Claim No: ENF 221/2019

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

FAL OIL COMPANY

Applicant

and

SHARJAH ELECTRICITY AND WATER AUTHORITY

Respondent

ORDER WITH REASONS OF JUSTICE WAYNE MARTIN

UPON the enforcement application dated 19 November 2019

AND UPON the Order of H.E Justice Omar Al Muhairi dated 4 June 2020

AND UPON hearing Counsel for the Claimant and Counsel for the Defendant at a hearing on 17 November 2020

IT IS HEREBY ORDERED THAT:

1. the judgment of the Sharjah Court of First Instance on 31 July 2016 in the case referred to as no. 17654/2011 be ratified, recognized and declared enforceable as a judgment of the DIFC Court pursuant to Articles 5(1)(e) and 7(6) of Dubai Law No. 12 of 2004, as amended by law no. 16 of 2011 and Article 24 of DIFC law 10 of 2004.

2. The Respondent is to pay the Applicant's costs of this application to be assessed by the Court unless agreed within twenty-eight (28) days of the date of this order.

Issued by:
Nour Hineidi
Registrar
Date of issue: 16 February 2021
At:2pm

REASONS FOR DECISION

Summary

1. The Sharjah Court of First Instance has entered judgment ordering Sharjah Electricity and Water Authority (**"SEWA"**) (the respondent in these proceedings) to pay FAL Oil Company Limited (**"FAL"**) (the applicant in these proceedings) the amount of AD1,709,220,465 plus interest at the rate of 1% per annum from 13 March 2011 (**"Sharjah Judgment"**). The judgment debt has been discharged in part by FAL's agreement to allow certain other debts due to SEWA to be set off against the judgment debt in satisfaction of those debts, and in part by payments made by SEWA in the course of execution proceedings in the Sharjah Court of First Instance. However, a very substantial amount of the judgment debt remains unpaid.

2. FAL has applied to this Court for an order that the Sharjah Judgment be ratified, recognised and declared enforceable as a judgment of this Court. It is important to emphasise that FAL does not seek any orders by way of enforcement or execution of the judgment at this stage. Rather, FAL seeks the order for recognition and associated declaratory relief as a precursor to any steps that may be taken by way of execution on the judgment.

3. SEWA opposes the application on a variety of grounds including an asserted lack of jurisdiction, sovereign immunity, breach of public policy, abuse of process and futility.

4. For the reasons which follow I have concluded all of SEWA's objections to the application should be dismissed, and the application granted.

The parties

5. FAL is a private corporation engaged in the supply of petroleum products. Although it is not apparently under any form of insolvency administration, a significant number of claims have been brought against FAL in the courts of Sharjah by creditors of FAL. Judgments entered against FAL in respect of those claims remain unsatisfied. FAL asserts that "many, if not all of FAL's existing creditors . only exist because SEWA failed to pay the amounts it owes FAL"[1]. It is unnecessary to assess the validity of that assertion for the purposes of resolving this application.

6. SEWA is a legal entity constituted by Decree in the Emirate of Sharjah. It is capable of suing and being sued in its own name. In very general terms, its functions include the monopoly supply of electricity and gas within the Emirate of Sharjah (Sharjah - a term which I will use hereafter to

describe the polity constituted by that Emirate). It will be necessary to consider the Decrees which constitute SEWA and govern its operations, its functions and its relationship with Sharjah in the context of SEWA's claim to sovereign immunity.

The dispute

7. FAL supplied petroleum products to SEWA throughout 2008 and 2009 at SEWA's request. It seems that the petroleum was used to generate electricity which was supplied by SEWA to its customers, although direct evidence of this is somewhat sparse.

8. SEWA did not pay for the petroleum supplied by FAL. As at 23 November 2010, FAL claimed that an amount of AED2,675,103,627.83 was owed to it by SEWA[2].

9. On 16 December 2010, His Highness the Crown Prince of Sharjah appointed a Special Committee to resolve the dispute between FAL and SEWA. That Special Committee concluded that an amount of AED2,215,506,715 should be paid by SEWA to FAL. However, SEWA made no payment to FAL[3].

10. FAL commenced proceedings against SEWA and Sharjah in the Sharjah Court of First Instance on 13 March 2011[4]. It is common ground that in defending the claim by FAL, Sharjah asserted that it was not liable under contracts entered into by SEWA, relying upon SEWA's separate legal personality. The Court of First Instance upheld Sharjah's defence on that ground and FAL's claim against Sharjah was dismissed.

11. However, FAL's claim against SEWA was upheld and on 31 July 2016 the Sharjah Court of First Instance entered judgment against SEWA in the amount of AED1,709,220,465 plus interest at the rate of 1% per annum from 13 March 2011[5].

12. SEWA appealed against that judgment to the Sharjah Court of Appeal. On 14 February 2017 that Court dismissed SEWA's appeal[6]. SEWA appealed from that decision to the Union Supreme Court, which dismissed SEWA's appeal on 21 November 2017[7].

13. It will be appropriate to refer to some of the observations made by the Courts in the course of the proceedings to which I have just referred in the context of SEWA's claim for sovereign immunity.

14. On 7 May 2017, FAL commenced enforcement proceedings against SEWA in the Sharjah Courts[8].

15. On 14 May 2018, with FAL's consent, amounts owing to SEWA by other parties and which were the subject of other judgments in the Courts of Sharjah were set off against SEWA's judgment debt, reducing the amount owed by SEWA under the judgment debt to AED1,682,552,833[9].

16. On 6 May 2018, orders were made in the Sharjah Court attaching payments made by SEWA in discharge of the judgment debt in favour of several of FAL's judgment creditors. The consequence of that order is that any payments made by SEWA in discharge of the judgment debt due to FAL are paid into Court in Sharjah, and disbursed to specific creditors of FAL in partial discharge of FAL's judgment debts[10].

17. FAL appealed against the order attaching payments made by SEWA in discharge of its judgment debt in favour of FAL's creditors. That appeal was dismissed by the Sharjah Court of Appeal on 2 October 2018[11].

18. During 2019 and 2020, SEWA made quarterly payments in reduction of the judgment debt. It will be necessary to consider in more detail the extent to which those payments were sanctioned by the Court in Sharjah, and the effect of certain orders made by that Court in the context of SEWA's claim that recognition of the Sharjah Judgment by this Court would be contrary to public policy or an abuse of process.

19. It is clear from the history of the Sharjah proceedings which I have recited above, that the Sharjah Judgment is a final judgment enforceable in Sharjah. Enforcement action is under way in Sharjah, with the result that the amount due under the Sharjah Judgment, while still very substantial, is reducing. The question which must be determined on this application is whether this Court should make orders which would enable FAL to take enforcement action against SEWA in this Court, or perhaps utilise recognition of the judgment by this Court to take enforcement action in other courts of Dubai through the jurisdictional arrangements within Dubai generally described as the "conduit".

The issues

20. SEWA opposes FAL's application on the following grounds:

(1) This Court lacks the jurisdiction to recognise and enforce the judgments of other courts as a result of a lacuna in the relevant legislation.

(2) If the Court has jurisdiction it should decline to exercise that jurisdiction because SEWA is entitled to sovereign immunity.

(3) If the Court has jurisdiction it should decline to exercise that jurisdiction because recognition of the Sharjah Judgment would be contrary to public policy because:

(a) SEWA is entitled to sovereign immunity, and/or

(b) recognition would interfere with the enforcement regime in place in the courts of Sharjah.

(4) If the Court has jurisdiction it should decline to exercise that jurisdiction because registration of the Sharjah Judgment would be an abuse of process because it would interfere with the enforcement regime instituted by the courts of Sharjah.

(5) If the Court has jurisdiction it should decline to exercise that jurisdiction because recognition of the Sharjah Judgment would be futile and would serve no purpose because:

(a) any of SEWA's assets within the DIFC are immune from execution because of sovereign immunity, and/or

(b) it would not be possible for the courts of Dubai to order execution against any of SEWA's assets which are outside the DIFC but within the Emirate of Dubai.

21. I will deal with each of these issues in turn.

Issue 1 - Jurisdiction

22. The authoritative statement of the jurisdiction of this Court is contained in Article 5(A) of law no. 12 of 2004 (as amended) relating to the Judicial Authority at Dubai International Financial Centre (the **"JAL"**). The provision of that Article which is relevant to these proceedings is Article 5(A)(1)(e) which provides:

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

.

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

23. In Article 2 of the JAL "DIFC Laws" is defined to mean:

"Any laws issued by the Ruler in relation to DIFC."

24. In the same Article, "DIFC Regulations" are defined to mean:

"Any rules, regulations, bylaws or orders relating to DIFC issued by the President or by DIFC Bodies."

25. Also in Article 2 of the JAL "DIFC Bodies" are defined to mean:

"The bodies established pursuant to Article (3) of the aforementioned Law no. (9) of 2004 and any other body established pursuant to the DIFC Laws or pursuant to approval of the President."

26. The JAL is clearly a "DIFC Law". As the DIFC Courts are established by Article 3 of the JAL, they are clearly "DIFC Bodies". It follows that Rules of Court promulgated by the DIFC Courts are "DIFC Regulations". Although there has been controversy as to the extent to which the Court can, in effect, expand its own jurisdiction by making Rules of Court (the "bootstraps" argument), for reasons which will appear it is unnecessary to enter into that controversy for the purposes of this application.

27. Article 7 of the JAL is headed "Execution". It contains provisions relating to:

(a) Execution within DIFC[12];

(b) Execution outside DIFC[13];

(c) The general procedure for execution by the Court and the Courts of Dubai outside DIFC[14];

(d) Execution within DIFC of the judgments of the Courts of Dubai outside DIFC and arbitral awards ratified by those Courts[15];

(e) The enforcement of judgments, decisions, orders and ratified arbitral awards rendered by Courts outside DIFC.

28. The latter subject is dealt with by Article 7(6) which provides:

"The judgments, decisions, orders and ratified Arbitral Awards rendered outside DIFC by any court other than Dubai Courts shall be executed within DIFC in accordance with the procedure prescribed in the Rules of the Courts."

29. DIFC Law no. 10 of 2004 (the **"DIFC Court Law"**) is also clearly a DIFC Law for the purposes of Article 5(A)(1)(e) of the JAL. Article 24 of the DIFC Court Law provides:

"24. Ratification of judgments

(1) Pursuant to Article 7(4) of the Judicial Authority Law, the Court of First Instance has jurisdiction to ratify any judgment, order or award of any recognised:

(a) Foreign court;

(b) Courts of Dubai or the United Arab Emirates;

(c) Arbitral Awards;

(d) Foreign Arbitral Awards; or

(e) Orders for the purposes of any subsequent application for enforcement in the Courts of Dubai.

(2) Where the UAE has entered into an applicable treaty for the mutual enforcement of judgments, orders or awards, the Court of First Instance shall comply with the terms of such treaty."

30. It is clear that the reference in Article 24 to Article 7(4) of the JAL is a reference to that Article in the original text of the JAL, prior to the amendments made by Dubai Law no. 16 of 2011. Article 24 of the DIFC Court Law has not been amended to take account of those amendments. However, it is established by authority that Article 24 should be read as referring to the current provisions of Articles 7(4) and (5) and (6) of the JAL[16].

31. The DIFC Courts have made extensive rules with respect to the enforcement of judgments and orders[17]. Although it will be necessary to make brief reference to one provision of those Rules later in these reasons, for present purposes it is sufficient to observe that, as might be expected, those Rules essentially concern the various processes and procedures which might be invoked by a judgment creditor seeking to enforce the judgements and orders of the Court.

Issue 1 - Jurisdiction

32. The legislative regime which I have set out above is clear and unambiguous. Article 5(A)(1)(e) provides a "gateway" to the jurisdiction of this Court if the Court has jurisdiction "in accordance with DIFC Laws and DIFC Regulations". The JAL is a DIFC Law. Article 7(6) of the JAL expressly provides that the Court has jurisdiction to execute the judgments of courts outside the DIFC "in accordance with the procedure prescribed in the Rules of the Courts". This provision clearly and unambiguously confers jurisdiction on this Court to execute the judgments of courts outside the DIFC (other than Dubai Courts, in respect of which jurisdiction is conferred elsewhere within Article 7 of the JAL). That provision provides a "gateway" to the jurisdiction of this Court to judgment creditors under the judgment of any court other than a Dubai Court through which such a creditor might pass in order to seek execution of the relevant judgment by this Court.

33. Article 7(6) expressly provides that the jurisdiction to which it refers shall be exercised "in accordance with the procedures prescribed" in the RDC. However, the source or font of the relevant jurisdiction is Article 7(6), not the Rules. The Rules merely prescribe the manner in which the jurisdiction conferred by the Article is to be exercised.

34. Article 7(6) of the JAL is concerned with the execution of the judgments of courts outside Dubai (including DIFC). Obviously, recognition or ratification of the relevant judgment is a necessary first step in any process of execution. It follows that the conferral of jurisdiction upon the Court to recognise or ratify such judgments is implicit in Article 7(6).

35. But in any event, the conferral of jurisdiction with respect to recognition or ratification of the judgments of other courts is explicit in the provisions of Article 24 of the DIFC Court Law. That provision expressly confers upon this Court the jurisdiction which FAL has invoked in this application - namely, jurisdiction to ratify (or recognise) the judgment of a Court of the United Arab Emirates.

36. This construction of the relevant legislative regime accords with the views expressed by Hwang CJ[18] in DNB Bank[19]. Although those observations were, in the context of that case strictly obiter, the reasoning is persuasive and conforms with the natural and ordinary meaning of the provisions used in the relevant legislation.

37. However, SEWA submits that there is a defect in this legislative regime which deprives the Court of jurisdiction to recognise and enforce the judgments of other courts.

38. It is, with respect, difficult to glean precisely what the defect is said to be from SEWA's skeleton arguments. However, during the hearing senior counsel for SEWA neatly expressed the proposition in the following terms (referring to Article 7(6)):

"We say that the words can be read to suggest that it is only insofar as jurisdiction is conferred in the Rules, so essentially what is said is that there is jurisdiction under the statute if the Rules allow, and then in the Rules essentially what it says is that there is jurisdiction if the statute allows. That, we say, is the circularity. . We do not want to over press the point but we do say that in circumstances with that circularity there is not a clear conferral of jurisdiction. We accept that in the Court of Appeal in DNB, the Judge obiter took different view. We do maintain the point. If this case does go further then we would like to be able to raise that point in the Court of Appeal[20]."

39. This proposition falls at the first hurdle, which is the assertion that Article 7(6) should be construed as only conferring jurisdiction upon the Court if the Rules of Court also confer jurisdiction upon the Court. With respect, I am quite unable to see any basis for construing the Article in that way. The Article clearly and unambiguously confers jurisdiction with respect to execution of judgments upon the Court. That conferral is not qualified by the requirement that jurisdiction also be conferred by the Rules. Under the clear and unambiguous terms of the Article, the role performed by the Rules is to specify the manner in which the jurisdiction conferred by the Article is to be exercised. That is why, in this case, no issue with respect to the conferral of jurisdiction upon the Court by the Rules of Court arises. It also explains why SEWA's submission must be rejected.

40. There is another reason why SEWA's submission must be rejected. That is because the submission is only concerned with Article 7(6) of the JAL. Even if SEWA's submission with respect to that provision were to be accepted, there remains the jurisdiction conferred upon the Court by Article 24 of the DIFC Court Law. That provision clearly and unambiguously confers jurisdiction upon this Court to recognise the judgments of other courts in the United Arab Emirates, entirely unqualified by any reference to the Rules of Court. That is precisely the jurisdiction which is invoked by FAL's application.

41. For these reasons I have no doubt that this Court has jurisdiction to grant the orders sought by FAL and, in due course, make orders with respect to the enforcement and execution of the Sharjah Judgment if requested to do so by FAL. SEWA's first ground of opposition to FAL's application must be rejected.

Issue 2 - Sovereign immunity

42. SEWA asserts that even if this Court does have general jurisdiction to recognise and enforce the judgments of other courts within the United Arab Emirates, it is immune from that jurisdiction because it is entitled to the immunity afforded to sovereign states. Sovereign (or state) immunity is a principle derived from customary international law which is recognised by the common law. It is a principle based upon the notional equality of all

sovereign states, such that it would be contrary to principle for the courts of one state to impeach or impugn another state or its assets.

43. Because of imprecision of language in some jurisdictions[21] it is desirable to distinguish sovereign or state immunity from Crown immunity. Crown immunity is a principle which is involved in common law jurisdictions based upon the indivisibility of the Crown. Under that principle, because the powers and jurisdictions of common law courts are derived from the authority of the Crown, those powers can not be used to impugn or impeach the Crown acting through another agency, such as the Government. It is a principle which has been severely eroded or abolished by statute in most common law jurisdictions[22]. Crown immunity is not relevant to this application and played no part in the proceedings brought against SEWA in the Courts of Sharjah. In particular, at no point in those proceedings did SEWA assert that it was immune to those proceedings because it was an emanation of Sharjah.

44. SEWA's claim to sovereign immunity gives rise to four distinct issues:

(a) Do the principles of sovereign immunity apply generally within the Courts of the DIFC;

(b) If so, do those principles apply within the United Arab Emirates, so that all Emirates are immune to any action or proceedings in the courts of all other Emirates;

(c) If so, is SEWA entitled to the immunity to which Sharjah is entitled?

(d) If so, does that immunity extend to these proceedings, having regard to the Sharjah Judgment and the underlying transactions which gave rise to that judgment.

45. For the reasons which follow, I have concluded that the first question should be answered affirmatively, but the three remaining questions answered in the negative.

(a) Do the general principles of sovereign immunity apply in the DIFC Courts?

46. None of the legislative provisions conferring jurisdiction upon this Court to enforce the judgments of other courts[23] make any reference to sovereign or state immunity. Although Article 7(6) of the JAL requires the jurisdiction to be exercised in accordance with Rules of Court, the relevant Rules referring to enforcement and execution also make no reference to sovereign immunity.

47. It follows that the first question in relation to sovereign immunity is whether the substantive laws or the procedures of this Court should be augmented by the application of principles of sovereign immunity derived from some other source, and if so, which source.

48. It is desirable to commence a consideration of that question with some admittedly trite observations with respect to the DIFC and its courts.

49. The DIFC was created under Federal Laws authorising the creation of Financial Free Zones. Article 3 of Federal Law no. 8 of 2004 provides that the Financial Free Zones and Financial Activities shall be subject to all Federal Laws "with the exception of Federal civil and commercial laws".

50. The lacuna created by that provision has been filled by many specific laws concerning the civil and commercial laws to be applied within the DIFC, together with the more general provisions of DIFC no. 3 of 2004 - the "law on the application of civil and commercial laws in the DIFC".

51. Article 8 of that Law provides:

"8(1). Since by virtue of Article 3 of Federal Law no. 8 of 2004, DIFC Law is able to apply in the DIFC notwithstanding any Federal Law on civil and commercial matters, the rights and liabilities between persons in any civil or commercial matter are to be determined according to the laws for the time being in force in the Jurisdiction chosen in accordance with paragraph (2).

(2) The relevant jurisdiction is to be the one first ascertained under the following paragraphs:

(a) so far as there is a regulatory content, the DIFC Law or any other law in force in the DIFC; failing which,

(b) the law of any Jurisdiction other than that of the DIFC expressly chosen by any DIFC Law; failing which,

(c) the laws of a Jurisdiction as agreed between all the relevant persons concerned in the matter; failing which,

(d) the laws of any Jurisdiction which appears to the Court or Arbitrator to be the one most closely related to the facts of and the persons concerned in the matter; failing which,

(e) the laws of England and Wales."

52. This provision is often referred to as "the waterfall" because of its cascading effect on the identification of the applicable laws.

53. In this case, if the waterfall provision applies, neither party suggests that there is any jurisdiction higher up the cascade than England and Wales. Because of the way the waterfall is constructed those laws are, in effect, the default laws to be applied by this Court unless applicable laws from a higher level in the cascade are identified. Neither party has suggested that there are any such laws applicable to this case.

54. The laws of England and Wales are of course a combination of the common law and statute laws. Because the statute laws of England and Wales are to be construed in the context of the common law, it has become the practice of this Court to look to broad principles of common law in the resolution of disputes not covered by a more specific law applicable under the waterfall provision. So, for example, in YYY Ltd v ZZZ Ltd[24] Justice Field observed:

"The conflicts of laws rules applied in the DIFC Courts are founded in general on the English conflicts of laws rules which are authoritatively expounded in Dicey, Morris and Collins[25]. It is not controversial that the conflicts of laws rules expounded in Dicey, Morris and Collins include non-recognition of foreign judgments where recognition would be contrary to public policy or would contravene the principles of sovereign immunity."

55. However, in Pearl Petroleum Company Ltd v The Kurdistan Regional Government[26], Justice Cooke considered a claim to sovereign immunity in the context of an application to set aside the recognition of an arbitral award. The party seeking to invoke sovereign immunity relied upon common law principles for the purposes of its claim. Justice Cooke rejected that basis for the claim in the following terms:

"Under Article 8 of DIFC Law no. 3 of 2004, the law on the application of civil and commercial laws in the DIFC, there is provision as to the law to be applied in the DIFC, the objective of which, according to Article 7, is to provide certainty as to the rights and obligations of persons in civil and commercial matters arising in the DIFC and to allow persons to adopt the laws of another jurisdiction in relation to such matters. Article 8 is often said to include `waterfall' or `cascade' provisions, since it provides for a hierarchy for determining the applicable law. This Article was not relied on by the KRG [the party claiming immunity] but is of some relevance to the debate in which the KRG contended for the applicability of what it termed `common law' in the context of state immunity. Article 8 provided, after referring to Article 3 of Federal Law no. 8 of 2004 . that, as DIFC Law can apply in the DIFC in relation to civil and commercial matters, `the rights and liabilities between persons in any civil or commercial matter are to be determined according to the laws for the time being in force in the **jurisdiction** chosen, in accordance with paragraph 2'. Paragraph 2 then provided that `the relevant jurisdiction is to be the first one ascertained under the following sub paragraphs' of which the first, sub paragraph (a) is `the DIFC Law or any other law in force in the DIFC', failing which reference is to be made to the following sub paragraphs (b)-(e) which detail respectively the law of any jurisdiction which DIFC law expressly choses, the law chosen by the parties, the law with the closest connection to the dispute and finally, in sub paragraph (e) the laws of England and Wales.

Whilst this court is a common law court, there is no basis for incorporation of a body of substantive `common law', whatever that may mean, into the substantive law which falls to be applied in the DIFC. The KRG sought to argue for such a body of common law, including state immunity as recognised generally by common law courts throughout the world, to be treated as part of the law of the DIFC, because it was said to incorporate, in turn, customary international law in relation to state immunity. I can see no basis for any such contention as a matter of substantive law, given the nature of the jurisdiction of the CFI as set out above. That jurisdiction is founded on statutory provision which requires the law of the DIFC to be first applied and only in absentia to move on to the cascading sub paragraphs provisions, of which the last is the law of England and Wales, which for reasons which are apparent, in the light of the decisions of the English courts set out above . on the absence of immunity of the KRG in the present case, does not assist the KRG. The KRG effectively wishes to stop the clock at a time prior to the English State Immunity Act of 1978, and to apply in the DIFC what it contended was the common law position at that time, which was said to reflect the common law position throughout the world and which is said to form part of DIFC Law. This is untenable. Whilst the law of the DIFC is interpreted in accordance with the methodology of the common law and proceeds incrementally, the courts have no power to create law by incorporating some external body of law for which there is no provision in Article 8 of DIFC Law no. 3 of 2004. The DIFC creates its own precedents on the basis of the law to be applied under the provisions of the statutory framework[27]."

56. For reasons which will appear, it is important to observe that these observations were made in a case in which a claim to immunity was made by a party claiming to be a foreign state in the true sense of those words - namely, a state which is not one of the constituent polities of the UAE. Put shortly, that is significant because the English State Immunity Act of 1978 only applies to states outside the unitary state of England and Wales, because of the very nature of that state, and therefore arguably at least, has no application to the issues of immunity which can arise as between the different polities constituting a federation such as the UAE.

57. Moreover, the observations which I have set out above were not determinative of the case before Justice Cooke and were therefore obiter. That is because, as Cooke J observed:

"Where procedure is concerned, the DIFC Courts has its own rules (the RDC) but on other matters of procedure, not governed by the rules, the Court is free to adopt the procedures it considers appropriate which are consonant with the law of DIFC and the overriding objective set out in paragraph 1.6 of the RDC. The terms of article 8 of Law no. 3 of 2008 have no application to such questions, as is clear from the decisions of the DIFC Courts of Appeal in Fidel v Felicia[28] and, more particularly, in Protiviti Member Firm (Middle East) Ltd v Mohammed Bib Hamad Abdul-Karim Al Mojil & Another[29], when it considered how the principles of forum non conveniens might apply in the DIFC. In this latter case, the court considered the operation of such principles in other common law jurisdictions and held that it was open to it to apply whatever forum non conveniens principles it considered to be most suitable[30]."

58. This observation was determinative because in the Pearl case the parties had agreed that the issue of sovereign immunity was an issue of procedural law. It followed that it was for the Court to determine, in the absence of any express provision in the DIFC Laws or RDC, that the appropriate common law procedure was to be adopted. Cooke J concluded that the relevant procedural principles included waiver, and on that basis concluded:

"I do not need to decide whether or not there is a recognition in the law of the UAE, of Dubai and of the DIFC that a sovereign state or an arm or a constituent part of it is capable of asserting sovereign or state immunity because I have come to the clear conclusion that the KRG has waived any right to such immunity .".[31]

59. In Pearl the agreement of the parties to the effect that the recognition of a claim to sovereign immunity was governed by procedural rather than substantive law made it unnecessary for the Court to determine that question. However, if it is the case that recognition of a claim to sovereign immunity is governed by procedural law rather than substantive law, there is no conflict between the decisions in Pearl and YYY to the effect that the common law principles of conflict of laws authoritatively enunciated in Dicey Morris and Collins should be applied by this Court.

60. In my view the parties in Pearl were correct to conclude that a claim to sovereign immunity is governed by procedural law rather than substantive law. At the risk of oversimplification, substantive law is the law which governs the rights and obligations of the parties as between themselves. Procedural law is the law to be applied by the Court with respect to its own processes and procedures. The question of whether the

judgments of other courts should be recognised is inherently and of its very nature, a question pertaining to the processes and procedures of the court in which recognition is sought, and is therefore governed by the procedural laws of the court. It follows that this Court is free to apply the most appropriate body of common law procedural law to that question. I agree with Field J in YYY and with the approach implicitly taken by Justice Cooke in Pearl, that the most appropriate body of conflicts of laws principles to be applied by this Court is that enunciated in Dicey Morris and Collins. As I have noted, it is uncontroversial that sovereign immunity, as understood at common law, is included within those principles.

61. For these reasons the first question posed in relation to SEWA's claim of sovereign immunity should be answered affirmatively - that is to say, the general principles of sovereign immunity as understood at common law form part of the procedural law to be applied by this Court, including in respect of the recognition of the judgments of other courts.

(b) Do those principles apply within the United Arab Emirates, so that all Emirates are immune to any action or proceedings in the courts of all other Emirates?

62. Neither party has been able to refer me to the decision of any court in the UAE dealing with the next question arising with respect to sovereign immunity, which is whether the Emirates of the UAE are entitled to claim sovereign immunity in answer to a claim brought against an Emirate in the courts of any other Emirate. That question must therefore be addressed from first principles.

63. Perhaps predictably, the parties approached this question of principle from diametrically opposed starting positions. FAL contends that:

(a) Following their union to form the UAE, none of the Emirates are properly regarded as a sovereign state for the purposes of immunity;

(b) Before any Emirate could rely upon immunity in proceedings against it in the court of another Emirate, it would be necessary to identify a right to such immunity in the constitution of the UAE.

64. On the other hand, SEWA contends that:

(a) Based on historical analysis, the states formerly known as the Trucial States, some of which combined to form the UAE, were all independent sovereign states at the time of Federation of the UAE:

(b) The individual Emirates retained their sovereignty notwithstanding Federation;

(c) Before any Emirate could be deprived of its entitlement to sovereign immunity it would be necessary to establish that the Emirate in question has waived that entitlement, either in a specific case or generally by a provision to that effect in the Constitution of the UAE.

65. Further, the parties referred to and each relied upon the position with respect to inter-provincial immunity in other Federations, principally Canada, the United States of America and Australia. Predictably, SEWA focused attention upon the United States and Canada, where slightly differing forms of inter-provincial immunity are recognised. On the other hand, FAL focused attention upon Australia, where, for various reasons, inter-provincial immunity is not recognised.

66. While all of these contentions have some force, in my respectful view none is entirely correct. So, while the Emirates which combined to form the UAE were undoubtedly independent sovereign states prior to federating, by federating they surrendered part of that sovereignty to the national state which they formed, whilst retaining some of the sovereignty which they previously enjoyed. Following Federation it is quite unrealistic to assess the relationships between the Emirates which had combined to form a single nation state as if they were each completely independent nation states with no allegiances or obligations to each other. The act of Federation changed the fundamental relationship between those states for as long as they remain within the Federation.

67. Following Federation, the rights and obligations of the Emirates inter se are governed by the Constitution to which they all acceded. It follows that the answer to the question whether an Emirate is entitled to claim immunity against proceedings against it in the court of another Emirate is to be found within the Constitution of the UAE. It is the terms of that Constitution, rather than principles of customary international law or common law which must provide the answer to this question.

68. Nor do I consider that a consideration of the positions adopted with respect to inter- provincial immunity in other federations is of any assistance in addressing this question. By their very nature, each federation will have its own unique history and each federal constitution has its own unique terms. It follows that the search for a unifying principle of inter-provincial immunity amongst other federations is doomed to failure. Further, even if the consideration of inter-provincial immunity restricted to federations in common law jurisdictions, which was the approach taken by the parties, no unifying principle is apparent. Generally speaking, Canada has embraced inter-provincial immunity, Australia has rejected it and the position in the USA is somewhat in between. Nor is there any good reason for restricting consideration to federations in common law jurisdictions. To the contrary, none of the Emirates were common law jurisdictions at the time of Federation so that if it were thought that assistance could be provided from analysis of the position in other federations, it could be contended with some force that it would be desirable to start with federations in other non-common law jurisdictions, such as Switzerland or Germany. However, neither party gave any attention to jurisdictions such as those.

69. The parties did however provide detailed submissions with respect to the provisions of the Constitution of the UAE which might bear upon this issue and that is where I think the answer to this question is to be found. I will however only refer to those provisions of the Constitution which I consider to be relevant.

The Constitution of the UAE

The preamble

70. The Constitution commences with a preamble in which the parties recite their:

"..desire and the desire of the people of our Emirates to establish a Union between these Emirates, to promote a better life, more enduring stability and a higher international status for the Emirates and their people; .

Desiring also to lay the foundation for federal rule for coming years on a sound basis, corresponding to the realities and capacities of the Emirates at the present time, enabling the Union, so far as possible, freely to achieve its goals sustaining the identity of its members providing that this is not inconsistent with those goals .

We proclaim . our agreement . to this Constitution."

Article 1

71. Article 1 provides that the UAE is an independent sovereign federal state.

Article 2

72. Article 2 provides:

"The Union shall exercise sovereignty in matters assigned to it in accordance with this Constitution over all territory and territorial waters lying within the international boundaries of the member Emirate."

Article 3

73. Article 3 provides:

"The member Emirates shall exercise sovereignty over their own territories and territorial waters in all matters which are not within the jurisdiction of the Union as assigned in this Constitution."

Article 6

74. Article 6 provides:

"The Union is a part of the Great Arab Nation, to which it is bound by the ties of religion, language, history and common destiny.

The people of the Union are one people, and one part of the Arab Nation."

Article 8

75. Article 8 provides that:

"The citizens of the Union shall have a single nationality which shall be prescribed by law ."

Article 10

76. Article 10 provides that:

"The aims of the Union shall be the maintenance of its independence and sovereignty. The safeguard of its security and stability. The defence against any aggression upon its existence or the existence of its member states. The protection of the rights and liabilities of the people of the Union. The achievement of close cooperation between the Emirates for their common benefit in realizing these aims and promoting their prosperity and progress in all fields. The provision of a better life for all citizens together with respect by each Emirate for the independence and sovereignty of the other Emirates in their internal affairs within the framework of this Constitution."

77. I digress to observe that the provisions to which I have referred in the basic structure of the Union involve both unity and independence. The Emirates were united in forming a new independent nation state with the functions and responsibilities defined in the Constitution. However, each Emirate retained sovereignty in respect of functions not conferred upon the Union under the Constitution, and the continuing existence and sovereign responsibilities of each Emirate within areas not ceded to the Union is expressly recognised.

78. Other provisions of the Constitution specify the social objectives and policies of the Federation including, by Article 22 "the protection of public property shall be the duty of every citizen."

79. Other provisions set out specific freedoms, rights and public duties.

Part 4

80. Part 4 of the Constitution specifies the authorities of the Union, including the legislative, executive and judicial authorities of the Union.

81. Chapter V of Part 4 is entitled "The Judiciary and the Union and the Emirates". Article 95 creates the Union Supreme Court and Union Primary Tribunals.

Article 99

82. Article 99 provides that the Union Supreme Court shall have jurisdiction in the following relevant matters:

> "1. Various disputes between member Emirates in the Union, or between any one Emirate or more and the Union Government, whenever such disputes are submitted to the Court on the request of any of the interested parties.

.

4. Interpretation of the provisions of the Constitution, when so requested by any Union authority or by the Government of any Emirate. Any such interpretation shall be considered binding on all.

.

8. Conflict of jurisdiction between the judicial authority and one Emirate and the judicial authority in another Emirate. The rules relating thereof shall be regulated by a Union Law."

Part 6

83. Part 6 of the Constitution is entitled "The Emirates". Within that Part Article 116 provides:

"The Emirates shall exercise all powers not assigned to the Union by this Constitution. The Emirates shall all participate in the establishment of the Union and shall benefit from its existence, services and protection."

Article 119

84. Article 119 provides:

"Union law shall regulate with utmost ease matters pertaining to the execution of judgments, requests for commissions of rogation, serving legal documents and surrender of fugitives between member Emirates of the Union."

Analysis and conclusion on this question

85. As I have noted, the Constitution of the UAE reflects a degree of unity and a degree of continuing independence for each Emirate. The Constitution defines the functions and responsibilities of the Union on the one hand, and the Emirates on the other. Although each Emirate is of course bound to adhere to the terms of the Constitution to which it agreed, with one exception, there are no provisions within the Constitution regulating the rights and obligations of the Emirates as against each other.

86. The one exception is Article 99 which confers jurisdiction upon the Union Supreme Court with respect to disputes between any Emirates and in respect of conflicts of jurisdiction between judicial authorities in different Emirates.

87. It follows from Article 99 that disputes between any two Emirates, or between the judicial authorities of any two Emirates, are to be resolved by reference to the Union Supreme Court unless specifically dealt with by some other provision of the Constitution. There is no provision of the Constitution recognizing or contemplating a claim by one Emirate to immunity from proceedings in the courts of another Emirate.

88. Further, it is significant that Article 99 also confers jurisdiction upon the Union Supreme Court to interpret the Constitution when required by the government of any Emirate.

89. It follows that if a claim for immunity was made by an Emirate in relation to proceedings in the court of another Emirate, but rejected, it would be open to the Emirate claiming immunity to seek a ruling from the Union Supreme Court with respect to the proper interpretation of the Constitution in relation to inter-Emirate immunity, or to assert that the Emirate of the court which rejected the claim for immunity had failed to properly constitute its courts and govern their procedures, giving rise to a dispute between Emirates which could also be referred to the Union Supreme Court.

90. For these reasons the provisions of the Constitution of the UAE do not support SEWA's contention that each Emirate has a right to claim immunity from proceedings against that Emirate in the courts of any other Emirate. Rather, Article 99 of the Constitution supports the conclusion that a dispute with respect to the capacity of the courts of one Emirate to entertain a claim against another Emirate should be referred to and resolved by the Union Supreme Court on a case by case basis, rather than by the application of any general principle applicable to all proceedings of whatever nature.

91. For these reasons I have concluded that there is no general principle of inter-Emirate immunity under the Constitution of the UAE.

92. Had I come to a different conclusion on this question, another question may have arisen relating to issues of comity as between the courts of the different Emirates. That question would arise because, in the circumstances of this case, there is no question of conflict between the judicial authorities of Sharjah and of Dubai. The judicial authorities of Sharjah have entered judgment against SEWA, and the judgment creditor now invites one of the judicial authorities of Dubai to recognise that judgment. In those circumstances, even if there was a general principle of inter-Emirate immunity under the Constitution of the UAE, a question would arise as to whether an Emirate could claim immunity in respect of the enforcement of a judgment of the courts of that Emirate. In addressing that questions, questions might arise as to the extent to which the courts of the Emirates should give full faith and credit to the judgments of the courts of other Emirates, and with respect to the comity which should properly exist as between the courts of the polities which together form a Federation.

93. Although I raised these issues with the parties during the hearing, it is clear that they were not prepared to present arguments with respect to them and, in the event, because I have concluded that there is no general principle of inter- Emirate immunity, it is unnecessary to dwell upon them. However, should a different view be taken with respect to inter -Emirate immunity elsewhere, it may be necessary to consider these issues.

94. The conclusion I have reached in relation to this question is sufficient to dispose of SEWA's claim for sovereign immunity. However, in case a different view of this question is taken elsewhere, and out of deference to the arguments presented, I will consider the other issues which arise in relation to SEWA's claim for sovereign immunity.

(c) Is SEWA entitled to the immunity to which Sharjah is entitled?

95. Assuming, contrary to my view, that Sharjah could claim immunity in proceedings in this Court, the next question would be whether SEWA is entitled to claim that immunity. That question turns upon whether SEWA is so inextricably intertwined with Sharjah that it should be regarded as Sharjah for the purposes of sovereign immunity.

96. Both parties cited English cases with respect to the principles to be applied to the resolution of this question. The cases include the decision of Lord Denning in Mellenger v New Brunswick Development Corp[32]; Trendtex Trading Corp v Central Bank of Nigeria[33]; and I Congreso Del Partido[34]. These cases reflected differing nuances of approach over time, as the parties recognised. In this context both parties appeared to accept that the most authoritative statement of recent principle relating to this question is to be found in the decision of the Privy Council in the Gecamines case[35].

97. The judgment of the Board was delivered by Lord Mance. After referring to a number of the earlier decisions to which I have referred, and a number of relevant international instruments, Lord Mance observed:

"What then is the correct approach to distinguishing between an organ of the state and a separate legal entity? . In the Board's opinion, it is now appropriate . to have regard to the formulation of the more nuanced principles governing immunity in current international and national law. These . express the need for full and appropriate recognition of the existence of separate juridical entities established by states, particularly for trading purposes. They do this, even where such entities exercise certain sovereign authority jure imperii, providing them in return . with a special functional immunity if and so far as they do exercise such sovereign authority. .

Separate juridical status is not however conclusive. An entity's constitution, control and functions remain relevant: .. But constitutional and factual control and the exercise of sovereign functions do not without more convert a separate entity into an organ of the state. Especially where a separate juridical entity is formed by the state for what are on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the state forming it should not have to bear each other's liabilities. It will in the Board's view take quite extreme circumstances to displace this presumption. The presumption will be displaced if in fact the entity has, despite its juridical personality, no effective separate existence. But for the two to be assimilated generally, an examination of the relevant constitutional arrangements, as applied in practice, as well as of the state's control exercised over the entity and of the entity's activities and functions would have to justify the conclusion that the affairs of the entity and the state were so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the state and vice versa."[36]

98. Their Lordships went on to cite with approval the following passage from the judgment of Shaw LJ in Trendtex Trading[37]:

"It is suggested that the following principles can be derived from these cases:

(a) The characterization of a party to proceedings as a department of the government of a foreign sovereign State depends not on any single factor, but on a consideration of all relevant circumstances.

(b) The status of the party under the law of its home state is one relevant factor, but is not decisive. Nor is the presence of separate legal personality itself decisive against characterizing a party as a department of government.

(c) A detailed analysis of the constitution, function, powers and activities of the party and of its relationship with the state is likely to be essential. The existence of State control is not, however, a sufficient criterion.

(d) The courts are likely to exercise caution before treating a party having separate legal personality as a department of government.

(e) The range of functions performed by and degree of independence usually granted to (and, indeed, required of) a foreign central bank make it unlikely that a separate legal entity performing such a role will be characterized as a department of government.

The principles to be applied in determining whether an entity is a `department of government' for this purpose are closely related to and mirror those for determining whether an entity is a `separate entity'. Indeed, it is submitted that there should be no scope for a finding that a governmental entity falls between the two categories, into a judicial no-man's land.

.

An entity is a `separate entity' if it is `distinct from the executive organs of the government' and `capable of suing or being sued'."[38]

99. Following this passage Lord Mance observed:

"This is a helpful enumeration of factors relevant when determining whether an entity is a department or organ of state. The Board sees particular value in the propositions that the existence of state control will not be a sufficient criterion, that the possession of a range of functions coupled with independence in their exercise will militate against a conclusion that an entity is an organ, and, generally, that caution is required before treating a separate legal personality as an organ."[39]

100. It is necessary to apply these principles to the facts established by the evidence adduced in the present case. That evidence is sparse indeed, essentially being limited to the most recent Decree constituting SEWA. The principles set out above make clear that while the Constitutional documents of the entity in question are relevant, they are not determinative, and that appropriate enquiry extends to and includes the relationship between the entity and the Government as a matter of fact, and the nature of the functions actually performed by the entity in question, and the manner in which those functions are performed and in particular, the extent to which the entity makes its own determinations with respect to such matters, as a matter of fact.

101. SEWA has not adduced any evidence at all in respect of any of these matters. The only evidence it has filed in opposition to FAL's application is a statement from one of its external lawyers relating to the court proceedings in Sharjah. SEWA claims to be entitled to immunity as if

it is a sovereign state. Clearly, SEWA carries the burden of adducing evidence sufficient to sustain that proposition. Apart from producing the Decree constituting SEWA, which, on the principles set out above, is of itself insufficient, it has made no attempt to discharge the evidentiary burden imposed upon it. It follows that SEWA's claim to be treated as if it were an emanation of Sharjah must be rejected.

102. However, for the sake of completeness, I will address such evidence as there is in relation to this subject.

103. First, there is no dispute that SEWA is a separate juridical entity from Sharjah. Further, it is not disputed that Sharjah relied upon the fact that SEWA is a separate juridical entity to defeat FAL's claim against it. SEWA claims in these proceedings that, despite its separate juridical status, its functions and activities are so inextricably intertwined with Sharjah that it should properly be regarded as an organ of the Government of Sharjah, and indivisible from it. SEWA's assertion in these proceedings that it is, in effect, an emanation of Sharjah, is fundamentally inconsistent with the position which both SEWA and Sharjah adopted in the proceedings brought by FAL in the courts of Sharjah. In this respect it is significant to note the observations in Gecamines (above) to the effect that the principle relating to the separate liability of an entity and the state and the principles relating to the immunity of an entity will generally produce the same result, so that entities don't fall into a "judicial no man's land".

104. Although I do not suggest that SEWA's conduct in the Sharjah proceedings goes so far as to give rise to an issue estoppel, it certainly justifies considerable scepticism in relation to its current claims, which are fundamentally inconsistent with the position previously adopted. Sharjah's unequivocal assertion that its liabilities were separate from those of the State in those proceedings lends considerable support to the application of the legal proposition that separate juridical status will generally count strongly against a conclusion that the entity is to be regarded as an organ or an emanation of government.

105. SEWA was constituted as a public authority that has legal personality by Sharjah Emiri Decree No (1) of 1995G. However, all operative provisions of that Decree have been repealed and the Decree which currently constitutes SEWA is SHJ Decree Emeri no. 38 of 2014. Article 3 of the Decree sets out SEWA's functions which include owning, managing, operating and maintaining power and desalination plants, electrical transmission lines, water networks, fibre optic networks, gas plants and networks and other assets that help SEWA achieve its objectives. It is authorized to own and lease property and do other things necessary for the execution and completion of its work. It is also authorized to assign to third parties the function of carrying out works falling within its functions. It may also carry out all works the Ruler or any person authorized thereby deems to be relevant.

106. Article 4 provides that SEWA shall be managed by a chairman to be appointed under an Emiri Decree, and Article 5 specifies the functions of the chairman which include making proposals to the Ruler with respect to budgets, policies and programs and contracts and agreements. The chairman may also propose prices of electricity, water and natural gas and other charges. Although the Ruler has ultimate control over such matters, it is significant to the application of the principles in Gecamines that responsibility for their formulation rests with SEWA. The chairman may also develop the organizational structure and employee recruitment systems, determine the conditions of their recruitment and their rights and duties and present the same to the Council for approval.

107. Article 6(1) provides:

"The chairman shall not be held accountable towards any third party for any act or omission committed thereby with regard to SEWA's management work. SEWA shall be solely accountable to the third party for such act or omission."

108. This provision tells significantly against SEWA's case. The provision that SEWA shall be solely accountable to third parties draws a hard and fast line between SEWA and Sharjah in relation to such matters. It is entirely inconsistent with the proposition that the functions and activities of SEWA and Sharjah are so inextricably intertwined that SEWA should be regarded as Sharjah for all intents and purposes.

109. Returning to the passages from Gecamines which I have set out above with such conclusions as can be drawn from the extremely scanty evidence which has been adduced by SEWA, there might be a nice question as to whether SEWA's functions are "sovereign functions". Whilst gas and electricity are commonly supplied by Government owned utilities in many jurisdictions, in many other jurisdictions such services are provided by private trading corporations. Whatever view is taken on that issue, there is much to be said for the proposition that SEWA is a "separate juridical entity . formed by the state for what are on the face of it are commercial or industrial purposes, with its own management and budget"[40] with the result that "the strong presumption is that its separate corporate status should be respected."

110. Further, in the absence of any evidence with respect to the manner in which the relationship between SEWA and Sharjah is managed in practice, the observations in Gecamines to the effect that there is:

`.particular value in the propositions that the existence of state control will not be a sufficient criterion, that the possession of a range of functions coupled with independence in their exercise will militate against a conclusion that an entity is an organ, and generally that caution is required before treating a separate legal personality as an organ",[41]

tell strongly against SEWA's assertion that it should be regarded as an organ of Sharjah for the purposes of immunity.

111. For these reasons I have concluded that the third question relating to sovereign immunity must be answered in the negative, and that even if it was open to Sharjah to claim immunity if proceedings were brought against it in this Court, it is not open to SEWA to claim such immunity.

(d) Does that immunity extend to these proceedings, having regard to the Sharjah Judgment and the underlying transaction which gave rise to that judgment.

112. The fourth question arises if, contrary to my views, there is a general principle of inter-Emirate immunity in the UAE and SEWA is to be regarded as Sharjah for the purposes of the application of that principle. In such a circumstance there would be a further question as to whether proceedings in respect of which immunity is claimed relate to the actions of SEWA in the performance of the sovereign functions of government, or alternatively are properly characterized as proceedings relating to commercial activities.

113. SEWA submits that the proper question is ask in this context is not whether the underlying transactions giving rise to the Sharjah Judgment - namely, whether the sale and purchase of a large quantity of oil are commercial transactions but rather whether the proceedings in this Court for recognition of the Sharjah court are proceedings relating to a commercial transaction. This proposition is, at first sight, counter-intuitive, but it draws support from the decision of the majority in NML Capital Ltd v Republic of Argentina[42].

114. However, that decision turned entirely upon the construction of particular provisions of the English State Immunity Act 1978 viewed in the context of an historical view of the law in force at the time that Act was passed.

115. It follows that the decision in NML Capital would only be relevant to this question if the State Immunity Act 1978 forms part of the law to be applied by this Court in deciding FAL's application. There are two reasons why that is not the case.

116. First, English statute law could only form part of the law to be applied by this Court if it came within the "waterfall" provision of the 2004 Act. However, as I have already observed, the waterfall provision is concerned with substantive law, rather than procedural law. Having concluded that the legal principles relating to sovereign immunity are part of the procedural law of this Court, it follows that the waterfall provision can have no application, from which it follows that the decision in NML Capital is irrelevant.

117. The second reason that the State Immunity Act can have no application to proceedings in this Court is that it is concerned with the recognition, in a unitary nation state, with the immunity to be afforded to foreign states in the true sense of that expression - that is to say, states with no allegiance to the United Kingdom. It would not be appropriate to apply such statutory provisions to issues of immunity as between different polities which have together united to form a Federation.

118. For these reasons in my view this question must be addressed to the transactions which gave rise to the Sharjah Judgment. Those transactions were recurrent transactions for the sale and purchase of large quantities of oil. They are transactions of an inherently commercial character. While it may be that the transactions were undertaken for the purpose of generating electricity (although there is no direct evidence of this) the sale of electricity to consumers is not a function of such an inherently sovereign character as to result in the conclusion that any and all transactions associated with that function are also of a sovereign character, even if they are fundamentally commercial in nature.

119. The characterisation of the activities of SEWA which underpin the Sharjah Judgment as commercial is entirely consistent with the views of the courts dealing with the proceedings giving rise to that judgment. The Court of Appeal of Sharjah observed "whereas both Parties do not deny existence of commercial relationship between them but disputes regarding settlement of account between them"[43]. Further, the Union Supreme Court observed ".the commercial relationship was between [FAL] and [SEWA].. It is obvious that the commitment between the two parties with regard to the importation of petroleum products is the prerogative of the two partners and it concerns none but themselves..."[44]

120. For these reasons I conclude that the fourth question in relation to sovereign immunity must also be answered in the negative - that is, even if SEWA were otherwise entitled to claim immunity, it would not be able to do so in relation to FAL's application because the Sharjah Judgment arises from a series of transactions of a commercial character.

Sovereign immunity - conclusion

121. For these reasons SEWA's claim to sovereign immunity must be rejected.

Issue 3 - would recognition of the Sharjah Judgment be contrary to public policy?

122. As I have concluded that this Court should generally apply common law conflicts rules, for the reasons I have given, it follows that FAL's application should be dismissed if recognition of the Sharjah Judgment would be contrary to public policy. SEWA submits that recognition would be contrary to public policy for two reasons:

(a) Recognition would circumvent SEWA's entitlement to sovereign immunity; and

(b) Recognition would unduly interfere with the actions of the Sharjah courts with respect to execution and enforcement on the Sharjah Judgment.

123. Obviously the first ground advanced by SEWA must be rejected because of my conclusion that SEWA is not entitled to claim sovereign immunity.

124. In my view there are also short answers to SEWA's second ground for asserting that recognition would be contrary to public policy.

125. First, the assertion is premature in that the only orders sought at this stage are orders for recognition and a declaration that the Sharjah Judgment is capable of enforcement. FAL does not presently seek any orders for enforcement or execution. Until such time as such orders are sought, there is no prospect of interference with the actions being taken by the courts of Sharjah with respect to enforcement or execution of the Sharjah Judgment.

126. When this proposition was put to Senior Counsel for SEWA, he responded with the submission that if the orders sought by FAL were granted, execution and enforcement pursuant to the RDC would follow axiomatically and inexorably, without the exercise of any discretion on the part of the Court. That submission cannot be accepted. The various mechanisms for enforcement and execution provided under RDC Parts 45-50 of the Rules are all subject to supervision by the Court and contains discretionary powers in relation to their exercise. See in particular, RDC Part 48.53 which confers a discretion upon the Court to order a stay of execution in certain circumstances.

127. Second, I see no reason to suppose that this Court might authorise enforcement or execution which is inconsistent with the steps being taken by the courts of Sharjah. Rather, it seems much more likely to infer that the two courts will act cooperatively with each other to facilitate the satisfaction of the Sharjah judgment for the benefit of the judgment creditor.

128. In order to develop this point it is necessary to look in a little more detail at the steps which have been taken in relation to enforcement in the courts of Sharjah.

129. I have already referred to the order for attachment of payments made by SEWA in favour of FAL's creditors. In relation to payments by SEWA, on 2 July 2019 SEWA applied for orders permitting payment of the judgment debt in 40 equal instalments over a period of 10 years. FAL opposed those orders, and it doesn't seem that any order was made approving that payment plan or directing that adherence to SEWA's proposed plan would constitute satisfaction of the judgment. However, in August 2019 a judge in the Sharjah courts did order SEWA to pay into court the first instalment of the proposed instalment plan. Further, in late October 2019 the same judge ordered SEWA to pay into court the second instalment of the proposed plan. However, as I have noted, no order was made with respect to the payment plan as a whole. FAL submits the courts of Sharjah have no power to deprive FAL of the full benefit of its judgment by authorizing such a plan.

130. On 24 November 2019, another judge of the Sharjah courts ordered that the previous orders directing SEWA to make the first two payments under the proposed instalment plan be cancelled and "considered as if they have never been made". However, subsequent to that order another judge of the Sharjah courts made a further order for SEWA to pay another instalment and it seems that SEWA is continuing to make quarterly payments in reduction of the judgment debt.

131. On the evidence before me it doesn't appear that the courts of Sharjah have made any order restricting enforcement of or execution upon, the Sharjah Judgment. Although they have sanctioned periodic payments by SEWA against the judgment, the court has not ordered that such payments prevent or preclude other forms of enforcement or execution.

132. It follows that steps taken by way of enforcement or execution by this Court would not contravene or interfere with steps being taken by the courts of Sharjah in relation to the enforcement of the Sharjah Judgment. Further, as I have indicated, there is no reason to suppose that the officers of the two courts would not act cooperatively in relation to the joint objective of enforcing the judgment.

133. The attachment order made by the courts of Sharjah in favour of some of FAL's creditors raises different issues. They are not issues with respect to the enforcement of the Sharjah Judgment, but rather with respect to the enforcement of judgments entered against FAL. There is no reason to suppose that FAL's creditors will not receive the benefit of any enforcement or execution action taken by FAL in this Court, if and when those steps are taken. Further and in any event, if FAL's creditors wish to obtain the benefit of rights with respect to the proceeds of such enforcement action, there is nothing to stop them applying for recognition of their judgments in this Court, nor from seeking similar orders with respect to the proceeds of enforcement action in this Court as they obtained in the courts of Sharjah.

134. For these reasons SEWA's assertion that recognition of the Sharjah Judgment by this Court would be contrary to public policy must be rejected.

Issue 4 - would recognition of the Sharjah Judgment constitute an abuse of process?

135. SEWA submits that recognition of the Sharjah Judgment by this Court would be an abuse of process because it would interfere with the steps that have been taken by the courts of Sharjah with respect to enforcement and execution of that judgment. The grounds for that assertion are identical to the grounds for the assertion that recognition of the Sharjah Judgment would be contrary to public policy and must be rejected for the same reasons.

Issue 5 - recognition of the Sharjah Judgment would be futile

136. SEWA submits that the Court has a discretion to refuse to recognise the Sharjah Judgment, and should exercise that discretion against recognition because recognition would be futile for two reasons:

(a) Any of SEWA's assets in the DIFC would be immune from execution because of SEWA's sovereign status;

(b) FAL could not execute against any of SEWA's assets in Dubai through the conduit jurisdiction because of certain statutory provisions which would apply in the Dubai courts.

137. There are a number of reasons why this submission must be rejected. First, assuming without deciding that the Court does have a discretion to refuse recognition, it is well established that it is not necessary for a judgment creditor to establish that there are assets within the jurisdiction of a court in which recognition of a judgment is sought. In other words, the utility of recognition is not a matter to be considered by the Court at the time recognition is sought.

138. Second, the proposition that any assets of SEWA within DIFC would be immune from execution must be rejected for two reasons - first, SEWA is not entitled to sovereign immunity and second, even if it were, the immunity of assets from execution would be decided by different rules and principles, being rules and principles which focus upon the specific asset and the functions for which the asset is used by the judgment debtor. Unless and until such an asset is identified, the question of whether the asset would be immune from execution is sheer speculation.

139. Third, the question of whether the Dubai courts would execute the Sharjah Judgment pursuant to the conduit jurisdiction is a matter for those courts, and it would be presumptuous for this Court to speculate as to the manner in which those courts would exercise their jurisdiction.

140. For these reasons SEWA's submission that this Court should decline to grant recognition on the ground of futility must be rejected.

Conclusion

141. For the reasons I have given all of SEWA's grounds for objection to FAL's application must be rejected. As FAL's application has satisfied all relevant requirements for recognition, there is no reason why the application should not be granted and there will be orders to that effect.