limited Private Placement) which shows that the address of the Defendant is listed as the Exchange Building 5 in the DIFC.

58. The Defendant's position is that they are incorporated in Cayman Islands and not in the DIFC. Incorporation in the DIFC was not more than a plan which the Defendant did not end up following. They also argued that the letter of 18 May 2006 was sent almost a year before the signing of the SVC Agreement.

59. The evidence presented by the Claimant might indicate that the Defendant intended to be a DIFC Establishment at some time after 2006 but there is no evidence, such as a trade license or lease agreement, that they became a DIFC Establishment within the meaning of Article 5 and therefore, the Claimant's argument in this regard must fail.

60. The Court now turns to the question of whether the action referred to by the Claimant arises out of or relates to a contract or promised contract that was partly or wholly concluded, finalised or performed within DIFC or will be performed or is supposed to be performed within the DIFC.

61. The SVC Agreement is completely silent in this regard. Furthermore, the Claimant's argument that the Defendant attempted to raise capital and establish key relations in the DIFC in connection with its venture with Gavin under the SVC Agreement is not reflected in the SVC Agreement itself. Instead, it is mentioned in the letter of 4 May 2009 which shall be discussed in Paragraphs 63 to 65 below.

62. Next, I move to discuss the third jurisdiction gateway under the Judicial Authority Law, which requires an action arising out of or relating to any incident or transaction, wholly or partly performed within the DIFC and that the action is related to DIFC activities.

63. To support their argument, the Claimant provides the letter of 4 May 2009 with the subject line: *"Gavin ◆- Gaynor Stored Value Card Program."* The letter discusses meeting arrangements in the DIFC to occur the next day. Additionally, in this letter, the Deputy CEO of Gaynor Private Limited (Pakistan) was inquiring about the 2nd Addendum to the Gavin - Gaynor Agreement, which was signed by him on 21 January 2009.

64. This letter is quite clear evidence that the transaction between the parties took place, at least in part, within the DIFC, which means that the parties transacted business in the geographical territory of the DIFC and therefore must be governed by DIFC Laws including being subject to the jurisdiction of the DIFC Courts pursuant to Article 5 of the Judicial Authority Law.

65. The only criticism the Defendant can provide against this evidence is that the letter was sent by an independent company, Gaynor Pakistan. In my view this criticism lacks rationale. Although the letter was sent by Gaynor Pakistan, the subject matter and the content of the letter indicate that the referenced meeting is about executing the SVC Agreement in the DIFC or that a transaction related to the same contract came through the DIFC. In my view, this is sufficient to link the transaction to the jurisdiction of this Court as required by Article 5(1)(b) and (c) of the Judicial Authority Law.

66. Thus, having said that this Court's interpretation of the wording *"the courts in Dubai, the UAE"* of Article (13.3) of the SVC Agreement must mean the DIFC Courts and since the parties executed their contract and transacted in this jurisdiction, the DIFC Courts are the Courts of natural jurisdiction in the absence of an Arbitration Clause.

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.

The Validity of the Arbitration Clause

68. The Defendant's next defence in support of the Court rejecting the Claimant's application to appoint Arbitrators is to challenge the validity of the Arbitration Clause (13.5) of the SVC Agreement.

69. This is a very risky argument, especially considering that a jurisdictional link with the DIFC Courts has been established. The risk lies in two situations. First, if this Court finds that the Arbitration Clause is invalid or unenforceable, the only remaining venue available to resolve the dispute between the parties, as relates to the SVC Agreement, would be the DIFC Courts.

70. Second, if the Defendant continues with this argument, it may result in an interpretation that there should be no arbitration at all, even in the US, or that the Defendant has waived its right to arbitrate.

71. However, the parties' intent with regard to Arbitration is clear, both want to arbitrate the claims. The controversy remains over the Seat of Arbitration as the Defendant seeks to arbitrate in the US while the Claimant seeks arbitration in Dubai, UAE.

72. Furthermore, the Defendant's arguments against the Arbitration Clause are based on the UAE Civil Procedure Code which is not the applicable law in the current case, as the Court has found previously above. Since the Defendant did not submit that the Arbitration Clause is invalid under the laws of the DIFC, the Arbitration Clause is therefore a valid Jurisdiction Agreement.

73. Nothing in the DIFC Arbitration Law or in other rules governing arbitration in the DIFC provides that an Arbitration Clause would become unenforceable for failure to nominate a Seat of Arbitration. I see no reason why the Seat of Arbitration cannot be determined by reference to an implied choice, giving consideration to the Seat with the most connection with the Agreement, the parties, the transaction or any other relevant consideration.

74. In my view, the SVC Agreement contains an implied agreement that the Seat of Arbitration is to be Dubai (DIFC) and not the US or any other place. Nothing in the Defendant's submissions suggests the contrary. In fact, reference to Dubai, UAE Law as the applicable substantive and procedural law, and reference to the Dubai, UAE Courts, which this Court earlier interpreted to be both DIFC Laws and Courts, give ample support to an implied Seat of Arbitration in Dubai (DIFC).

75. In response to the Defendant's argument that the Claimant has waived its right to arbitration by filing counterclaims in the California I proceedings, this Court finds that these actions do not amount to a waiver of the Claimant's right to arbitrate claims under the SVC Agreement. The Order of the California Court dated 27 March 2015 has made it clear that the Claimant is consistent in its position that arbitration must take place in Dubai, UAE as the Claimant applied for a stay of the proceedings before the California Court.

76. In summary, this Court's interpretation of the SVC Agreement as it relates to arbitration leads to the conclusion that arbitration must be conducted in the DIFC and in accordance with the DIFC rules and regulations governing arbitration.

Abuse of Process

77. The Defendant, when making its abuse of process argument, draws attention to the California proceedings, where the California Court has ordered arbitration to proceed in California on allegedly the same issues that the Claimant seeks to pursue in its claim before this Court. The Defendant argues that the DIFC case is creating the risk of two conflicting decisions, and that the DIFC Courts, as a common law Court, should not exercise jurisdiction over the claim as the Claimant's application is an abuse of process.

78. It is evident that the California Court initially ordered the parties to arbitrate their contract claims in California and that the Claimant sought to appeal this Order and lost. This means that if this Court grants the Claimant's application to appoint arbitrators and the parties proceed to arbitrate in the DIFC, such a decision would create the possibility of two conflicting decisions of two different Arbitral Tribunals.

79. The Claimant's defence to this point is that the subject matter in the two cases is not the same. The Claimant asserts that the claims before the DIFC Courts against Gaynor Gulf are the dismissed counterclaims before the California Court, which include the following:

a) Breach of the SVC Agreement by Gaynor US based on an *alter ego* theory;

b) Imposition of a constructive trust over funds paid by Gavin Bank fraudulently to Gaynor Gulf that eventually went to Gaynor US;

c) Unjust enrichment of Gaynor US; and

d) Conversion of funds fraudulently paid.

The case before the California Arbitration allegedly includes the following claims;

a) Breach of contract against Gavin Bank, and

b) Breach of an implied covenant of good faith and fair dealing.

80. In my view, the subject matters in both proceedings are strongly connected and hard to separate, especially the element of causation in claims (a) and (b) in the DIFC Courts as compared with both claims in the California Arbitration, as they all stem from performance of the same agreement. Further, allowing two different forums to adjudicate these claims separately shall lead to extensive and duplicative costs in addition to the possibility of conflicting decisions regarding the same facts. Accordingly, it seems that the correct decision is to dismiss the Claimant's case based on an abuse of process.

81. However, since the Claimant indicated that the California Court Order is not final until the appointment of Arbitrators, this Court will order a stay of the Claimant's claims instead, pending the appeal of the Order before the United States Court of Appeals for the Ninth Circuit.

82. If the United States Court of Appeals for the Ninth Circuit or the appointed Arbitral Tribunal proceed to overturn the ruling regarding jurisdiction in favour of the Claimant, the DIFC Arbitration shall proceed.

83. Although the Defendant has won in the final outcome of this case, since it has lost two thirds of the principal arguments, it is the view of this Court that no costs shall be ordered in favour of either party.



Issued by:

Natasha Bakirci

Assistant Registrar

Date of Issue: 3 April 2016

At: 12pm