Claim No: SCT 479/2019

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE SMALL CLAIMS TRIBUNAL OF DIFC COURTS

BETWEEN

LINSAEN COMPANY LIMITED

Claimant

and

LIRANI DEVELOPMENT AND MANAGEMENT LLC

Defendant

ORDER WITH REASONS OF SCT JUDGE AND DEPUTY REGISTRAR AYESHA BIN KALBAN

UPON this Claim having been called on 21 November 2019 for a Jurisdiction Hearing before SCT Judge and Deputy Registrar Ayesha Bin Kalban, with the Claimant's representative and the Defendant's representative in attendance

IT IS HEREBY ORDERED THAT:

1. The Defendant's Application to contest jurisdiction is rejected.

2. The DIFC Courts has jurisdiction to hear and determine this claim.

Issued by:
Ayesha Bin Kalban
SCT Judge and Deputy Registrar
Date: 4 December 2019
At: 9am

SCHEDULE OF REASONS

1. The Claimant is Linsaen Company Limited (the "Claimant"), a law firm registered in the Dubai International Financial Centre (the "DIFC").

2. The Defendant is Lirani Development and Management LLC (the "Defendant"), a special purpose vehicle established to develop a piece of land with the DIFC.

3. The Defendant signed an engagement letter as well as a standard terms of engagement (the "ToE") provided by the Claimant, pursuant to which the Claimant would proceed to provide legal services to the Defendant in relation to the aforementioned development of land in the DIFC. The scope of work that the Claimant would undertake as agreed between the parties was set out within the ToE.

4. On 9 October 2019, the Claimant filed a claim in the DIFC Courts' Small Claims Tribunal (the "SCT") seeking the recovery of its unpaid fees for the services it provided to the Defendant. The Defendant acknowledged service of the Claim brought by the Claimant and confirmed within its filed acknowledgment of service its intention to contest the jurisdiction of the DIFC Courts to hear this Claim.

5. On 27 October 2019, the Defendant filed its jurisdiction application (the "Jurisdiction Application"), to which the Claimant responded on 29 October 2019.

The Jurisdiction Application

6. The Defendant's Jurisdiction Application dated 27 October 2019 seeks an order containing a declaration that the SCT has no jurisdiction or will not exercise its jurisdiction upon this Claim, and that the Claim Form be set aside in accordance with Part 12 of the Rules of the DIFC Courts (the "RDC").

7. Both parties, in their submissions, have referred to Part 12 of the RDC in relation to the procedure applicable to applications to contest the jurisdiction of the DIFC Courts within the SCT. During the course of the Hearing, the parties confirmed that they are no longer pursuing these issues as points of contention in this Application.

8. The Defendant makes its Application on the assertion that the parties have opted-out of the jurisdiction of the DIFC Courts in favour for the Dubai Courts. It submits that upon the point in which the parties entered into the engagement agreement, the Claimant provided a standard agreement which set out its choice of jurisdiction. This is set out in Clause 15 of the ToE and reads as follows:

> "15. RESOLVING ISSUES AND DISPUTES
>
> 15.1 To raise or discuss any matter we are handling or have handled on your behalf, please contact either your relationship partner involved in the particular matter or our Managing Partner.

15.2 These Terms shall be governed by and construed and interpreted in accordance with the laws of the jurisdiction from which we delivered the work to you, subject to the following sentence. In relation to our office in the Dubai International Financial Centre ("DIFC"), the (non-DIFC) laws of the Emirate of Dubai and the applicable federal laws of the United Arab Emirates shall apply, while in relation to our office in the Abu Dhabi Global Market ("ADGM"), the (non-ADGM) laws of the Emirate of Abu Dhabi and the applicable federal laws or the United Arab Emirates shall apply.

15.3 In relation to matters involving our offices in Dubai (including in the DIFC), it is agreed that the Dubai Courts established pursuant to the Emirate of Dubai Law No (3) of 1992 will have exclusive jurisdiction over any claim against us founded on any allegation of negligence or breach of duty or otherwise in relation to any specific transaction or matter. In relation to matters involving our office in Abu Dhabi (including in the ADGM), it is agreed that the Courts of Abu Dhabi established pursuant to the Emirate of Abu Dhabi Law No 23/2006 will have exclusive jurisdiction over any claim against us founded on any allegation of negligence or breach of duty or otherwise in relation to any specific transaction or matter. Matters related to our offices, including our associated offices, outside the UAE shall be referred to and be determined by the courts of the applicable jurisdiction. The foregoing shall apply even if the specific alleged act or omission on which the claim is founded occurred elsewhere."

9. The Defendant submits that, within Clause 15, the parties have effectively agreed that:

a) The UAE federal law shall apply to this Claim going forward. The Claimant's representative agreed this to be the case during the course of the Hearing.

b) Any matters concerning the Claimant's DIFC office shall be subject to the exclusive jurisdiction of the DIFC Courts.

10. The Defendant submitted that the wording of Clause 15(3) is very specific to exclude the jurisdiction of the DIFC Courts, whilst at no time does it provide any wording to include said jurisdiction. It contends that the Claimant, being the drafting party of the ToE, was explicit in its attempt to specifically exclude the DIFC Courts' jurisdiction, and that this exclusion covers all claims relating to the Claimant's offices in Dubai and DIFC, seeing as Clause 15(3) contains no wording to include the DIFC Courts. It submits that Clause 15(3) and Clause 15(2) read together demonstrate the Claimant's intention to remove reference to the DIFC Courts by excluding it as the venue for resolving disputes arising out of the ToE.

11. The Defendant continues that, in relation to the wording contained in Clause 15(3) distinguishing between the jurisdiction governing claims brought against the Claimant and the jurisdiction governing claims brought by the Claimant, this would warrant Clause 15(3) to be an unworkable and unjust clause. The Defendant explains that wording that directs that any claims relating to allegations against the Claimant firm for negligence, breach of duty or otherwise shall be subject to the exclusive jurisdiction of the Dubai Courts would stifle the Defendant's ability to make a defence on the grounds of negligence or breach of duty on the Claimant's part, specifically in relation to this Claim.

12. The Defendant further asserts that Clause 15(3) is unclear and thus requests that the ambiguity be read in favour of the Defendant in light of Article 266 of the UAE Civil Code, which translates to `doubt is construed in favour of the debtor'. It makes this contention on the basis that the Claimant has drafted the allegedly ambiguous clause and thus requests that the Court read this Clause in favour of the Defendant and order that the DIFC Courts cannot entertain this case for lack of jurisdiction.

13. In support of the Jurisdiction Application, the Defendant exhibits an article prepared by the Claimant firm titled `Opting Out of the Exclusive Jurisdiction of The DIFC Courts'. It submits that the Claimant retains extensive knowledge on opting-out of the DIFC Courts' jurisdiction and that the submitted article demonstrates the Claimant's intention to opt-out as the contract did not expressly provide wording in respect of claims being brought by the Claimant being subject to the DIFC Courts' jurisdiction.

The Claimant's Response to the Jurisdiction Application

14. In response to the Jurisdiction Application, the Claimant states that both parties are DIFC entities and that the dispute at hand relates to an agreement for the provision of services within the DIFC. The Claimant continues that the jurisdiction of the DIFC Courts is firmly established on the basis of Article of 5(A) of the Judicial Authority Law, Dubai Law No. 12 of 2004, as amended (the "JAL"), which sets out the DIFC Courts' jurisdiction over:

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

ii. (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;

iii. (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; . . .

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

. . . civil or commercial claims or actions where the parties agree in writing to file such claim or action with [the DIFC Courts] whether before or after the dispute arises, provided that such agreement is made pursuant to specific, clear and express provisions."

15. In light of Article 5(A), the Claimant submits that claims brought by the Claimant would be subject to the jurisdiction of the DIFC Courts, and reference to this need not be made within Clause 15(3).

16. The Claimant's representative responds to the Defendant's claim that Clause 15(3) is ambiguous by asserting that it is of the view that Clause 15(3) captures the Claimant's intention to opt-out of the DIFC Courts' jurisdiction specifically in relation to negligence and breach of duty claims that are brought against the Claimant by its clients. The Claimant continues that this opt-out provision is well within its rights and that there is no

law, regulation or case law preventing the Claimant from doing so. The Claimant explains that such a clause is deemed to be an asymmetric clause and is commonly used in financial agreements, and further asserts that there is no malintent on the Claimant's part by the drafting of this Clause.

17. In relation to the Defendant's argument that Clause 15 is an ambiguous clause, the Claimant responds that the clause reads and sets out quite clearly its intention to have its disputes resolved in the manner it deems fit, and such was agreed within the ToE.

18. The Claimant responds to the Defendant's claim that Clause 15 is unjust and unworkable by raising the following question: If the Court finds the clause to be unfair to the Defendant, what would be the effect of that finding? It submits that even if Clause 15 were to fall away, the effect of that would be that the primary jurisdiction of the DIFC Courts would be engaged and thus this Court would retain its jurisdiction.

Discussion

19. I find that Clause 15 does indeed set out the Claimant's intention with respect to how it wishes for disputes to which it is a party be resolved. I do not find Clause 15 to be ambiguous, nor do I find it to be unjust or unworkable. I shall briefly set out my reasons below.

20. As provided above, no authority was submitted that would demonstrate a contracting party's inability to opt-out of the DIFC Courts' jurisdiction (or any other hybrid jurisdiction) in relation to claims being brought against it for specific allegations. I therefore do not believe that Clause 15 would be found to be unjust, nor do I agree with the Defendant's claim that it is unworkable. Under the JAL, parties are free to opt-in and opt-out of the DIFC Courts' jurisdiction as they wish provided this is expressly set out in the contract. The JAL does not set out wording to the effect that would prevent a contracting party from opting out in respect of certain types of allegations, and therefore I am of the view that such a clause should be deemed acceptable.

21. In respect of the Defendant's claim that the language in Clause 15 contains wording to exclude the DIFC Courts' jurisdiction and no wording to include it, I am of the view that such wording would not be necessary as the DIFC Courts' jurisdiction is originally engaged under the gateways set out in the JAL and the wording of Clause 15 serves to differentiate claims regarding allegations brought against the Claimant.

22. As regards the Defendant's claim that Clause 15 would stifle the Defendant's ability to make a defence to this Claim on the grounds of negligence and breach of duty in this Court, I posed a question to the Claimant's representative during the course of the Hearing as to what the effect of such a claim might be. I agree with the Claimant's response to that question in that a defence to the Claimant's claim for unpaid legal fees that contains allegations as set out in Clause 15 would need to be made in the form of a counterclaim, which would be subject to this Courts' jurisdiction seeing as the underlying claim was indeed brought by the Claimant in this Court. I am of the view that before this Court, the Defendant can make its full defence under the UAE law, being the law governing the contract, but in the event that it wishes to bring a fresh claim against the Claimant this would be subject to the Dubai Courts' jurisdiction. This would not apply in respect of a counterclaim where the original claim was brought by the Claimant in the DIFC Courts, as the circumstances would indicate that the jurisdiction of this Court was primarily engaged and a consequence of this would be that the competence of the Courts would not be divided in such a way to mean that the Defendant would need to submit its claims to the Dubai Courts, when an interrelated claim has been brought against it in the DIFC Courts. In light of this finding, I dismiss the Defendant's argument that Clause 15 would prevent it from making a full defence to this Claim.

23. In relation to the Defendant's claim that, in the event that Clause 15 is deemed to be ambiguous, the Court must interpret the Clause in favour of the Defendant, I find that this would not be a workable solution. As concluded above, I do not find Clause 15 to be unclear or ambiguous, however even if found otherwise I do not believe that interpreting Clause 15 to the Defendant's favour would mean that the Court must find that the DIFC Courts lack jurisdiction to determine this Claim. If such a finding on ambiguity was made, I agree with the Claimant's conclusion that the jurisdiction clause would fall away and the original jurisdiction of the DIFC Courts would be engaged under the auspices of the JAL.

24. Another point to be raised is that if the Defendant found issue with Clause 15, the time to have raised such an issue would have been at the time it retained the Claimant's services, rather than in the course of a dispute regarding the Claimant's remuneration for those services which have already been provided to the Defendant.

25. Therefore, I am of the view that the DIFC Courts has jurisdiction to hear and determine this Claim and that Clause 15 does not provide an opt-out of the DIFC Courts' jurisdiction with respect to claims brought by the Claimant.