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The evolution of dispute resolution in the UAE: The departure from and return to legal plurality

by
Karen Seif

A dissertation submitted as part of the
requirements for the degree of
Doctor of the
Science of Law

of the
University of California, Berkeley

Committee in charge:
Professor Laurent Mayali, Chair
Professor Katerina Linos
Professor Vinod Aggarwal

Spring 2022

The evolution of dispute resolution in the UAE:
The departure from and return to legal plurality

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Karen Seif

Abstract

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Professor Laurent Mayali, Chair

Through a series of three papers, this work examines the evolution of the UAE's legal system and its courts. Applying a mixed-methods approach, it makes three main contributions to the literature on an underexplored jurisdiction. First, using a comprehensive dataset of Arabic Dubai Court judgments, together with the Dubai International Financial Centre ("DIFC") Courts and the DIFC Arbitration Centre as case studies, it critically analyses the reception, coordination and competition between the Arabic, civil law legal system created in 1971 and the freezone English, common law legal system carved out some 30 years later. Second, using a selection of DIFC Courts judgments, it suggests that surrounding circumstances emboldened the DIFC Courts to actively adopt an expansionist jurisdictional position. Third, using historical British Foreign Office documents, it traces Abu Dhabi's unique path away from legal plurality under British extraterritorial jurisdiction.

To my father, for teaching me about empowerment through knowledge

To my mother, for being my role model

To my husband, for believing in me and this work from the very start

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Chapter 1

Introduction

Over the past two decades, Arab legal systems have experienced moments of episodic increase in academic and popular interest. These legal systems remain vastly understudied and underexplored. In focusing on the evolution of dispute resolution in the United Arab Emirates ("UAE"), this body of work seeks to partially fill that gap in the literature.

The second chapter introduces the Dubai International Financial Centre ("DIFC") Courts. It explains the unique social and economic context out of which they were established, as one where legal plurality was an attractive alternative to dismantling the legal status quo. The second chapter demonstrates that the DIFC Courts took the lead in shaping their identity as a fraternal court within the family of courts of Dubai. It argues that the adoption of the fraternal role as early as November 2010 resulted in a jurisdictional spread that preceded the 2011 legislative extension.

The third chapter makes three contributions. First, it contextualizes the 2011 legislative extension, and the subsequent spread of DIFC jurisdiction, within the surrounding circumstances in Dubai. It suggests that these surrounding circumstances emboldened the DIFC Courts to further expand their jurisdictional reach, this time by carving out a new identity as a conduit court. Second, using the DIFC Courts and the DIFC Arbitration Centre as case-studies, it illustrates the tensions that occur between transplanted legal institutions and local, homegrown legal institutions, and principals. Finally, it empirically investigates the relationship between the two court systems of Dubai for signs of spill-over. Building on the second chapter that finds the DIFC Courts embracing its fraternity with other courts of Dubai, it shows that being family does not necessarily translate to a close relationship, and argues that this is a lost opportunity for both court systems.

The fourth chapter takes a deep dive into the UAE's plural legal system prior to 1971. It builds on archival fieldwork and uses British Foreign Office documents to trace the path of Abu Dhabi away from legal pluralism and towards legal unity. In constructing a narrative on the exercise and retrocess of British extraterritorial jurisdiction in the Gulf, it investigates Abu Dhabi's transformation from a state of vastly underdeveloped legal machinery to a model for other Gulf states.

The final chapter offers a brief conclusion.

Chapter 2

On The Dynamic Nature of Legal Systems: The Case of The Dubai International Financial Centre Courts

2.1 Introduction

After almost forty years of incubation, the UAE civil law legal system was the recipient of a major legal transplant: the Dubai International Financial Centre ("DIFC") Courts. In direct contrast to the civil law legal system of the local Dubai and UAE courts, the DIFC Courts operate under the British common law legal system. This resulted in the juxtaposition of two legal systems in Dubai: a legal system of general application and a special legal system for business disputes.

As a transplant, the DIFC environment is unique in that it is not limited to transplanting legal rules. Rather, a special judicial institution is transplanted in tandem to interpret and apply the transplanted rules – an important evolution in the methods and toolkits of transplants.

Of particular relevance to the study of the DIFC Courts are studies on legal change: how laws are modified. For some time, the dominant theory was that since law is a reflection of society, then legal change is organic and stems from changes within the society that it regulates. This was challenged by the legal transplant theory, according to which legal change is a top-down phenomenon, where laws are borrowed across legal systems.[1] The legal transplant theory motivated numerous studies across disciplines, from comparative law[2] and sociology[3], to technical legal studies on the mechanisms of transplants[4] to law and economics.

The economic study of legal transplants was particularly influential. Its outcome was the development of the Legal Origins ("LO") theory in 1997.[5] LO makes two main claims. First, that "law matters for economic outcomes"[6] – in other words, that legal institutions impact economic growth. Second, that because it is characterized by more judicial independence and greater adaptability, the common law system is correlated with higher levels of economic development than the civil law system.[7]

Following its publication, the LO faced a string of criticism. Its methodology and coding came under fire, and it was demonstrated that with different – and arguable better – coding

[1]The term was coined by Alan Watson. *See* Watson [1974]. *See also* Ewald [1995].

[2]One main preoccupation of the field was whether legal transplants are possible or desirable. *See for example:* Legrand [2001]; Legrand [1997].

[3]Krishnan and Purohit [2015]. For law review type studies of the DIFC Courts, *see generally:* Husein and Burns [2015]; Lutrell [2008]; Punwar [2009]; Mohtashami and Tannous [2009]; Hwang [2015]; Thilak [2012].

[4]*See generally:* Galinou [2003]; Berkowitz et al. [2003]; Markovits [2004]; Kahn-Freund [1974].

[5]La Porta et al. [1997] (Their conclusion was that "*common law countries protect both shareholders and creditors most, French civil law countries the least, and German civil law and Scandinavian civil law countries somewhere in the middle*", p. 1132, 1139). *See also* La Porta et al. [1998].

[6]Schnyder [2016]. *See also* La Porta et al. [2000].

[7]From its early stages of application within the context of investor protection, the scope of LO expanded into a general theory on the relative merits of major legal systems, and was eventually applied to evaluate court performance between different countries. In 2003, the founders of the LO theory turned their attention to courts as a fundamental guarantor of contractual and property rights, and conducted an empirical study of the relative effectiveness of courts from different legal traditions. To that end, dispute resolution mechanisms in 109 countries were compared to Shapiro's "ideal court" where disputes are resolved on fairness grounds, with no lawyers or formal procedures. Starting from the premise that more procedural formalism hampers court performance, the study links the degree of legal formalism in each country to the origin of its legal

of variables, its conclusion proclaiming the superiority of common law systems was not based on solid ground.[8] This resulted in an updated LO study, which defines legal origins "*as a style of social control of economic life*" where "*common law stands for the strategy of social control that seeks to support private market outcomes, whereas civil law seeks to replace such outcomes with state-desired allocations*".[9]

Perhaps the greatest impact of the LO is through its progeny: the "Courts" methodology for evaluating court systems that was used in the Contract Enforcement index of the World Bank's Doing Business report.[10] In September 2021, the World Bank announced that it was discontinuing the Doing Business reports, due to confirmed corruption in ranking outcomes.[11]

The DIFC was built with an eye towards the financial capitals of the world, such as New York, London Hong Kong, Singapore and Frankfurt. The significance of the shared common law tradition was not lost on the architects of the financial freezone, who were keen to equip it with the right legal framework to ensure its success. From the outset, there was no doubt that the legal and judicial framework for the DIFC would be based on the common law tradition – the law that major financial institutions work with, understand and recognize and want to do business with.

The implementation of the common law system in Dubai's financial freezone is a triumph for LO.[12] The DIFC Courts illustrate the extent to which the common law system is today synonymous with a business-friendly legal ecosystem. The common law's self-professed aptitude in business law has been emphasized by the DIFC Courts themselves, which have highlighted the inadequacy of the civil law system: "*there is no room in a civil law jurisdiction with a civil code to develop the law in the manner suggested even if otherwise thought justified*".[13]

This chapter analyzes the DIFC Courts as a legal transplant that took a life of its own, with a wider jurisdictional scope than had been imagined at its conception as the jurisdictional arm of a freezone. When the jurisdiction of the DIFC Courts was expanded in October 2011 from disputes related to the DIFC to any commercial disputes where the parties elect the Court, the enacting legislation was lamented by advocates of the civil law

system. They found that French inspired civil law countries have the most formal procedures (p. 501), which is correlated with the slowest enforcement, and that the increased duration caused by increased procedural formalism is not offset by resulting in overall "better justice" (p. 506).

[8]Spamann [2010]; Armour et al. [2009].

[9]La Porta et al. [2008].

[10]Michaels [2009] at 771 (The objective of these reports is to encourage legal reform and they rely on the legal origins theory proclaiming superiority of the common law).

[11]World Bank [16 September 2021].

[12]Michaels [2009] at 772 ("*Dubai established an International Financial Centre governed by common law because that was perceived as more attractive for investors*"); Strong and Himber [2009] at 37: "*After considering various approaches to such an ambitious project, Dubai's ruler decided that the best strategy for jumpstarting a world-class global financial hub would be to create a legal environment based on British common law. Not only are the world's top three financial centres (Business Week, 2008) based on common law, but so are number four (Singapore), number eight (Chicago) and number ten (Sydney)*".

[13]Taaleem PJSC v (1) National Bonds Corporation PJSC and (2) Deyaar Development PJSC, DIFC CFI 014/2010, 19 February 2014.

courts. However, a close examination reveals that the DIFC Court's jurisdictional creep began years before the legislation was enacted. Through a close analysis of a selection of judgments issued before October 2011, this paper examines how the DIFC judiciary took an active role in carving out – and defending – their niche expertise in international high-stakes business disputes. Throughout, it traces the trajectory of the DIFC Courts' jurisdictional creep, painting a picture of how the Court danced between assimilation as a Dubai Court like any other, while leveraging the purported efficiency of the common law to distinguish their justice-dispelling abilities from those available in the civil law courts.

The structure of the chapter is as follows. The second section introduces the social and legal context into which the DIFC Courts were born (2.2). The third offers a brief description of the DIFC Courts (2.3). The fourth traces the trajectory of the jurisdictional expansion through a close analysis of selected judgments (2.4). Finally, some brief concluding remarks are presented in the fifth section, that transitions from this paper to the next in the series (2.5).

2.2 The socio-legal context: A melting pot of cultures, a patchwork of legal systems

2.2.1 Dubai: a cultural melting pot

Dubai's status as a melting pot of cultures is the result of its unique demographics (A). These demographic trends are reflected in the nature of legal practice (B).

A Unique demographics

One unique feature of many states of the Arabian Gulf is the low ratio of citizens compared to foreign nationals. In Dubai, foreign nationals make up more than 90% of the total population.[14] The legal presence of foreign nationals is based on their visa, which until recently was granted for a maximum of three years at a time. In 2018, the UAE government issued a series of immigration reforms that created avenues for certain categories of foreign nationals to obtain "permanent residency" in the form of a ten-year residency permit.

The majority of the population residing in the UAE are not Arab nationals. Their level of fluency in Arabic is not reported in official statistics.[15] According to the World Population Review, 85% of the expatriate population hails from Asia (half of which are from India).[16] The remaining 15% is shared between Arabs and Westerners, although the distribution is not reported.[17] One thing is clear however: Arabs represent less than 30% of the UAE

[14]Dubai Statistics Center [2018 – 2016].

[15]Even among Arab, fluency in the Arabic language has reached an all-time low, particular among the educated population. *See* The Economist [18 September 2021].

[16]World Population Review [2019].

[17]It is unclear whether these ratios are representative of the linguistic skills and legal tradition of professionals in Dubai.

population. In that context, Arabic-speaking local courts present a linguistic barrier to more than 50% of the population. From that perspective, English-language courts provide a greater level of accessibility and transparency to the population.

B Behind the scenes: who are the legal professionals in the UAE?

The nature of legal practice reflects the unique demographics of the UAE population. The legal profession in the UAE is broadly divided in two categories. The first category is "advocates". The advocate's profession in the UAE is regulated under Federal Law No. 23 of 1991,[18] as well as by Ministerial Decision No. 972.[19]

Advocates are attorneys who have full rights of audience before the UAE courts, are licensed to give legal advice and to operate a legal practice. This category is exclusive to UAE nationals (and in some instances Gulf Cooperation Council ("GCC") nationals). The conditions to register on the Roll of Advocates include being a UAE national, of at least 21 years of age, possessing good moral character, together with a university degree in Law or Shari'a, as well as the requisite training.[20] The mandatory training is one year, and includes six month of theoretical coursework, followed by six months of practical on-the-job training.[21]

The second category ("legal consultants") includes foreign-licensed attorneys (members of a foreign bar) and foreign jurists (those who with legal education and training who are not members of a foreign bar). The nature of their work is either transactional (contract drafting, incorporation), or based on representing parties in arbitration disputes, or both. They may also own and operate a legal practice in the DIFC, and apply for permission to appear before the DIFC Courts. Those with Arabic fluency may assist advocates in litigation matters, but are barred from appearing in mainland courts representing clients.

In Dubai, the profession is further regulated under a set of local rules for the practice of law within the Emirate: Administrative Resolution No. 234 of 2015 Concerning the Registration of Legal Consultants in the Emirate of Dubai and Executive Council Resolution No. 22 of 2011 Concerning Fees and Fines Prescribed for the Advocacy and Legal Consultancy Profession.[22]

Although Arabic is the official language of the UAE and is used exclusively in the local mainland courts, English is the common denominator between the different nationalities

[18]Federal Law No. 23 of 1991 on The Regulation of The Legal Profession issued on 16 December 1991. Available on Ministry of Justice website: https://elaws.moj.gov.ae/UAE-MOJ_LC-En/00_PROFESSION/UAE-LC-En_1991-12-16_00023_Kait.html?val=EL1 (last accessed on 8 May 2022).

[19]Ministerial Decision No. 972 on Implementing the Regulation of the Federal Law No. 23 of 1991 on the Regulation of the Legal Profession and its Amendments issued on 25 September 2017. Available on Ministry of Justice website: https://elaws.moj.gov.ae/UAE-MOJ_LC-En/00_PROFESSION/UAE-LC-En_2017-09-25_00972_Kait.html?val=EL1 (last accessed on 8 May 2022).

[20]Article 6 of Federal Law No. 23 of 1991.

[21]Articles 9 to 15 of Federal Law No. 23 of 1991.

[22]*See also* Law No. 32 of 2008 Establishing the Government of Dubai Legal Affairs Department. For the regulation of the legal profession in the DIFC, *see* DIFC Courts Order No. 1 of 2019 in Respect of Issuing and Conducting Proceedings, Rights of Audience and Registration in Part I and Part II of the DIFC Courts' Register of Legal Practitioners.

residing in the UAE. Arabic fluency and familiarity with the civil law system are necessary skills for working in litigation. Foreign legal professionals with this skill set are involved in drafting court pleadings that are submitted under the name of a licensed Emirati lawyer.

The protective nature of UAE laws towards Emirati citizens is not limited to legal practice. It is particularly reflected in the corporate federal law.

2.2.2 Navigating the patchwork of legal systems in Dubai

The UAE's demographic structure presented unique challenges for the government, which must balance its policy of protecting its citizens' economic interests with the need to provide incentives for its foreign population who make up a significant portion of its workforce. In this context, freezones were embraced as a solution that offer attractive incentives for foreign businesses, while continuing to shelter local rent-seekers.

A Corporate law protective of Emirati interests

From the outset, corporate and commercial laws in the UAE were protective of the interests of Emirati nationals. Until recently, the general rule in the Federal Commercial Companies Law ("CCL")[23] was that Emirati nationals must hold at least 51% of a company's shares.[24] In other words, the stake of foreign nationals was limited to 49%. Some business forms allowed more foreign ownership, although they were an exception to the pro-Emirati shareholder rule.[25] By requiring that Emirati nationals hold the majority stake in companies, the corporate law operated as a form of passive tax on foreign businesspersons, providing Emirati nationals with rent-seeking opportunities. This is particularly visible in the nominal presence of Emirati nationals in more than 90% of UAE business entities.[26]

To soften the application of this rule, it was common practice to enter into side agreements limiting the role of the mandatory UAE party. To that end, the "sleeping partner" practice was employed to minimize the protective law's potential negative impact on foreign business owners. Under this practice, an Emirati national would be listed on the company's license and founding documents as the majority shareholder of the business. However, a side agreement would be concluded, under which the Emirati party would agree to relinquish their statutory rights derived from their majority shareholder position, in exchange for an annual fee.[27] This arrangement would include a power of attorney from the Emirati majority shareholder in

[23]Federal Law (8) of 1984 As Amended by Federal Law (13) of 1988 Commercial Companies.

[24]Article 22 CCL: "*Without prejudice to commercial activities reserved only to nationals, as may be prescribed herein or in any other law, it is a requirement for the establishment of a company to have one or more national partner(s) whose share in the company's capital is not less than* 51%"; Article 25 CCL: "*All partners in a general partnership must be state nationals*"; Article 48: "*All joint partners in a commandite must be U.A.E. nationals*".

[25]For example, foreign nationals may hold 100% stake in a sole proprietorship in certain limited industries. There are also industry-based exemptions for nationals of the GCC.

[26]Gulf News [12 September 2010] reporting that UAE nationals share ownership in 108,035 companies of the 113,832 registered in onshore Dubai (outside the freezones).

[27]Gulf News [12 September 2010].

favor of the foreign counter-party, who would be appointed as managing director or general manager. UAE officials had considered implementing legislation to prevent the "sleeping partners" practice, although this did not materialize.[28]

The recognized outdated nature of the corporate law spurred numerous government discussions on reform. The move from protectionism to liberalization of corporate ownership was a slow process that allowed time for the idea to reach a minimal threshold of social acceptance.

B Incremental steps towards liberalization of corporate law

Over the years, numerous discussions about the liberalization of the UAE's corporate laws took place within the UAE government, which would routinely solicit proposals to update the CCL to fit the requirements of a modern business environment. The main question was not whether the CCL should be updated, but rather what aspect should be reformed and when each reform should take place.

Consensus was difficult to reach, and the process was riddled with false starts and long pauses.[29] For example, in 2010, initial reports that the CCL would be amended to allow 100% foreign ownership were eventually dialed back by government representatives.[30] Instead, licensing procedures were streamlined to facilitate doing business.[31] Then in December 2011, it was announced that the Cabinet had approved a new CCL, and that the draft law was under review at the Federal National Council ("FNC").[32] At the time, commentators of the draft noted that although the ambit of this reform was not as significant as had been expected – the reform was limited to public joint-stock companies – it nevertheless left room for the Cabinet to issue the "FDI Law", i.e., a resolution identifying strategic business sectors that would be exempted from the 49% limit for foreign investors.[33]

It took until February 2013 for the FNC to discuss the CCL draft.[34] In addition to the CCL, the Ministry of Economy submitted draft laws on foreign investment, consumer protection and small and medium enterprises. Once again, the issue of the percentage of foreign ownership was on the table, with the Minister of Economy highlighting that "*the percentage of foreign ownership will be decided based on the capital, uniqueness of the project*

[28]The National [7 November 2011b]: "*The Ministry of Economy had been expected to implement a so-called sleeping-sponsor law. It could have used penalties, such as fines, to deter people from entering agreements that are designed to sidestep certain rules. The implementation of this legislation, however, has been postponed for an eighth consecutive year*".

[29]Under Article 110 of the UAE Constitution, the legislative process begins with draft federal laws issued by the Cabinet, then approved by the Federal National Council ("FNC"), the President and the UAE Supreme Council in that order.

[30]The National [22 March 2010].

[31]Federal Law (13) of 2011. *See also* Gulf News [22 September 2011].

[32]Gulf News [5 December 2011]. *See also* New York Times [14 December 2011].

[33]Gulf News [19 December 2011].

[34]Gulf News [13 February 2013] (notably, the draft law provided that the Cabinet would issue a decree detailing the conditions under which freezone companies may register onshore in order to extend their business activities to the mainland).

or the company, its strategic investments and employment of UAE citizens".[35]

On 21 February 2013, the FNC completed its review of the 377 articles of the draft CCL.[36] It was reported that "*[a] clause which would have eased foreign ownership of companies was scrapped with Al Mansouri [Minister of Economy] saying the issue will be addressed in the investments laws [FDI law], scheduled to be approved by the end of this year [2013]*".[37] The reform was enacted, abrogating the CCL of 1984. To replace it, Federal Law (2) of 2015 on Commercial Companies ("New CCL") was published in the Official Gazette on 31 March 2015 and came into force on 1 July 2015. As expected, the New CCL maintained the mandatory majority stake for Emiratis.[38]

The reform's inevitable impact on long-standing rent seekers translated to significant delays in implementing the enacted reform. Three years later, in a major step towards liberalization of company ownership, the long-awaited FDI Law was enacted. In May 2018, the UAE government announced that foreign investors would be allowed to own 100% of UAE companies under Federal Decree (19) of 2018. At the same time, the government also announced that it would reform the immigration system in the UAE, and introduce a ten-year visa for skilled foreigners.[39] The FDI law contained a "Negative List" of strategic business sectors that were excluded from foreign ownership.[40] In March 2020, a "Positive List" was announced, listing 122 business activities eligible for foreign ownership.[41]

These incremental steps towards the liberalization of company ownership culminated in total liberalization in 2020. On 23 November 2020, a federal law was issued amending the New CCL and allowing foreigners 100% ownership in domestic companies, with effect from 1 December 2020. The amendment excluded companies in strategic sectors and those with government ownership from its purview.[42] As a result, the FDI Law and the Positive List were rendered obsolete.[43]

Prior to the 2020 liberalization, freezones were embraced as a solution that struck a balance between two seemingly irreconcilable priorities: offering attractive incentives to international businesses on the one hand, while shielding the local population on the other hand.

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[35]Gulf News [14 February 2013].

[36]Gulf News [21 February 2013].

[37]Gulf News [21 February 2013].

[38]Article 10 New CCL: "*With the exception of Joint Liability Companies and Simple Commandite Companies where all the joint partners of any such companies shall be UAE nationals, any company established in the State shall have one or more UAE partners holding at least* 51% *of the share capital of the company*".

[39]Gulf News [21 May 2018a].

[40]The Negative List includes key strategic sectors of national interest such as activities related to petroleum mining and exploration, defense security and water and electricity, as well as others.

[41]*See* Cabinet Resolution No. 16 of 2020 Concerning the Determination of the Positive List of Economic Sectors and Activities Eligible for Foreign Direct Investment and Percentage of their Ownership (includes agriculture activities, legal services, engineering and design services and others).

[42]Gulf News [19 May 2021].

[43]Gulf News [20 December 2020].

C Freezones: A solution to pro-Emirati corporate law

To alleviate the potential stifling effects of the Emirati majority shareholder requirement, the government went about establishing areas within the UAE with special laws and regulations: "free trade zones" or "freezones". The first freezone in the UAE was established in 1985, in the Jebel Ali port of Dubai.[44] Today, the UAE counts over 35 freezones, more than half of which are in Dubai.

Freezones constitute pockets of land where a significant portion of the Federal UAE laws and state Emirati laws (jointly or severally referred to as "mainland" or "onshore" law) do not apply.[45] Federal criminal law and laws related to state interests continue to apply in freezones. However, UAE freezones are exempt from most legal statutes that apply to onshore businesses and their commercial activities. Instead, freezones are subject to their own special laws and regulations.[46] The exemptions granted to the economic zones are determined by the Council of Ministers together with the competent authorities of the Emirate hosting the freezone.[47] Freezones are administered by the Ruler within which they are hosted; as such, the Ruler determines the appropriate exemptions for the freezone, and enacts the laws of the freezone.

The main advantage of freezones is 100% business ownership for foreigners, although the setting-up costs were – at least until the New CCL – significantly elevated.[48] Other advantages of free-zones include the option of 100% repatriation of capital and profits outside of the UAE, no trade duties and no taxes.[49] The impending threat of legislation banning the practice of "sleeping partners" was a catalyst for some mainland companies to move their businesses out of the mainland into the freezones, in order to avoid potential interference in their business from their mandatory Emirati partner, in addition to reducing operating costs related to paying the local partner.[50]

With the proliferation of freezones, one issue that came to light was the restrictions faced by freezone companies for doing business on the mainland. While some freezone authorities were allegedly more lax in policing the activities of registered companies, others made an effort to ensure that the lines between freezone and mainland business activities were not crossed.[51] Companies in breach were exposed to fines, revocation of freezone license as well as immigration issues since freezone employees obtained their visa for work within the bound-

[44]Middle East News Online [1 April 2001].

[45]Federal Law No. 1 of 1979 Concerning the Regulation of Industry Affairs issued on 19 March 1979 provides that privileges and exemptions may be granted on a case-by-case basis by the Council of Ministers and the competent authorities in the emirate.

[46]The laws of the special economic zones are made by the Ruler of the emirate where they are located. For example, DIFC laws are issued by the Dubai Ruler (*see* DIFC Law No. 3 of 2004 Law on the Application of Civil and Commercial Laws in the DIFC).

[47]Federal Law No. 1 of 1979 Concerning the Regulation of Industry Affairs issued on 19 March 1979, Article 20.

[48]For a discussion of setting-up costs in freezones and mainland UAE, *see* Gulf News [5 April 2011].

[49]Although, when VAT was introduced, it became applicable to freezone companies. *See* Gulf News [31 March 2020].

[50]The National [7 November 2011b].

[51]The National [7 November 2011a].

aries of the freezone. In May 2017, the DIFC entered into a memorandum of understanding with Dubai Economy, which allowed DIFC companies that wish to expand their business activities to mainland Dubai to apply for a dual license.[52]

When the UAE government announced on 20 May 2018 that foreign investors would be allowed to own 100% of UAE companies, freezone authorities were confident that these measures were no cause of concern for their base of companies. They further emphasized that while 100% ownership was one major advantage of freezones, there were also others, such as linkages and infrastructure.[53] In July 2019, the DIFC introduced a series of four new business licenses, the most notable of which is the "commercial permissions", which allows certain categories of non-DIFC entities (such as event planning, retail or educational services) to conduct their business activities within the DIFC at special rates.[54]

The complete liberalization of the mainland companies law led UAE freezones to rethink their offerings, now that their main strategic advantage – 100% foreign ownership – was taken off the table. As a result, they reduced fees associated with set-up, increasing the validity of the licenses offered as well as the visa quota for their businesses.[55]

In freezones, deviation from mainland protectionism was acceptable because of the limited and exceptional nature of that deviation. Creating freezones has been beneficial to the UAE, allowing it the flexibility to offer attractive conditions for businesses under international best practice standards. As shown in this chapter, one potential difficulty with freezones is conflict with mainland institutions and laws.

2.3 The DIFC Courts: The judicial arm of Dubai's financial freezone

The DIFC Courts were created under the conditions described above: an international population with English as their *lingua franca*, developing creative solutions to work around laws aimed at protecting the interests of a small yet influential group (i.e., Emirati citizens). Dubai's common law courts were born out of the DIFC (2.3.1). The DIFC Courts were created as the DIFC's judicial arm (2.3.2).

2.3.1 The DIFC: A financial freezone

The DIFC is a financial freezone in the emirate of Dubai.[56] Like other freezones, the DIFC is circumscribed to its geographical boundaries within Dubai.[57] It enjoys "financial and

[52]Gulf News [31 July 2017].

[53]Gulf News [21 May 2018b].

[54]Gulf News [10 July 2019].

[55]Gulf News [1 April 2021].

[56]The DIFC is a financial free zone created by Federal Decree No. 35 of 2004 dated 27 June 2004. *See also* Federal Law No. 8 of 2004 dated 14 March 2004 (established the legal framework for financial free zones).

[57]*See* Article 2(2) of Federal Law No. 8 of 2004 in respect of financial freezones. This is in contrast to the Qatar Financial Centre, which may license businesses to set up anywhere within Qatar. In the same

administrative independence [while being] attached to the Government".[58] Its regulatory power is limited to those "*regulations necessary for carrying out their activities*" and "*within the limits of the purpose of their establishment*".[59]

The DIFC endeavors to promote Dubai as a world-class leading financial center.[60] As such, the DIFC has its own set of laws and regulations, as well as an independent regulatory authority. From the outset, the vision of the DIFC included the judicial arm based on the common law legal system. The DIFC Courts allow investors to bypass the mainland legal system, thus providing them with the benchmarks of a modern pro-business city. If establishing the DIFC was a signal of Dubai's commitment to businesses, the introduction of a corresponding court system reinforced that commitment.[61]

2.3.2 The DIFC Courts: The DIFC's judicial arm

Setting up the DIFC Courts was not a simple process. It involved a modification of the UAE Constitution, a momentous occurrence in a country that strictly avoids disturbing the legal stability of the union's constitutive documents.

As the judicial arm of the DIFC, the DIFC Courts are an independent body with exclusive jurisdiction in interpreting DIFC law and resolving DIFC related disputes.[62] The Courts began operating in 2006 and published their first decisions in 2008.

Two instances of jurisdiction are embedded within the court: the DIFC Court of First Instance ("CFI") and the DIFC Court of Appeal ("CA"). There is also a Small Claims Court for disputes valued at between AED 100,000 and AED 500,000, as well as courts with various technical specializations. One judge sits at the First Instance Court, while judgments at the appeals level are rendered by a bench composed of three judges. To date, some 200 judgments have been issued by the DIFC CFI. Disputes are heard in the English language by an international bench of common law judges. DIFC Courts judgments are issued in English, in the name of the Ruler.[63]

As the judicial arm of Dubai's financial freezone, the DIFC Courts have exclusive jurisdiction over issues arising out of the DIFC. Their purpose was limited to serving the DIFC but that changed over time.[64] The principles sources of their jurisdiction are: (i) the Law of

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vein, under Article 4(5) of the same law, DIFC businesses were required to remain within the geographical boundaries of the freezone.

[58] Article 3 of Dubai Law No. 9 of 2004 with respect to the Dubai International Financial Center.

[59] Article 7(3) of Federal Law No. 8 of 2004.

[60] Articles 1 and 4 of Dubai Law No. 9 of 2004.

[61] Gulf News [16 November 2008]: ""The independent, fair, transparent and efficient judicial system provided by the DIFC Courts is an integral part of the platform offered by DIFC for the development of the financial services industry and capital markets. As DIFC further grows as a global financial centre, the DIFC Courts will play a key role in giving DIFC-based financial institutions the certainty and stability required to grow their business," said Dr Omar Bin Sulaiman, Governor of DIFC".

[62] Article 3(1) of Dubai Law No. 12 of 2004 in respect of the DIFC Judicial Authority Law as amended ("JAL").

[63] Article 3(4) of DIFC JAL.

[64] *See* Speech of Sir Anthony Evans on the occasion of his succession, 16 June 2010, praising the Dubai

the DIFC;[65] (ii) the Judicial Authority Law ("JAL");[66] (iii) the DIFC Courts Law[67] and the Protocol of Jurisdiction between Dubai Courts and DIFC ("POJ").[68]

The DIFC Courts consistently attracts an international body of legal professionals, including Queen's Counsels, who interact with its Court system. Figure 2.3 depicts the number of DIFC CFI judgments issued in each year (based on judgments issued between May 2007 and August 2021), stratified by the involvement of Queen's Counsels in the dispute, while Figure 2.4 presents the law firms involved in DIFC CFI cases within the same time frame, with the "OTHER" law firms from that figure listed in Table 2.2 (each with a single case).

Building trusted institutions requires patience because establishing trust is a lengthy process that requires the trustworthiness of the institution under consideration to be tested. In the hope of accelerating the trust-building process, institutions have a number of techniques at their disposal: the reputation of key members of the institution (A), linkage to a trusted institution that is more established (B), as well as endorsement from other trusted institu-

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Ruler who "*recognized that a world class Dispute Resolution Service was essential to the success of the international financial centre they [Dubai] were planning*".

[65] Article 8(2), Dubai Law No. 9 of 2004: "*Unless otherwise provided by any other Centre's Laws, the Centre's Courts shall have exclusive jurisdiction to hear and determine any claims in which the Centre, the Centre Establishments or any of the Centre's Bodies is party to and also to hear and determine any dispute, arising out of any transaction carried out in the Centre or an incident which took place therein*".

[66] Article 5(A), Dubai Law No. 9 of 2004: "*5(A) The Court of First Instance: (1) Without prejudice to paragraph 2 of this Article, the Court of First Instance shall have the exclusive jurisdiction over: (a) civil or commercial cases and disputes involving the Centre or any of the Centre's Bodies or any of the Centre's Establishments. (b) civil or commercial cases and disputes arising from or related to a contract that has been executed or a transaction that has been concluded, in whole or in part, in the Centre or an incident that has occurred in the Centre. (c) objections filed against decisions made by the Centre's Bodies, which are subject to objection in accordance with the Centre's Laws and Regulations. (d) any application over which the Courts have jurisdiction in accordance with the Centre's Laws and Regulations; (2) Parties may agree to submit to the jurisdiction of any other court in respect of the matters listed under paragraphs (a), (b) and (d) of this Article*". (version before amendment in 2011).

[67] Article 19(1), DIFC Law No. 10 of 2004: "*The DIFC Court of First Instance has original jurisdiction pursuant to Article 5(A) of the Judicial Authority Law to hear any of the following: (a) civil or commercial cases and disputes involving the Centre or any of the Centre's Bodies or any of the Centre's Establishments; (b) civil or commercial cases and disputes arising from or related to a contract concluded or a transaction concluded by any of the Centre's Establishments or the Centre's Bodies; (c) civil or commercial cases and disputes arising from or related to a contract that has been executed or a transaction that has been concluded, in whole or in part, in the Centre or an incident that has occurred in the Centre; and (d) any application over which the DIFC Court has jurisdiction in accordance with DIFC Laws and Regulations*".

[68] Article 3, POJ between Dubai Courts and DIFC of 7 December 2009: "*DIFC Courts shall have exclusive jurisdiction over: 3.1 Civil or commercial cases and disputes involving the Centre or any of the Centre's Bodies or any of the Centre's companies, and branches of companies and establishments that are established or licensed to operate in the DIFC; 3.2 Civil or commercial cases and disputes arising from or related to a contract that is to be or has been performed in whole or in part within the DIFC. 3.3 Civil or commercial cases and disputes arising from or related to a transaction that has taken place, in whole or in part, in the Centre, and which is related to Financial Banking Activities, Financial Activities, Ancillary Activities or any Activities licensed to be performed within the DIFC; 3.4 Civil or commercial cases and disputes arising from or related to an incident that has occurred in the Centre, except Criminal Proceedings relating to any Criminal Offence according to the Penal Codes; and 3.5 Disputes about Civil remedies flowing from or related to any criminal Offence that has occurred in the Centre*".

tions (C). Together, these function as a cluster of signals of the government's commitment to sound legal institutions that meet international standards.

A The (positive) reputation of the DIFC Court's international bench

The reputation of the judges in the "international community" was an important aspect of the building the DIFC Courts.[69] Jurists of exceptional reputation and pedigree benefit from a high degree of trust from court users and legal professionals.[70] By associating with these jurists, the DIFC Courts aim to gain institutional credit. The current bench is composed of 5 Emirati judges, four judges from the UK, three judges from Australia and one judge Malaysia (See Table 2.1 for a breakdown of all DIFC Courts justices, past and present). Figure 2.2 depicts the number of judgments issued by each of the justices in the DIFC CFI between May 2007 and August 2021.

It is of note that the two senior Justice from the UAE – Deputy Chief Justice Al Muhairi[71] and Justice Al Madhani[72] – were first public prosecutors in Dubai, and served on the Dubai Courts hearing civil, commercial and criminal cases. Justice Al Sawalehi has a degree in UAE law, as well as an LL.M. from Westminster University in the UK. The more recent appointees to the DIFC bench include Justice Al Nasser, a Bachelor of Law graduate of the UK's University of Middlesex, "the first Emirati to join the DIFC Courts whose primary legal training has been in English common law".[73]

The selection criteria and process for the Emirati judges is not public. As for the inter-

[69]DIFC Authority Director General commenting on the appointment of the Chief Justice and the Deputy Chief Justice: "*Having developed a body of laws in consultation with major global institutions and following international best practice, it is essential that judges appointed to the DIFC Courts are of the highest possible calibre. His Highness, Sheikh Maktoum Bin Rashid Al Maktoum, Ruler of Dubai, has without doubt, appointed two men of the very highest standing within the international legal community and, critically, companies establishing themselves at the DIFC can rest assured that the DIFC Courts will be independent, credible and effective*" (Front page of the DIFC website, 6 October 2006).

[70]One potential problem here is that linking the reputation of the institution to the person(s) associated with it could potentially lead to an important trust deficit when certain people leave the institution. This could potentially be countered by multiplying the number of reputed jurists associated with the institution, thereby spreading out the risk over several individuals. The amount of time each judge remains on the bench is also important: the longer their commitment, the greater the potential trust transferred by association to the institution.

[71]Profile of Deputy Chief Justice Omar Al Muhairi, available at: https://www.difccourts.ae/about/court-structure/judges (last accessed on 11 May 2022): "In 1994, H. E. Justice Omar Al Mheiri was appointed as a Prosecutor for Dubai Public Prosecution and served as Prosecutor until 1998. In 1998, he was appointed by the Ruler of Dubai to serve as a Judge in the Dubai Courts. During his tenure as a Judge, H. E. Justice Omar Al Mheiri dealt with a large number of major criminal, commercial and civil cases".

[72]Profile of Justice Ali Al Madhani, available at: https://www.difccourts.ae/about/court-structure/judges (last accessed on 11 May 2022): "He began his judicial career in 1994 until 1998 as a Public Prosecutor for Dubai Public Prosecution. In 1998, he was appointed by the Ruler of Dubai to serve as a Judge in the Dubai Courts. During his tenure as a Dubai Courts' Judge. He was adjudicated over a large number of major commercial, criminal and civil cases".

[73]Profile of Justice Nassir Al Nasser, available at: https://www.difccourts.ae/about/court-structure/judges (last accessed on 11 May 2022).

national bench, they are generally senior judges from prominent common law jurisdictions, who have either retired or are close to retirement.

Notably, the DIFC Courts were lauded in 2008 for appointing the first female judge of the UAE.[74] Shortly after, in March 2009, the first female judge was appointed to the mainland Dubai Courts. Slowly, the number of female judges in Dubai grew, such that there were 3 female judges by 2011.[75] These developments clarified Article 18 of the Federal Judicial Authority law – which provides that federal judges must be Muslim, Emirati males – only applies to the federal judiciary and not to state courts of each Emirate.

In September 2021, it was announced that Deputy Chief Justice Al Muhairi was appointed by the Ruler of Dubai as Director of the DIFC Courts.[76] This appointment was made following an amendment to the DIFC Law that was enacted in May 2021, that created the position of DIFC Courts Director.[77]

B A privileged relationship with the Commercial Court of London

The DIFC Courts also gained institutional credit through their direct attachment to the Commercial Court of London. The long-standing history of the British institution served as an important foundation upon which the DIFC Courts were built. By capitalizing on the established precedents of the London Commercial Court, the DIFC Courts further signaled their commitment to developing and maintaining legal institutions that comply with international standards.[78]

C Chain linkage to and endorsement by reputable institutions and figures

At the occasion of its inauguration, the DIFC Courts received letters of endorsement from prominent UK figures. For example, the Lord Mayor sent "best wishes" from the City of London, describing the Courts as "a model for the future which, with the sister court in Qatar, leads the way for dealing practically, where appropriate, with disputes that will arise in the world wide financial markets – in which London is acknowledged as the leading center."[79]

[74]The National [30 April 2008].

[75]The National [23 November 2011].

[76]DIFC Newsroom [1 September 2021].

[77]Law No. 5 of 2021 Concerning the Dubai International Financial Centre, issued on 27 April 2021.

[78]20 April 2010 – His Highness Sheikh Maktoum bin Mohammed Commends Performance of DIFC Courts (available at: https://www.difccourts.ae/2010/04/20/20-april-2010-his-highness-sheikh-maktoum-bin-mohammed-commends-performance-of-difc-courts/; last consulted on 18 April 2019).

[79]DIFC Press Release, 7 February 2019, Lord Mayor Seeks Further Links with UAE (reporting that the Lord Mayor of London lead a business delegation visit to the DIFC).

2.4 The trajectory from freezone court to standalone Dubai court

From the outset, the delimitation of the DIFC Courts' jurisdiction was a sensitive matter. The first Chief Justice of the DIFC Courts took pains to explain that its jurisdiction is "limited to matters related to Dubai's financial freezone", although "the precise limits of jurisdiction are obviously going to be open to argument".[80]

This description is a far cry from the Court's jurisdiction and role today. The October 2011 legislative extension of the DIFC Court's jurisdiction generated a range of reactions (2.4.1). What the critics had failed to notice was that the Court's jurisdictional spread began well before October 2011, when after initially emphasizing the distinction from mainland Arabic-language courts (2.4.2), the DIFC Courts reversed position, highlighting their fraternity with mainland courts as part of the Courts of Dubai family (2.4.3).

2.4.1 The 2011 legislative expansion of the DIFC Courts' jurisdiction

On 31 October 2011, the Dubai Ruler amended the JAL to allow DIFC Courts jurisdiction by election of parties to civil or commercial disputes.[81] In becoming a stand-alone international commercial court, the DIFC Courts evolved into a new institution that went beyond their initial objective of exclusively serving the financial freezone.

This legislative extension of jurisdiction generated mixed reactions. Although it was eagerly welcomed by large segments of the UAE business community, as well as by English-speaking expatriate lawyers practicing in the UAE (or abroad), it was unsettling for the Emirati legal community.

Some applauded the expansion for opening access to an English-language forum to litigants who would prefer to have their cases litigated in a language they understand, as well as to onshore, small and medium size businesses in the UAE that may not have the financial power to set-up shop in the DIFC. Others noted that wider DIFC Courts access would facilitate the recovery of attorney fees in litigation between commercial parties.[82]

In contrast, the amendment did not sit well with the Emirati legal community.[83] The local legal community was concerned with potentially substantive loss of casework to common-law

[80] Gulf News [21 November 2008].

[81] DIFC Press Release, 31 October 2011, Dubai Judiciary Move Cements Dubai's Position as Middle East Business Hub.

[82] Gulf News [1 November 2011] (In the onshore Dubai Courts, the rule is that attorney fees may not be recovered, and that each party pays their own fees. In contrast, the ability to recover attorney fees in the DIFC Courts was expected to have the added benefit of decreasing frivolous lawsuits. This benefit was highlighted by lawyers commenting on the new rule, but the DIFC Courts Justice did not recognize this as a factor that would influence the decision of commercial parties regarding forum selection within Dubai).

[83] The National [12 November 2011]: "*DIFC jurisdiction has been the most controversial topic in Dubai's legal system for some time now. The newly announced plan is resented by some local lawyers and judges as unnecessary and unfair to the local courts. According to these critics, expansion of DIFC courts jurisdiction is a declaration of the inadequacy of the general judiciary*".

lawyers, the dilution of the local legal system and the seeming "declaration of the inadequacy of the general judiciary".[84] At the time of the expansion, it was unclear whether and to what extent the DIFC Courts would be able to handle a sudden influx of cases, if these were to occur, since only two of its judges resided full-time in the UAE, and disputes were heard only one week out of the month.[85]

A close examination reveals that the DIFC Court's jurisdiction spread did not begin in 2011. In reality, since 2009, DIFC Courts representatives had been eyeing wider jurisdictional reach, not only to "show everybody that it is possible to get world-class legal justice in Dubai",[86] but also because businesses in other freezones had expressed interest in coming under DIFC jurisdiction.[87] The expansionist aspirations are clear from a close analysis of the DIFC judgments. From their narrow mandate as the judicial arm of a financial freezone, the DIFC Courts Justices took an active role in carving out – then justifying and defending – their all-encompassing jurisdiction in international high-stakes business disputes.

2.4.2 Hardt case: The "natural" meaning of Courts of Dubai

The first decision to address a choice of forum contract in favor of Courts of Dubai is the Hardt case of April 2010.[88] The dispute arose out of 37 contracts concluded from 2007 to 2009, for the purchase of numerous residential and retail units by a German investor.[89] The properties were located in mainland Dubai, except for one which was within the geographical territory of the DIFC.[90] DAMAC is a DIFC Registered Company, while the other defendants are individuals.[91]

The dispute arose out of defendants' breach of contract due to their failure to deliver the properties on time. As a result, the claimants filed a claim in the DIFC CFI requesting termination of all contracts and reimbursement of the contract cost.[92] In response, DAMAC (the first defendant) filed an application to have the claim struck out, and for a declaration that the DIFC CFI has no jurisdiction over the dispute.[93] A hearing was held on 23 February 2010, where arguments were limited to the issue of jurisdiction.[94] The judgment on jurisdiction was issued on 4 April 2010.

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[84]The National [12 November 2011].

[85]The National [13 November 2011]. *See also* The National [16 November 2011] (where Sir Anthony Colman describes a typical day serving on the DIFC Courts, explaining that "*[w]e have pre-designated periods of one week, and I come [to the UAE] for my particular week on the roster whenever it is, probably about once every four months*".

[86]The National [4 December 2009], citing Mark Beer, the DIFC Courts registrar.

[87]The National [4 December 2009] (At the time, more than 100 cases had been filed in the Small Claims Courts, but only some 30 cases higher-value cases had been filed at the Court of First Instance).

[88]Dr. Lothar Ludwig Hardt and Hardt Trading F.Z.E. v DAMAC (DIFC) Company Limited et al., DIFC CFI 36/2009, 4 April 2010.

[89]Hardt [DIFC CFI 2010], para 1.

[90]Hardt [DIFC CFI 2010], para 1, 41.

[91]Hardt [DIFC CFI 2010], para 6.

[92]Hardt [DIFC CFI 2010], para 2-4.

[93]Hardt [DIFC CFI 2010], para 7.

[94]Hardt [DIFC CFI 2010], para 9.

Each of the 37 contracts between the parties contained an identical choice of law and choice of court clause.[95] The clause stipulated:

> "*This Agreement is made in the English language and the rights of the Parties hereunder shall be governed by the Laws of the United Arab Emirates and the Laws of Dubai and the Parties agree that any legal action or proceedings with respect to this Agreement shall be subject to the exclusive jurisdiction of the Courts of Dubai, United Arab Emirates*"[96] (emphasis added).

In examining potential avenues for establishing jurisdiction over the claim, the DIFC Courts first offered an interpretation of the jurisdiction clause in light of the surrounding factual context (A) and a second interpretation based on the plain language meaning of the clause (B), ultimately finding that there was no basis for its jurisdiction (C).

A Contextual interpretation of the forum clause leads to mainland courts

The starting point of the Court's analysis was emphasizing the principle of uniform interpretation of the jurisdiction clauses. Under this principle, each of the 37 contracts must be interpreted homogeneously, such that jurisdiction over the 37 transactions is conferred to one single forum, irrespective of the location of the properties (i.e., whether they are located in mainland Dubai or within the DIFC).[97]

Applying that principle, the Court identified two barriers to establishing its jurisdiction. The first was based on the unlikeliness that the parties would opt for DIFC jurisdiction for the sale of properties located outside the DIFC territory, especially given the circumstances (i.e., that the contracts were neither entered into within DIFC territory, nor did they require execution within the DIFC).[98] The second was based on the absence of applicable DIFC Land Law at the time of contract conclusion. Justice Colman concluded that "[i]n these circumstances, it is, in my judgment, inconceivable as a matter of inference"[99] that the parties had elected DIFC Law or conferred exclusive jurisdiction on the DIFC Courts.

B "Natural meaning" interpretation of the forum clause leads to mainland courts

In addition to the contextual interpretation, the DIFC Courts also offered a plain language interpretation of the jurisdiction clause based on common understanding. The Court explained:

> "*[T]he contracts contain nothing to indicate that the parties by using the words "Laws of Dubai" and "Courts of Dubai" were employing a specially-agreed meaning that confined the Laws to DIFC Laws and confined the Courts to DIFC Courts.*

[95] Hardt [DIFC CFI 2010], para 41.
[96] Hardt [DIFC CFI 2010], para 40.
[97] Hardt [DIFC CFI 2010], para 41.
[98] Hardt [DIFC CFI 2010], para 44.
[99] Hardt [DIFC CFI 2010], para 45-47.

> *Great though Dr Hardt's professed enthusiasm for English Law and Courts, and therefore DIFC Courts, might be, unless he can address cogent evidence of an agreement that the words of the clause should have a specially confined meaning, they must be given their natural meaning. The "Courts of Dubai" would not be taken by anyone familiar with the relative jurisdiction of the Dubai and DIFC Courts and to the circumstances in which these agreements were entered into as referring to the DIFC Courts [...] In short, these particular contracts do not contain provisions which compel departure from the natural meaning of the "Laws of Dubai" or the "Courts of Dubai"*"[100] (emphasis added).

In other words, the DIFC Courts in Hardt acknowledged that the plain language and most commonly understood meaning of "Courts of Dubai" refers to the mainland civil law courts, the courts of general jurisdiction. The Hardt Court recognized that the civil law courts are the most representative "Courts of Dubai" and that the newer, transplanted, specialized DIFC Courts of limited jurisdiction are not what parties intend by an election for "Courts of Dubai".

Ultimately, the DIFC Courts found that the parties had effectively contracted out of any potential DIFC jurisdiction, and into the jurisdiction of the mainland courts.[101]

C Absence of any basis for DIFC jurisdiction

The Court found that if there were any basis for DIFC jurisdiction, the parties had effectively opted out in their forum selection clause. Despite this holding, the Court went a step further, finding that in any event, there was no basis for DIFC jurisdiction, even in the absence of an opt-out.[102]

In support of its conclusion against jurisdiction over DAMAC, the Hardt Court highlighted a number of elements: the first defendant was not a party to any of the contracts; the contracts were not entered into in the DIFC; the great majority of the properties were not in the DIFC; the contract was not performed within the DIFC (with the exception of the one property within the DIFC[103]) and no allegation of breach of contract or duty was made against the first defendant.[104] Ultimately, the DIFC Courts came to the conclusion that DAMAC did not come under any of the heads of jurisdiction of Article 5 JAL.[105]

Justice Colman's interpretation of "Courts of Dubai" in Hardt opened a Pandora's box for the DIFC Courts. Following Hardt, the Court employed significant effort to dial back its impact. For the next few years, in almost every judgment on jurisdiction involving a choice of court clause, the DIFC Courts distanced itself from the "natural" meaning interpretation, adopting instead an approach that places significant weight on surrounding circumstances of the clause being interpreted.

[100]Hardt [DIFC CFI 2010], para 49-50.
[101]Hardt [DIFC CFI 2010], para 51.
[102]Hardt [DIFC CFI 2010], para 59-60, 67.
[103]Hardt [DIFC CFI 2010], para 64.
[104]Hardt [DIFC CFI 2010], para 59-60.
[105]Hardt [DIFC CFI 2010], para 67.

2.4.3 Taaleem case: What a difference seven months make

Seven months after Justice Colman's "natural meaning" approach in Hardt, the Court was once again called upon to interpret a forum selection clause with similar wording. The Court, represented by Justice Chadwick, issued its judgment in November 2010.

A Background of Taaleem dispute

The dispute arose out of a series of purchases and financing arrangements made with respect to a major building in the DIFC, Sky Gardens.[106] On 9 June 2008, Amlak acquired most of the units in Sky Gardens. Shortly after, on 7 July 2008, a tripartite agreement was concluded between Amlak, Taaleem and DIFC Investments LLC, through which Taaleem acquired a 33% interest in the Sky Garden properties.[107] Taaleem's acquisition was financed by National Bonds Corporation ("NBC") through a Murabaha[108] contract dated 6 July 2008 between Taaleem and NBC.[109] A novation contract was concluded between Taaleem and Deyaar, which provided that Deyaar would acquire Taaleem's interest in the properties for a premium, thereby replacing Taaleem in the tripartite agreement.[110] These transactions are represented in Figure 2.1.

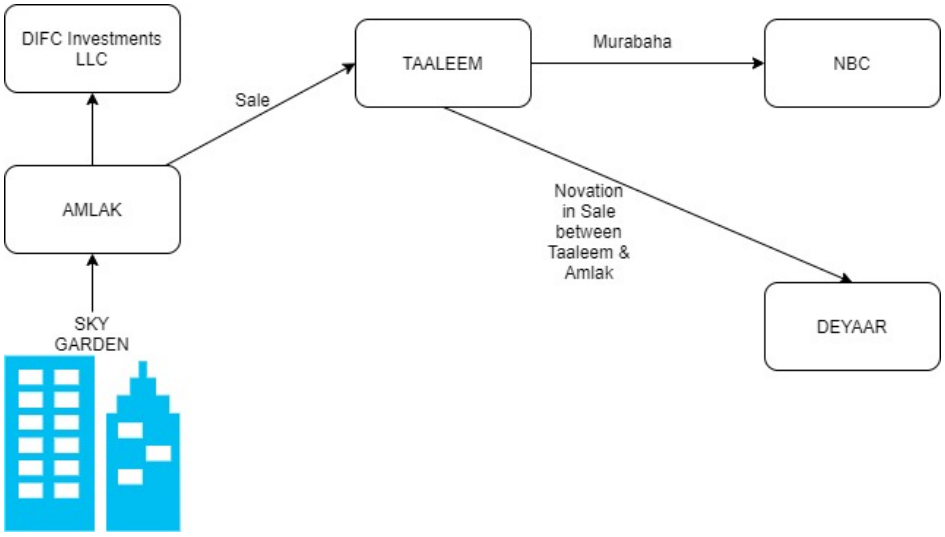


Figure 2.1: Taaleem Contracts.

[106]Taaleem PJSC v (1) National Bonds Corporation PJSC and (2) Deyaar Development PJSC, DIFC CFI 014/2010, 21 October 2010.

[107]The Tripartite Agreement also provided that Amlak would hold its legal interest in the property on trust for itself (Taaleem [DIFC CFI 2010], para 10).

[108]Islamic cost-plus financing contract.

[109]National Bonds Corporation PJSC v (1) Taaleem PJSC and (2) Deyaar Development PJSC, DIFC CA 001/2011, 11 May 2011, para. 2, 4.

[110]Taaleem [DIFC CA 2011], para 6, 13 and 22 (the plan for Taaleem was to sell the properties within a short period of the acquisition, after taking advantage of short-term capital gains).

After the collapse of the Dubai property market by December 2008, Deyaar failed to execute its payment obligations under the Murabaha contract.[111] In April 2010, NBC requested payments from Taaleem, which led to Taleem filing applications in the DIFC CFI.[112]

Taaleem applied for a declaration that it was not indebted to the first defendant (NBC) and that by virtue of the novation to Deyaar, it had no interest in the DIFC property and is consequently not liable to the bank for any financing issues. NBC applied to join the second defendant (Deyaar) to the proceedings.[113] Deyaar applied for a declaration that it was owed money by Taaleem and for an order that until the money is paid, the property be held on trust.[114]

B Jurisdiction clauses in the Taaleem dispute

The terms of the reported novation are not referenced by the Court, and appear to not have been recorded. However, the Tripartite Agreement stipulated that disputes would be resolved by an independent arbitrator appointed with the assistance of the London Chamber of Commerce, and that the agreement "shall be governed by and construed in accordance with the law applicable in Dubai".[115]

As for the Murabaha contract, it stipulated that it was governed by the laws of Dubai, UAE to the extent they are compatible with Sharia principles.[116] Furthermore, the Murahaba contained a choice of court clause which provided that:

> "*Each of the Parties irrevocably agrees for the benefit of the Seller that the courts of Dubai, UAE shall have jurisdiction to hear and determine any suit, action or proceedings, and to settle any disputes which may arise out of or in connection with this Agreement (respectively 'Proceedings' and 'Disputes') and for such purposes, irrevocably submits to the jurisdiction of such courts*"[117] (emphasis added).

C Taaleem CFI: The Court dials back on Hardt

The Claimant argued that the natural meaning of the forum selection clause had already been determined in Hardt, and therefore, that the parties had elected the mainland Dubai Courts, rendering the DIFC Courts without jurisdiction over the dispute.[118] NBC's defense was based on the argument that mainland Dubai Courts – and not the DIFC Courts – have exclusive jurisdiction.

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[111] Taaleem [DIFC CA 2011], para 23.

[112] Taaleem [DIFC CA 2011], para 24–25.

[113] Taaleem [DIFC CFI 2010], para 1.

[114] Taaleem [DIFC CFI 2010], para 2.

[115] Taaleem [DIFC CA 2011], para 14. *See also* Taaleem [DIFC CA 2011], para 45.

[116] Taaleem [DIFC CA 2011], para 19: This Agreement is governed by the laws of Dubai, UAE to the extent these laws are not inconsistent with the principles of Sharia (as set out in the Sharia Standards published by Accounting and Auditing Organisation of Islamic Financial Institutions and/or Islamic Fiqh Academy of Organisation of Islamic Conference), in which case the principles of Sharia will prevail.

[117] Taaleem [DIFC CFI 2010], para 10.

[118] Taaleem [DIFC CA 2011], para 28.

C.1 Sources DIFC jurisdiction

The DIFC Courts reviewed the principle sources of its jurisdiction: (i) the Law of the DIFC[119] (ii) the JAL;[120] (iii) the DIFC Courts Law[121] and the POJ between Dubai Courts and DIFC.[122] In contrast to the Law of the DIFC, the JAL and POJ contain references to the mainland Dubai Courts. Article 2 of the JAL stipulates that the term "Dubai Court" is defined as "Courts of the Emirate established pursuant to the aforementioned Law No. (3) of 1992".

Additionally, the Court refers to the POJ between the DIFC Courts and the Dubai Courts.[123] "Dubai Courts" and "DIFC Courts" are each a party to the POJ, where the term "Dubai Courts" appears 15 times in total, as a clearly distinguished court system from the DIFC Courts. Notably, the POJ emphasizes that "Dubai Courts and the Dubai International

[119]Article 8(2), Dubai Law No. 9 of 2004: "*Unless otherwise provided by any other Centre's Laws, the Centre's Courts shall have exclusive jurisdiction to hear and determine any claims in which the Centre, the Centre Establishments or any of the Centre's Bodies is party to and also to hear and determine any dispute, arising out of any transaction carried out in the Centre or an incident which took place therein*".

[120]Article 5(A), Dubai Law No. 12 of 2004: "*5(A) The Court of First Instance: (1) Without prejudice to paragraph 2 of this Article, the Court of First Instance shall have the exclusive jurisdiction over: (a) civil or commercial cases and disputes involving the Centre or any of the Centre's Bodies or any of the Centre's Establishments. (b) civil or commercial cases and disputes arising from or related to a contract that has been executed or a transaction that has been concluded, in whole or in part, in the Centre or an incident that has occurred in the Centre. (c) objections filed against decisions made by the Centre's Bodies, which are subject to objection in accordance with the Centre's Laws and Regulations. (d) any application over which the Courts have jurisdiction in accordance with the Centre's Laws and Regulations; (2) Parties may agree to submit to the jurisdiction of any other court in respect of the matters listed under paragraphs (a), (b) and (d) of this Article*". (version before the 2011 amendment that extended the Court's jurisdiction).

[121]Article 19(1), DIFC Law No. 10 of 2004: "*The DIFC Court of First Instance has original jurisdiction pursuant to Article 5(A) of the Judicial Authority Law to hear any of the following: (a) civil or commercial cases and disputes involving the Centre or any of the Centre's Bodies or any of the Centre's Establishments; (b) civil or commercial cases and disputes arising from or related to a contract concluded or a transaction concluded by any of the Centre's Establishments or the Centre's Bodies; (c) civil or commercial cases and disputes arising from or related to a contract that has been executed or a transaction that has been concluded, in whole or in part, in the Centre or an incident that has occurred in the Centre; and (d) any application over which the DIFC Court has jurisdiction in accordance with DIFC Laws and Regulations*".

[122]Article 3, Protocol of Jurisdiction between DIFC and Dubai Courts: "*DIFC Courts shall have exclusive jurisdiction over: 3.1 Civil or commercial cases and disputes involving the Centre or any of the Centre's Bodies or any of the Centre's companies, and branches of companies and establishments that are established or licensed to operate in the DIFC; 3.2 Civil or commercial cases and disputes arising from or related to a contract that is to be or has been performed in whole or in part within the DIFC. 3.3 Civil or commercial cases and disputes arising from or related to a transaction that has taken place, in whole or in part, in the Centre, and which is related to Financial Banking Activities, Financial Activities, Ancillary Activities or any Activities licensed to be performed within the DIFC; 3.4 Civil or commercial cases and disputes arising from or related to an incident that has occurred in the Centre, except Criminal Proceedings relating to any Criminal Offence according to the Penal Codes; and 3.5 Disputes about Civil remedies flowing from or related to any criminal Offence that has occurred in the Centre*".

[123]POJ [2009]: "*The purpose of the POJ is to clarify the scope of the DIFC Court of First Instance exclusive jurisdiction on one hand, and to set out the legal procedures for transferring cases between the Dubai Courts and the DIFC Courts*".

Financial Centre Courts ("DIFC Courts") are pillars of the Dubai legal system and agree that both Courts should have full judicial cooperation. The cooperation shall have a positive impact on effectively establishing and maintaining a strong Judicial System in Dubai".

In analyzing the sources of DIFC jurisdiction under the JAL, Justice Chadwick highlighted that: "[t]he Dubai Courts and the DIFC Courts are each integral parts of the Dubai legal system: they are each "Courts of Dubai"".[124] The Court went on to find:

> "*It is clear, therefore, that – pending further legislative definition of the jurisdiction which the Dubai Courts, on the one hand, and the DIFC Courts, on the other hand, are to exercise within the Emirate of Dubai – the Courts have agreed between themselves that jurisdictional issues shall be determined by each in accordance with paragraphs 3 and 4 of the Protocol. The effect of that agreement is that each case should properly be heard by one Court or by the other; there should be no case in which the Courts differ as to which has jurisdiction; and, accordingly, there should be no case in which both Courts either claim, or refuse, jurisdiction. In determining a challenge to its jurisdiction, the DIFC Courts should have those principles in mind*".

In other words, the Court distinguished "Dubai Courts" – a defined term in several pieces of legislation – from "courts of Dubai", which it finds to mean both the Dubai Courts and the DIFC Courts, singularly or collectively.

In Taaleem, Justice Chadwick transformed the scope of the JAL's definition of Dubai Courts, creating an entirely new definition of "courts of Dubai", one that includes the DIFC Courts. This novel interpretation of "courts of Dubai" contrasts with the Hardt judgment, issued a mere 7 months before, where the Court affirmed the "natural meaning" of "courts of Dubai" does not include the DIFC Courts.

C.2 The DIFC Court: Just another court of Dubai

In response to the defense that the Murabaha contract gives exclusive jurisdiction to the mainland Dubai Courts, to the exclusion of the DIFC Courts, Justice Chadwick found that the forum selection clause did not elect a specific court within Dubai. The Justice highlighted:

> "*But that is to equate the phrase "the courts of Dubai, UAE" with the "Dubai Courts" to the exclusion of the "DIFC Courts". As I have explained, on a proper understanding of the position within the Emirate of Dubai, both Dubai Courts and DIFC Courts are "courts of Dubai". Absent some compelling context – which does not exist in the present case – there is no basis for holding that the phrase "courts of Dubai, UAE" means the Dubai Courts rather than the DIFC Courts. It follows that the premise is flawed. The better view is that, by the use of that phrase in the Murabaha agreement, the parties have agreed to litigate disputes in Dubai, rather than somewhere else, but without choosing which between the two*

[124] Taaleem [DIFC CFI 2010], para 6.

> *court systems in Dubai: that is to say, they have agreed to submit their disputes to whichever of the Dubai Courts and the DIFC Courts has jurisdiction under the laws of Dubai*"[125] (emphasis added).

Notably, the Taaleem judge made a point of highlighting:

> "*It is clear that, in that context, he [Justice Colman] was treating "the Courts of Dubai" and the "the DIFC Courts" as mutually exclusive. But it is also clear that the proposition that the DIFC Courts were Courts of Dubai had not been argued before him. The true distinction – as I have explained – is not between the DIFC Courts and the Courts of Dubai. The true distinction is between the DIFC Courts and the Dubai Courts in the sense defined in Article 2 of the Judicial Authority Law: that is to say, "The Emirate of Dubai courts established pursuant to Law No. (3) of 1992*"[126] (emphasis added).

C.3 Distinguishing the Hardt decision

The Court emphasized that the decision in Hardt is binding precedent, and that it should not depart from the reasoning adopted in Hardt.[127] The Court then turned to the Hardt decision, "to consider whether the reasoning in Hardt v Damac compels a different conclusion [on the interpretation of the Murabaha's forum clause]".[128] Here, Justice Chadwick found:

> "*As I have said, I was satisfied at the hearing of NBC's application that unless I were persuaded that the reasoning in Hardt v Damac required a different conclusion – and that it would be wrong to depart from that reasoning – NBC's challenge to the jurisdiction of the DIFC Courts could not be sustained on the grounds advanced in its application notice and its skeleton argument. Having considered the reasoning in Hardt v Damac – set out in the preceding paragraphs of this judgment – I was not persuaded that it compelled or required a different conclusion. It is unclear whether the judge considered, in that case, the possibility that the phrase "the Courts of Dubai" could properly refer to both the Dubai Courts and the DIFC Courts: leaving the choice between those Courts to be made in accordance with the laws of Dubai. It seems that, without considering that possibility, he took the view that the phrase "the Courts of Dubai" must refer either to the Dubai Courts or to the DIFC Courts – to the exclusion of the other – and that, faced with that choice, the facts of the case before him pointed to the Dubai Courts. In*

[125] Taaleem [DIFC CFI 2010], para 13.

[126] Taaleem [DIFC CFI 2010], para 15; Taaleem [DIFC CA 2011], para 28; Taaleem [DIFC CA 2011], para 34.

[127] Taaleem [DIFC CFI 2010], para 9: "I was satisfied at the hearing of NBC's application that unless I were persuaded that the reasoning in Hardt v Damac required a different conclusion — and that it would be wrong to depart from that reasoning — NBC's challenge to the jurisdiction of the DIFC Courts could not be sustained on the grounds advanced in its Application Notice and its Skeleton Argument".

[128] Taaleem [DIFC CFI 2010], para 14.

> *those circumstances I am satisfied that I am at liberty to take my own view in this case*"[129] (emphasis added).

The Court therefore limits the sphere of the Hardt finding, characterizing it as purely based on the surrounding circumstances, and not an absolute, stand-alone definition of the term "courts of Dubai". In particular, the Court attempts to obliviate the "natural meaning" interpretation in Hardt. To that end, Justice Chadwick unconvincingly claims – in the absence of any indication in the text of the judgment – that although the Hardt court did not expressly discuss the dual meaning of "Courts of Dubai", it nevertheless took the view that the reference could be to either one of Dubai's courts. Furthermore, although the Hardt Court refers to the circumstances, the reference is made after the emphasis on the "natural meaning" on the one hand, and is made together with a remark on familiarity with the jurisdictional landscape in Dubai on the other hand.

Finally, taking the Hardt Court's position into consideration in its entirety (i.e., natural meaning, surrounding circumstances and familiarity with the legal landscape), together with the fact that the last contract in Hardt was concluded in 2009, while the contracts at issue in Taaleem were from 2008, it is difficult to reconcile the contrasting interpretations of an almost identical forum selection clause within such a short period of time.

The Taaleem Court also highlighted that "the result [in Hardt] would have been the same even if the judge had treated the phrase "the Courts of Dubai" as including both the Dubai Courts and the DIFC Courts.[130] Justice Chadwick goes to great length to reconcile Taaleem with Hardt. The Taaleem case is a complete reversal in the definition of the DIFC Courts' identity, from a distinct court within Dubai, to a fraternal court of the family of the Courts of Dubai. The Taaleem CA continues the strategic refusal to acknowledge the reversal, focusing instead on fortifying its identity.

C.4 Finding on jurisdiction

After reviewing the salient facts of the dispute, Judge Chadwick concluded that "In those circumstances, [...] I was satisfied that the DIFC Courts had jurisdiction pursuant to Article 5(A)(1) (b) of the Judicial Authority Law".[131]

After finding that there was a sufficient basis for DIFC jurisdiction, the Court examined how the mainland Dubai Courts would interpret the clause under UAE law. Here the Court based its determination on the testimony of a legal expert who took the position that the court where the property is located has exclusive jurisdiction, unless the claimant decides to file the claim at the court of the defendant's domicile, and that the choice of court is entirely the claimant's. The Court therefore concluded that Dubai Courts would also find in favor of DIFC jurisdiction, since that is where the property is located.[132]

[129] Taaleem [DIFC CFI 2010], para 18.
[130] Taaleem [DIFC CFI 2010], para 17; Taaleem [DIFC CA 2011], para 35.
[131] Taaleem [DIFC CFI 2010], para 25.
[132] Taaleem [DIFC CFI 2010], para 26-30.

D Appeal of Taaleem

NBC appealed the decision of the CFI, on the basis that the DIFC lacked jurisdiction since the Murabaha contract elects the mainland Dubai Courts.[133] A three-judge panel composed of Justice Colman, Justice Williams and Justice Al Muhairi reviewed the judgment of Justice Chadwick, and issued their judgment in May 2011.

D.1 Principles of contract interpretation

The CA began its analysis by emphasizing the applicable principles of contract interpretation for choice of forum clauses, which involves "ascertaining (i) what the parties mutually intended when at the time when they entered into the agreement they used words identifying their chosen Court".[134] The CA highlighted that "[i]n repect of (i) the test to be applied is the ordinary and natural meaning of the words of the jurisdiction agreement as they would have been mutually understood by the parties when they entered into that agreement. That mutual understanding is to be ascertained from all the circumstances in which the agreement was entered into, its nature and the context in which the words were used".[135]

D.2 CA's discussion of Hardt and subsequent judgments

With regards to Hardt, the CA emphasized that "the Court derived its construction of the words used from a number of material surrounding circumstances".[136] These material surrounding circumstances can be summarized as: (1) the identical choice of forum clauses in the 37 contracts involving the sale of properties at 4 locations, only one of which is within the DIFC must be interpreted uniformly; (2) since the elected law was non-DIFC, it was improbable that the elected court would be DIFC; (3) since the contracts had been entered into outside the DIFC with non-DIFC companies, it was improbable that the parties would have selected DIFC Law or the DIFC Courts; (4) no DIFC Land law existed at the time the contracts were entered into.[137] As a result of these circumstances in Hardt, the natural meaning of "the Courts of Dubai" was the non-DIFC Courts of Dubai in that case.[138]

The appellant argued in favor of a uniform construction based on Hardt, based on the need for certainty in commercial contracts and pointed out that there would be great commercial confusion if in jurisdiction clauses the same words had different meanings in different contracts.[139]

In response, the CA took the following position:

> "*It is right to emphasise that references in Hardt to the words in question, in*

[133] Taaleem [DIFC CA 2011], para 1.
[134] Taaleem [DIFC CA 2011], para 29.
[135] Taaleem [DIFC CA 2011], para 29.
[136] Taaleem [DIFC CA 2011], para 33.
[137] Taaleem [DIFC CA 2011], para 33.
[138] Taaleem [DIFC CA 2011], para 33.
[139] Taaleem [DIFC CA 2011], para 36.

> *their natural meaning, referring to the non-DIFC Courts of Dubai are to that meaning within the range of possible natural meanings which in the particular circumstances of that case the words must be taken to have. But those particular circumstances are not present in this case. This Court, therefore, has to arrive at that particular meaning of those words within the range of their natural and ordinary meaning which, having regard to all the material circumstances in this case, most closely reflects the mutual intention of the parties*"[140] (emphasis added).

The CA makes a series of assumptions as part of its reasoning. The starting point of the CA's analysis is to link the parties' choice of law with their choice of court.[141] The CA then takes the position since Justice Chadwick's construction of "courts of Dubai" was not based on the material circumstances of the case, it was not correct. It found:

> "*For these reasons, the approach to construction adopted by the Judge in this case should not be applied. Rather, it is necessary in order to ascertain whether the parties agreed to confer jurisdiction on the non-DIFC Courts to construe the law and jurisdiction clause by reference to all the circumstances material to ascertaining the mutual intention of the parties at the time when they entered into the Murabaha Agreement including, in particular, the contractual setting of that contract within the transaction relating to the Sky Gardens Development, comprising in particular the Tripartite Agreement Novation*"[142] (emphasis added).

The Court gave significant weight to Clause 14.2 of the Murabaha contract, which stipulated that the buyer waives any objection to the forum elected in the contract and "agrees not to claim that any such court is not a convenient or an appropriate forum".[143] The Court came to the following conclusion:

> "*It [Clause 14.2] is clearly intended to prevent Taaleem from arguing in the relevant Dubai Court that "such court is not a convenient or appropriate forum". However, that argument would not be anticipated in the non-DIFC Courts. That is because the forum non conveniens principle has no application in that Court. It must, therefore, be aimed at a situation where NBC has started proceedings in*

[140] Taaleem [DIFC CA 2011], para 37.

[141] Taaleem [DIFC CA 2011], para 39: "*It can, therefore, be inferred with reasonable confidence that where at the moment of contracting the parties select the Laws of Dubai as the governing law they intend to select either Civil Law Dubai Law, as applied in the non-DIFC Courts, or Common Law Dubai Law, as applied in the DIFC Courts. [...] The assumption that in a clause such as this the parties could have mutually intended to disassociate the body of law governing the contract from the court upon which they conferred jurisdiction is, in our view, although theoretically possible, distinctly implausible. Their selection of one body of law can thus be assumed to reflect their agreement to confer jurisdiction on the Courts of that one place where that body of law will be applied*".

[142] Taaleem [DIFC CA 2011], para 40.

[143] Taaleem [DIFC CA 2011], para 42.

> *the DIFC Courts and Taaleem has invited that Court to exercise its discretion against exercising jurisdiction. This pre-supposes that it was the mutual perception that it was the jurisdiction of the DIFC Courts which might need protection, not that of the non-DIFC Dubai Court. That is certainly a pointer against the intended meaning of the jurisdiction clause being to select the non-DIFC Dubai Court*" (emphasis added).

Next, the Court highlighted that since the Tripartite Agreement was the crux of the commercial relationship between the parties – where the Murabaha contract was contracted in support of the Tripartite Agreement –, and that under the Tripartite Agreement, the property interests would be held in a trust, therefore, the choice-of-law clause can only refer to DIFC law.[144] In support of this position, the Court notably highlighted:

> "*Given that the property underlying the Tripartite Agreement was located in the DIFC and that the function of that Agreement was to regulate the relationship between the beneficiaries under the trust, a legal institution unknown to the Civil Law administered in the non-DIFC Courts of Dubai but fully applicable under the law administered in the DIFC Courts, it is to be inferred that the reference to the laws of Dubai in clause 14 was intended to refer to DIFC law rather than non-DIFC law. Intelligent commercial parties advised by an English solicitor would not have entered into an agreement in respect of the regulation of interests under a trust and incorporated into it a governing law provision which made it subject to a body of law to which the concept of a trust was unknown*".[145]

From that point, the CA inferred that since the object of the novation agreement was to substitute a party to the Tripartite Agreement, then that agreement would also be governed under DIFC Law.[146]

Having found that the choice-of-law clause in two of the three contracts at hand elect DIFC law, the Court concludes that the choice-of-law clause in the Murabaha must also be interpreted as electing DIFC law. The Court reasoned:

> "*Against this transactional background it is, in our judgment, highly improbable that the parties to the Murabaha Agreement would have mutually intended that it should be governed by non-DIFC Dubai law. After all, NBC had previously been directly involved in a central role in facilitating the creation of the Tripartite Agreement and the novation to both of which Taaleem was a party. It is thus to be inferred that when it came to negotiation of the Murabaha Agreement the mutual intention was that the reference in clause 13 to the "laws of Dubai" as*

[144]Taaleem [DIFC CA 2011], para 47: "It is, therefore, to be concluded that the reference to the "Laws of Dubai" in clause 14 of the Tripartite Agreement was a reference to the law of the DIFC and not to the laws of non-DIFC Dubai".

[145]Taaleem [DIFC CA 2011], para 46.

[146]Taaleem [DIFC CA 2011], para 48.

> *the governing law should be to the same body of laws as governed the other contracts within the transaction relating to Taaleem and the Property*"[147] (emphasis added).

The appellant argued that the court elected is the one "*more likely to have jurisdiction over typical disputes under the [Murabaha] agreement*",[148] meaning the Dubai Courts. The Court did not find this argument convincing, finding:

> "*Although the probability of a mutual intention to match the chosen forum of determination of disputes to the proper law of the contract, namely the Murabaha Agreement, is a strong pointer towards the selection of the DIFC Courts, there is an additional factor which could carry considerable weight in construing the jurisdiction clause. It is this. If disputes in respect of the contract incorporating the jurisdiction clause could be said to be substantially unlikely to fall within the jurisdiction of the DIFC Courts and substantially more likely to fall within that of the non-DIFC Courts, this would point strongly towards the conclusion that it was the mutual intention to select the non-DIFC Courts as the clause 14.1 forum*".[149]

The Court took the position that since the three agreements were part of package – the Tripartite Agreement being the main contract that led to the other two – then "the perspective of Taaleem and NBC when they entered into the Murabaha Agreement can be inferred to have been that any such disputed claims by NBC would be likely to arise from or be related to a transaction that had been concluded at least in part within the DIFC".[150] This led the Court to conclude that:

> "*Therefore, taking all these matters into account, we conclude that there is a very strong inference that when the parties referred in clause 14.1 of the Murabaha Agreement to "the courts of Dubai" they intended to refer to the DIFC Courts and not the non-DIFC Dubai Courts and we conclude that the clause should be construed accordingly*"[151] (emphasis added).

The Taaleem CA, like the first instance, made a point of highlighting the Hardt decision was correct, smoothing away potential difficulties from a construction using "ordinary and natural meaning". The presence of Justice Colman, who issued the Hardt judgment, on the Taaleem CA bench is significant to reinforcing the Hardt's validity.

The above judgments document an important turning point in the history of the DIFC Courts, one where the courts played an active role in defining their identity as a fraternal

[147] Taaleem [DIFC CA 2011], para 49.
[148] Taaleem [DIFC CA 2011], para 51.
[149] Taaleem [DIFC CA 2011], para 52.
[150] Taaleem [DIFC CA 2011], para 58.
[151] Taaleem [DIFC CA 2011], para 60.

court within the family of courts in Dubai. This expansive construction of a choice of court clause with similar wording was recently confirmed by the DIFC Courts,[152] referring to the suite of judgments discussed above.

2.5 Concluding remarks and transition

This paper showed that the DIFC Court's jurisdictional expansion began before the 2011 legislation. The next paper in the series will examine the relationship between the two court systems in Dubai (mainland Arabic civil courts on the one hand, and freezone common law courts on the other hand) after 2011, where the DIFC Courts – emboldened by the endorsement of the legislator – espouse the "conduit jurisdiction" doctrine.

The conduit jurisdiction is a further jurisdictional expansion under which the DIFC Courts recognize and enforce arbitral awards – both domestic and foreign – in the absence of any connection or nexus between the parties, their assets or the dispute and the DIFC. The conduit jurisdiction of the DIFC Courts was welcomed by the international community on the basis of their perception that Dubai Courts are hostile to international arbitration, for which there is empirical evidence to the contrary.[153]

The next chapter uses the DIFC conduit jurisdiction as one of two case studies of the risks of agency slack resulting from the implementation of foreign legal institutions into the local legal system.

[152] Ashok Kumar Goel (2) Sudhir Goyel (3) Manan Goel (4) Prerit Goel v Credit Suisse (Switzerland) Limited, DIFC CA 002/2021, 26 April 2021.

[153] Seif and Aranki [2020].

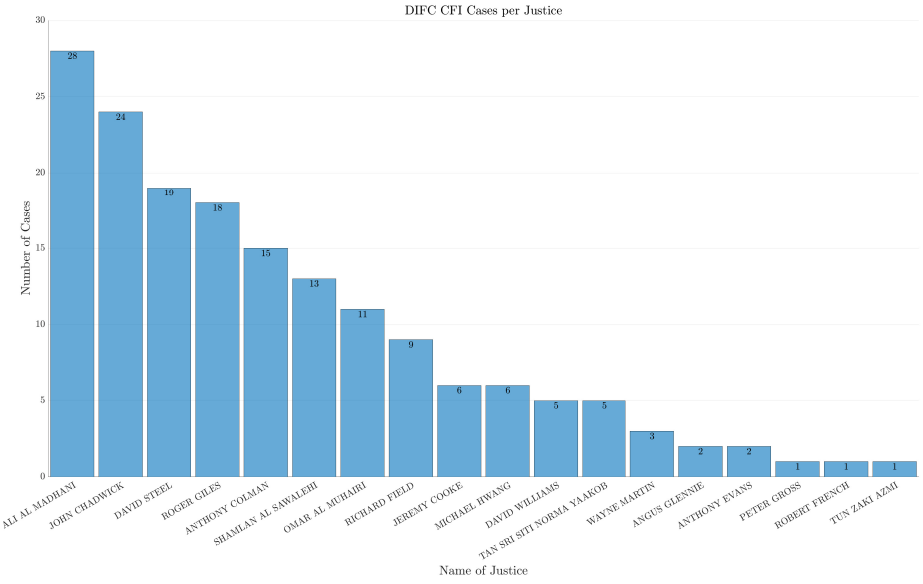


Figure 2.2: Distribution of Cases Per Justice. Court of First Instance ("CFI").

Name of Justice	**Position and Tenure**	**Nationality**
Ali Shamis Al Madhani	Justice CFI/CA (2008 – present)	UAE
Omar Juma Al Muhairi	Justice CFI/CA (2008 – 2018) Deputy Chief Justice (2008 – present) Director (2021 – present)	UAE
Shamlan Al Sawalehi	Justice CFI/CA (2014 – present)	UAE
Tun Zaki Azmi	Justice CFI/CA (2013–present) Chief Justice (2018 – present)	Malaysia
Maha Al Mheiri	Justice CFI (2021 – present)	UAE
Nassir Al Nasser	Justice CFI (2021 – present)	UAE
Wayne Martin	Justice CFI (2021 – present)	Australia
Robert French	Justice CFI (2021 – present)	Australia
Angus Glennie	Justice CA (2021 – present)	UK
Peter Gross	Justice CA (2021 – present)	UK
Jeremy Cooke	Justice CFI/CA (2016 – present)	UK
Richard Alan Field	Justice CFI/CA (2015 – present)	UK
Roger David Giles	Justice CFI/CA (2014 – present)	Australia
Judith Prakash	Justice CFI/CA (2017 – 2020)	Singapore
Michael Hwang	Deputy Chief Justice (2005 – 2010) Chief Justice (2010 – 2018)	Singapore
David Steel	Justice CFI/CA (2011 – 2016) Deputy Chief Justice (2016 – 2018)	UK
John Chadwick	Justice CFI/CA (2008 – 2016) Deputy Chief Justice (2013 – 2016)	UK
Anthony Colman	Justice CFI/CA (2008 – 2013) Deputy Chief Justice (2010 – 2013)	UK
Tan Sri Dato Seri Siti Norma Yakoob	Justice CFI/CA (2008 – 2013)	Malaysia
David Williams	Justice CFI/CA (2007 – 2013)	New Zealand
Anthony Evans	Chief Justice (2007 – 2010)	UK

Table 2.1: List of Justices of the Dubai International Financial Centre ("DIFC") Courts. Court of First Instance ("CFI") and Court of Appeal ("CA").

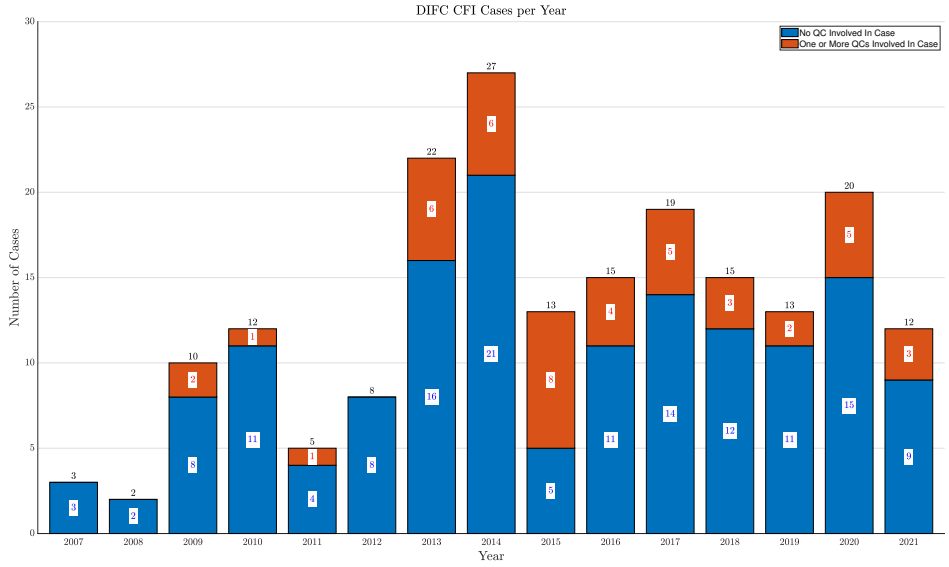


Figure 2.3: Distribution of Cases Per Year Stratified by The Involvement of Queen's Counsels ("QCs"). Court of First Instance ("CFI").

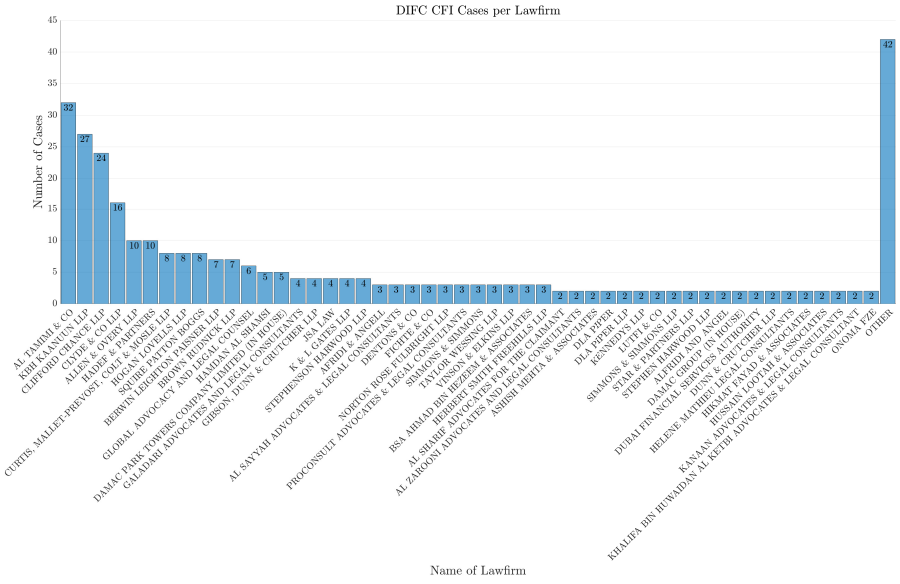


Figure 2.4: Distribution of Cases Per Law Firm. Court of First Instance ("CFI").

ABDELRAHMAN ALMAAZMI ADVOCATES AND LEGAL CONSULTANTS
ADDLESHAW GODDARD
ADEL MOHAMED AL QASEMI ADVOCATES & LEGAL CONSULTANTS
AL BAWARDI ADVOCATES & LEGAL CONSULTANTS
AL KABBAN & ASSOCIATES
AL NASSAR ADVOCATES & LEGAL CONSULTANTS
AL SAFAR AND PARTNERS
AMAL ADVOCATES & LEGAL CONSULTANTS
ARASH KOOZEHKANANI
AZHARI LEGAL CONSULTANCY
BAITULHIKMA LAW FIRM
BAKER BOTTS LLP
BIN SHABIB & ASSOCIATES
DAVIDSON & CO LEGAL CONSULTANTS
DEWEY & LEBOEUF
DIAZ REUS AND TARG LLP
DWF
EMIRATES LEGAL FZE
GATELEY LLP
HENNAOUI & SAKR
HOLMAN FENWICK WILLAN LLP
HORIZONS & CO
INCE & CO LLP
JONES DAY
JSA LAW/EVERSHEDS
KARBAL & CO LEGAL CONSULTANTS
KHALID DAUDPOTA & CO.
KING & SPALDING LLP
KING & WOOD MALLESONS
KOCHHAR & CO. LEGAL CONSULTANTS
KWM LLP
LATHAM & WATKINS LLP
LAWRENCE GRAHAM
LPA LLC
MAYER BROWN INTERNATIONAL LLP
MILLENIUM FINANCE CORPORATION (IN HOUSE)
PAHWA & CO
SOL INTERNATIONAL LTD
TAYLOR WESSING
UNITED ADVOCATES
WILBERFORCE CHAMBERS
XXIV OLD BUILDINGS

Table 2.2: Other Lawfirms (Each With a Single Case in Court of First Instance ("CFI")), in Alphabetical Order.

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Chapter 3

Competition, Backlash and Coordination: The Reception of Foreign Legal Institutions in Dubai

3.1 Introduction

This chapter explores the reception of foreign legal institutions in Dubai, through an account of their competition with local institutions. Using agency theory and two case studies – the first on the Dubai International Financial Centre ("DIFC") arbitration centre and the second on the conduit jurisdiction of the DIFC Courts – the chapter maps out expansion efforts by foreign institutions, which put them in direct competition with local institutions, leading to backlash and a constriction of their powers (see Figure 3.1). It also demonstrates that local officials who invite foreign actors into their jurisdiction are sometimes willing to modify and expand the limits of the original balance of power if it is to their advantage, offering another illustration of the dynamic nature of legal systems. Finally, the chapter digs deep into the interaction between the two legal systems in Dubai – the civil law mainland courts and the common law freezone courts – to investigate any cross-fertilization between them in the form of citation of each other's judgments.

The DIFC Arbitration Centre and the DIFC Courts present a similar foreignness. While both were created by invitation of the receiving state who fund them, they retained – by design – a foreign quality that sufficiently dissociates them from the state, thereby enhancing their appearance of legitimacy and independence.

As demonstrated by the experience of DIFC institutions, foreignness and independence can be a double-edged sword. On the one hand, these characteristics neutralize the risk of interference. On the other hand, the risk of agency slack is relatively higher, compared to that under local institutions. This is the result of the very characteristics that make the court independent from the state: a foreign, more independent actor has less to lose in the event of a fallout than a local counter-party. The state has limited power to yield over the foreign actor, other than terminating their mandate. Also, the foreign actor is not at a risk of loss of reputation, with the potentially negative impact on career progression that accompany it: there is always the option to simply returning "home". Terminating judicial mandates is significantly more damaging to the state than the foreign actor: it could undo all progress made, and potentially land the state in a worse position than it was previously.

The previous chapter showed that starting from 2010, the DIFC Courts highlighted their belonging to the family of Dubai Courts, which resulted in an expansion of their jurisdiction. The jurisdictional spread mapped out in the previous chapter – the outcome of the Courts' zealous self-identification as a Court of Dubai – continued in the years following the legislative extension.

This chapter constructs a contextualized narrative of the DIFC Courts' expansive jurisprudence following the 2011 legislative widening of its jurisdiction to argue that the surrounding context contributed to further DIFC Courts spread (in the form of conduit jurisdiction). While not a court, the DIFC-London Court of International Arbitration ("LCIA") Centre gives rise to similar concerns regarding the risks of agency slack.

The structure of this paper is as follows. After a brief overview of the salient literature (3.2), the paper focuses on the DIFC Arbitration Institution (3.3), and the DIFC Courts (3.4) as case studies illustrating the expansion of foreign legal institutions competing with

local institutions, and the potential backlash that may ensue. Then, using data from approximately a quarter million Dubai Courts judgments issued between January 2010 and July 2021, together with the some two hundred DIFC Court of First Instance ("CFI") judgments published between May 2007 and August 2021, the relationship between the two legal systems within Dubai is empirically explored (3.5). Finally, some concluding remarks are offered (3.6).

3.2 Literature review

The spectrum of analysis of courts and judicial behavior is broad.[154] One of the questions addressed in these is how judges behave and why.[155] Other studies examine court performance: how fast judgments are issued, the rate at which they are overturned and the general satisfaction of litigants with court services.[156] Another line of research focuses on institutional design: not only why states make courts, but also, why states create certain types of courts (such as specialized courts),[157] and how these courts should be designed, based on theories of how judicial independence influences court action[158] and features that make

[154]On one end sits the "black-letter" or classical legal analysis of the application of legal rules to real-world situations. On the other end figures the study of potential motivations behind the decisions made by judges and courts. The latter line of inquiry begins with the 'legal realist' school of thought, postulating that the making and application of legal rules is subjective and motivated by a plethora of factors. Different disciplines emphasize various factors as influential on judicial outcomes: law and economics (rational actor maximizer), gender studies (gender and race), critical theory (power structures), law and psychology (judges' cognitive state), law and sociology (ideology).

[155]These studies situate court behavior as having an influence on the behavior of states that create courts and litigants that use them. *See for example:* Posner [1993] (using appellate federal judges as reference, presents a model for understanding judicial behavior as rational behavior aimed at maximizing the economic incentives of income, leisure and judicial voting); Cooter [1983] (concluding that since private judges need to compete for disputes, their decisions are Pareto-efficient, as opposed to public judges, who are insulated from competition, and that private judges should not decide cases that potentially involve interests of third parties or the public) and Landes and Posner [1979] (discusses the dual role of judges as case-deciders motivated by judicial incentives (which raises the question whether performance-related incentives improve the efficiency of dispute resolution by making the dispute-solver compete for demand for their services) and as law-interpreters (here, judges interpret statutes based on their understanding of the underlying judicial bargain), at p. 1093).

[156]Easterbrook [1982] (argues that criticism of the Supreme Court of the United States is within two broad categories, the first directed at inconsistencies of its decisions with purported principles and the second at its performance as an institution based on division within the court or inconsistencies of decisions with other decisions, and uses Arrows public choice theory to argue that inconsistency between different judgments is inevitable, and criticizing it is futile (p. 831)).

[157]*See* Block et al. [1997] (concluding that "*[w]here business courts have been established they have been highly successful. Any jurisdiction with similar characteristics should carefully consider establishing a business court*" p. 960-961). *See also* Gramckow and Walsh [2013] stating that the paper was "*adapted from advice the authors provided to the Abu Dhabi judiciary in 2012 as part of a fee-based technical assistance contract*" (p. 1), and concluding that "*[...] specialization is not always the answer [...] [t]his creates an incentive for countries that want to do well in the Doing Business ranking to create a special commercial court, even though the need for it may not be justified after considering the case volume and cost involved*" (p. 25).

[158]Posner and Yoo [2005a] (arguing in the international context that, despite conventional wisdom, depen-

them attractive to forum shoppers.[159] In the United States, studies of specialized courts and competition for disputes typically focus on the Delaware Court of Chancery,[160] to analyze the advantages of business courts,[161] and examine how business courts in other states are created and reformed to compete with Delaware.[162]

One of the plethora of reasons why courts are created is their ability to signal a state's commitment to the rule of law, particularly to foreign investors. Conventional wisdom states that by improving the quality of law and courts, states strengthen contract enforcement, thereby attracting more foreign investment. The foreign investment-increasing incentive has

dent tribunals (where members are appointed and removed by state parties) are more effective than independent ones (where judges are appointed for a fixed term). More specifically, they argue that "*[t]ribunals are likely to be ineffective when they neglect the interests of state parties and, instead, make decisions based on moral ideals, the interests of groups or individuals within a state, or the interests of states that are not parties to the dispute*" (p. 7)). In response, Helfer and Slaughter propose a more refined theory under which "*states (1) establish formally independent international tribunals to enhance the credibility of their commitments, and (2) then rely on a range of structural, political, and discursive mechanisms to ensure that independent judges are nevertheless operating within a set of legal and political constraints*". *See also* [Helfer and Slaughter, 2005, p. 4 and 56]. For the response to this article, *see* Posner and Yoo [2005b].

[159]For a comparison of court fees in major global jurisdictions, *see* Centre for Commercial Law Studies [2013] (study commissioned by the UK Ministry of Justice in considering reforms to fee structures in commercial courts. Based on public information, and a total of 8 interviews, only one of which was conducted in Dubai, the study concludes that "*it is substantially less costly to pursue a Business Dispute in England & Wales than in the relevant court in Singapore, Australia or Dubai*". Interestingly, it reports that "*the degree of specialisation in Business Disputes of the Ordinary Courts is not comparable to that of the courts at the Rolls Building. In general, even though the ordinary courts in Dubai offer electronic filing and well equipped hearing rooms with wired and wireless telecommunication capabilities, views canvassed from legal practitioners from this report suggested that the quality of services offered by these courts (including the level of specialist knowledge among judges) is lower than that of the courts at the Rolls Building [...] In contrast to courts in the "ordinary" jurisdiction, this court has a great level of specialisation in business cases not only because it does not hear any other type of cases but also because several of its judges are former judges of the High Court of England & Wales, with others having held similar positions in jurisdictions including Singapore*" (p. 14)).

[160]For a history of the Delaware Court of Chancery, *see* Quillen and Hanrahan [1993].

[161]Tucker [2008]: "*In order to justify the resources dedicated to them, business courts should advance five basic goals of the administration of civil justice: access, timely action, equality, judicial independence, and enhanced public trust*" (p. 479) and "*There are two main purposes for creating business courts: the primary purpose is to serve the administration of civil justice, and the secondary purpose is to attract and retain business within a state*" (p. 482), referring to Kahan and Kamar [2002] on p. 491 as "*A 2002 study estimated that a state's lawyers could collectively increase its income by* $3.3 *million and revenue by* $4.5 *million for every percentage point increase a state gained in being the state of incorporation for public companies*".

[162]*See also* Halen [2015] (comparative study of business courts in Delaware, New York, North Carolina and Nevada, establishing that Nevada's business courts were not as successful as others because its decisions are not published, backlog of cases, lack of specialized expertise of judges in business and no judicial precedent in the absence of a higher business court (p.166-171)). For a comprehensive comparison of business courts in the USA, *see* Bach and Applebaum [2004] (concluding on p. 228: "*Ultimately, a successful business court depends in each instance on the actual judge hearing business court cases. Judges presented daily with a field of law in which to cultivate their understanding, knowledge, and ability are more likely to come to deeper understandings about the inner workings of the legal principles they face; the patterns that may reveal themselves in the conduct of business cases; and the patterns of thinking and behavior that may appear in parties and counsel. The judge without that experience, faced with business disputes, typically may have to rely upon a less developed understanding of these factors in rendering decisions*").

been studied in the context of Arab states described as 'authoritarian'. Filling the gap created by political studies sidelining courts in authoritarian regimes as pawns of the state, a series of case studies illustrate the multiple functions of courts in such regimes.[163] One study highlighted that even in such contexts, a functioning court system is a legitimizing tool of the state, and courts nevertheless are given sufficient independence to resolve disputes, as long as they do not challenge the state's authority.[164] More recent literature focuses on the legitimizing role played by alternative methods of dispute resolution, such as international arbitration.[165] Such legitimization has the benefit of increasing investors' legal certainty, thereby securing greater foreign direct investment for the state, without it having to relax its tight grip of control.

Some studies mix several of the themes discussed above; for example, to examine judicial behavior in the context of judicial competition or cooperation.[166] One recent line of inquiry focused on court reputation, and its influence on the behavior of litigants, states and other courts. In one such study that built in part on Guzman's theory of reputational compliance,[167] Shai Dothan developed a theory explaining judicial behavior when courts seek to maximize their reputation.[168] Using the Israeli Supreme Court and the European Court of Human Rights as case studies, Dothan's theory posits that courts strategize their behavior in judgments based on their perception of the parties' likelihood of compliance, and that courts obtain high reputation based on rates of compliance with their judgments.[169]

[163]Ginsburg and Moustafa [2008] "*Courts are used to (1) establish social control and sideline political opponents, (2) bolster a regime's claim to "legal" legitimacy, (3) strengthen administrative compliance within the state's own bureaucratic machinery and solve coordination problems among competing factions within the regime, (4) facilitate trade and investment, and (5) implement controversial policies so as to allow political distance from core elements of the regime*". For a discussion on the limitations of the autocratic v. democratic dichotomy, and the lag in applying lessons from autocratic legal regimes to contexts where typically democratic states slide into authoritarianism, *see* [Moustafa, 2014, pp. 293–295]. *See also* Linos [2020].

[164]Root and May [2008] (concluding that "*[t]he links between judicial institutions and liberalization are ambiguous at best. Even when the courts enforce property rights, contract, and family law, judicial power may block innovation and competition by selectively promoting the rights of established firms and technologies they control. Underneath the rules and procedures of formal constitutions and codes of conduct, the courts can be used to protect incumbent wealth. Governments may employ courts to improve contract enforcement, loan repayment, and bureaucratic discipline and still not allow citizens the right to assemble, mobilize, and organize for political purposes*" (p. 324).

[165]Massoud [2014].

[166]On court collaboration and competition, *see* Vos [2019] (Chancellor of the High Court of England and Wales. Speech on the occasion of the seminar Innovating International Business Courts: A European Outlook organised by the Erasmus School of law, Rotterdam, the Netherlands, 10 July 2018): "*It is extremely important, I think, that judges in different jurisdictions collaborate and cooperate with each other, and exchange ideas and information about their justice systems. No justice system is superior. We are all trying to offer an excellent service to our domestic and international court users, whether they are businesses or individuals. And collaboration between our judges will assist in this process*".

[167]Guzman [2002].

[168]Dothan [2014].

[169]The parties in Dothan's hypothesis are mainly states and the executive branch. For guidance on the selection of case studies, *see* Linos [2015].

Other studies focus on examining the relationship between judicial behavior and reputation based on the audience and incentives of judges.[170] For example, using case studies of judgments that improved or damaged the reputation of a court, Garoupa and Ginsberg develop a theory of how audiences shape judicial reputation, and employ a comparative approach to make policy recommendations on helpful court reform (which include judicial exchanges and random *de novo* review of lower court judgments).[171]

Beyond the discussion of interactions between courts in general, a growing literature discusses the potential of international commercial courts to act as representatives of the transnational legal order in the post-globalization age.[172] International commercial courts are studied as an alternative forum that combines advantages of domestic litigation and international arbitration,[173] as well as representatives of globalization that are likely to encounter some pushback from local governments.[174]

Other studies use agency theory to explain interactions between states and international organizations, as well as between parties and dispute resolution bodies, such as courts or arbitral bodies.[175] In the former, one notable study challenged the mainstream articulation of principle-agent theory in international law, distinguishing between "agent" and "trustee", where the former is subject to a greater degree of influence from states and subject to removal by them than the latter who has discretionary power, and engages their reputation to convince third parties of its legitimacy.[176]

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[170]Garoupa and Ginsburg [2008].

[171]They make three claims: first, that "reputation matters"; second, that judicial reputation can refer to either the individual judge or the entire court; and third, that information about the judiciary's reputation continuously impacts the institutional design of dispute resolution bodies.

[172]Slaughter [1994, 1998, 1999, 2003]; [Slaughter, 2014, pp. 65–103]. *See also* Helfer and Slaughter [1997] (developing a checklist of 13 characteristics for effective international courts, where effectiveness is based on compliance with judgments).

[173]For a typology of international commercial courts, *see* Bookman [2020] (cautions against the reassertion of state sovereignty through international commercial courts and that these courts could fall into the trap of prioritizing the private interests of repeat players over the public interest). *See also* Shany [2012] (proposing an inter-disciplinary research agenda for the study of international court effectiveness).

[174]For a study on the phenomenon of international commercial court from the perspective of legal hubs, *see* Erie [2019] (comparative "para-ethnographic" study on Hong Kong, Singapore, Dubai, Astana, Shanghai and Shenzhen, based on interviews with U.K. legal specialists, transnational legal elites and representatives of host governments, concluding that to the extent that these legal hubs are representative of globalization, they all encountered some form of push-back from the authorities, representing the recent anti-globalization sentiment).

[175]*See* Sweet and Grisel [2014] (Alec Stonesweet's account of the emergence of arbitration as a system of transnational governance develops three models of arbitral governance: contractual, judicial and constitutional. The contractual model emphasizes the parties' contract as the source of arbitral power, which renders the arbitrator as the agent of both parties (p. 29). In the Judicial model, the arbitrator is the agent of arbitral legal order (here, the arbitrator must execute his function in accordance with the interests of the wider arbitral order) (p. 31), while in the constitutional model, the arbitrator is an agent of the wider legal order (here, the arbitrator must take the overarching international legal order into consideration) (p. 33). *See generally:* Sweet [1999].

[176][Alter, 2008, p. 55]: "*Giving up the idea that states are the hidden puppet-masters of ICs allows us to instead focus on how international politics is being transformed by the existence of an alternative venue of international politics – namely international legal arenas*".

Agency theory provides a useful theoretical framework to assess court behavior. It revolves around two actors: the principal and their agent. The theory posits that the authority that originally resided with the principal is transferred either in part or in whole to the agent. Once the agent receives authority from the principal, the agent is consequently habilitated to make decisions that bind the principal. Vesting authority in the agent involves both benefits and risks to the principal. As a rational actor, the principal would only vest authority in the agent if the potential gains are greater than potential losses. In addition to the authority received from the principal, the agent maintains their original freedom of action to act independently without requiring the principal's permission.

When the incentives of the agent and the principal are in perfect alignment, the agent's freedom of action (and potential deviation from the principal's mandate) is not a cause for concern. Alternatively, when their interests are not entirely in alignment, then the risk of agency slack manifests itself. Agency slack refers to an instance when the agent acts independently of their mandate and against the interests of the principal. To mitigate potential losses resulting from agency slack or poor decisions made by the agent, principals maintain a certain degree of control over agents. The principal's power may be exercised by reducing the authority vested in the agent or eliminating it entirely.

In dispute resolution scenarios, agency theory applies in multiple contexts and has numerous configurations. In each scenario and configuration, the agent's actions are determined by their understanding of their role.

In the context of domestic litigation, the judge is the agent of the state which delegates the judicial function to them. As a result, as agent of the state, the judge must consider the public interest or that of third parties to the dispute in rendering their judgment, and reconcile them with the interest of the parties in having their case resolved. Judges in lower courts face being overturned by higher courts, or non-enforcement by the parties or the executive branch, and balance all these considerations in the exercise of their function.

In contrast, under the contractual theory of arbitration, the arbitrator, as the agent of the parties, may neither consider the public interest nor that of the business community. Even more, if the arbitrator were to take up these interests, they would be acting in ways that are potentially harmful to the interests of her principle. As a result, it is inherently inconsistent for an arbitrator to defend interests that fall outside the scope of the agency relationship.[177]

In the context of foreign judgments or arbitral awards, the enforcement court is a gate-

[177] *See* Sweet and Grisel [2014] (Alec Stonesweet's account of the emergence of arbitration as a system of transnational governance develops three models of arbitral governance: contractual, judicial and constitutional. Each differs based on the role of the arbitrator. The contractual model emphasizes the parties' contract as the source of arbitral power, which renders the arbitrator as the agent of both parties (p. 29). In the Judicial model, the arbitrator is the agent of arbitral legal order (here, the arbitrator must execute his function in accordance with the interests of the wider arbitral order) (p. 31), while in the constitutional model, the arbitrator is an agent of the wider legal order (here, the arbitrator must take the overarching international legal order into consideration) (p. 33). However, as rational actors, arbitrators have a vested interest in not seeing their award annulled. To maintain their interest, arbitrators have an incentive to expand their scope of jurisdiction beyond the limitations of the arbitration award with the objective of ensure (at least some) minimum compatibility with the legal system of the seat.

keeper of the domestic legal system, ensuring that only judgments and awards that are reconcilable with the tenants of its legal system are allowed entry. The review judge does not play a role in elaborating the award, nor can she, for example, modify the foreign judgment or award to reconcile it with her public policy and consequently ensure its enforcement. Gatekeeping is an intrinsic function of the enforcement court making it the guardian of the domestic legal system. The role of domestic legal institutions as guardians of their legal systems is explored throughout the two case studies below.

3.3 The development of the DIFC Arbitration Centre

Established under the tutelage of the LCIA, the DIFC Arbitration Centre was the subject of controversy almost from the outset (3.3.1). The impact of the backlash dulled the Centre's impact, as questions about its jurisdiction and the enforceability of its awards within Dubai – toted as its significant advantage – were posed (3.3.2). Confusion was dispelled with the amendment of the DIFC's founding law in 2014, which led to a 'relaunch' of the Arbitration Centre (3.3.3). The DIFC Arbitration Centre's caseload increased steadily every year, until a Decree issued in September 2011 abolished the DIFC Arbitration Centre, and simultaneously carved out a bigger role for the DIFC Courts to play in international arbitration (3.3.4).

3.3.1 DIFC Arbitration Centre: Origins and backlash

On 17 February 2008, the DIFC governor and the director-general of the LCIA entered into a Joint Venture agreement ("JV") to create the DIFC-LCIA Arbitration Centre.[178] Notably, this was the first arrangement of its kind for the LCIA, although at the time it also had plans for regional branches in India and Barbados.[179] One major benefit of the JV for DIFC arbitration was access to the LCIA's rich, long standing experience as an institution administering arbitrations.

The DIFC-LCIA was in operation starting from 2008 onwards. The relationship between DIFC and LCIA was described by a former Acting Registrar of the DIFC-LCIA[180] as tight-knit with the LCIA selecting staff, ensuring their training and being in contact almost daily to ensure harmony in case-management.[181] The objective of the DIFC-LCIA was described as offering the global services of the LCIA, adapted for the Middle East region, through

[178] El Ghatit [2017].

[179] Global Arbitration Review [19 February 2008].

[180] Also the former Deputy Registrar of the LCIA. *See* Rémy Gerbay's profile at: https://www.hugheshubbard.com/attorneys/remy-gerbay (last accessed on 30 October 2021).

[181] [Gerbay, 2012, p. 3] (Notes prepared for a conference held in London on 19 June 2012): "*Each centre has its own staff, and is now headed by its own Registrar but in each case the staff was selected and trained by the LCIA in London, on LCIA case management procedures, and they remain, at least for the time being, constantly in contact with London for training purposes. In addition, both the Secretariats at LCIA India and DIFC-LCIA work under the authority of the same "LCIA Court", under which the LCIA's own London Secretariat is also placed. Of course, the objective is to combine regional features with the main characteristics of what has made the LCIA successful globally*".

developing "*knowledge of the local industries and their needs, of the local arbitrators, and also of the peculiarities of the local legal systems*".[182]

As a complement to the inauguration of the DIFC-LCIA Arbitration Centre, in August 2008, the DIFC announced a new arbitration law, based on the UNCITRAL Model Law that would be applicable to arbitrations seated in the DIFC.[183] The major modification in the new DIFC Arbitration Law was the cancellation of a provision stipulating that the law applies to the arbitration of "disputes arising out of or in connection with the DIFC and to which at least one party is an Arbitration Party".[184] Under the new law, parties may select the DIFC as a seat of arbitration, even in the absence of any connection with the DIFC.[185]

This extension of the DIFC's arbitration jurisdiction beyond the DIFC's territory was a source of public controversy, and was the object of public criticism from a leading Emerati lawyer known as the architect of the DIFC's legal framework, Dr. Habib Al Mulla.[186] Dr. Al Mulla emphasized that while an arbitration centre had always been part of the plan for the DIFC – along with the DIFC Courts[187] – the DIFC constitutes a bounded geographical zone, where only the limited number of activities defined in its founding legislation may be exercised. In consideration of the particularly limited nature of DIFC activities, the DIFC was exempted from federal civil and commercial laws. He cautioned:

> "*This arrangement [the DIFC's exemption from federal commercial and civil laws] was not easy to reach and it took a year and a half and the involvement of various federal authorities before the concept was developed and agreed to. It merited an amendment to the constitution of the federation, a step which is not taken lightly. Any deviation from this carefully shaped balance between federal and local interests may result in far-reaching legal complications*".[188]

Ultimately, the main concern raised was that the extension of jurisdiction of the DIFC

[182]Gerbay [2012] The author notably contrasts the DIFC-LCIA as being more global than the LCIA branch in India, which they attribute to the attitude of the local legal community towards arbitration, with "local pressures to resist the "global" is felt more acutely in India than in Dubai" (p. 3).

[183]The DIFC Arbitration Law of 2008 (DIFC Law No. 1 of 2008) abrogated the DIFC Arbitration Law of 2004 (DIFC Law No. 8 of 2004).

[184]Article 7(3) DIFC Law No. 8 of 2004.

[185]Global Arbitration Review [19 February 2008].

[186]Profile of Dr. Habib Al Mulla on Baker and McKenzie Habib Al Mulla website: "*He created the concept of financial free zones in the UAE and was the architect of the legal framework establishing the Dubai International Financial Centre (DIFC), the first financial free zone in the UAE*" (available at: https://www.bakermckenzie.com/en/people/a/al-mulla-habib, last accessed on 27 October 2021).

[187]The DIFC Courts had only become operational in 2008 (despite being officially established in 2004), *see* The National [8 October 2008]: "The Dubai International Financial Centre ("DIFC") now has a fully operational court system following the appointment of Mark Beer as the registrar of the DIFC Courts and Amna Al Owais as deputy registrar". *See also* Gulf News [21 November 2008]: "*Evans said as a working rule, the DIFC Courts' powers are limited to matters related to Dubai's financial centre, but he admitted that the precise limits of jurisdiction are obviously going to be open to argument. 'In general terms, one can say the jurisdiction is limited to DIFC-related matters. But we have acknowledged that there is room for argument as to where precisely the limit lies, should borderline disputes arise,' said Evans during the seminar*".

[188]Global Arbitration Review [20 November 2008], contribution by Dr. Habib Al Mulla.

arbitral body was a violation of federal law, and as a result, any arbitral awards involving parties under this wider jurisdiction would surely face serious enforcement issues in local Emerati courts.[189]

Alec Emmerson, then a partner with British firm Clyde & Co – who had reviewed the draft of the new DIFC Arbitration Law – described it as "*a big deal*".[190] Interestingly, he was noted to have contrasted the Court jurisdiction with that of the arbitral centre, highlighting that "*[a]lthough the DIFC court was previously open to cases affiliated only with companies registered with the DIFC, the new arbitration law creates a venue open to parties regardless of their status with the DIFC and will allow them to resolve disputes with private judges under a system that mirrors the English courts*".[191]

A few days after the publication of Dr. Al Mulla's criticism, Essam Al Tamimi – a prominent Emirati lawyer and founder of the largest Arab law firm, who was notably involved in drafting the new DIFC Arbitration Law[192] – took a contrasting view. Arguing that concerns about enforcement lacked merit, he highlighted that "*[a]fter all, the DIFC Court was established by the Ruler of Dubai, and is considered a court of Dubai*" and under Article 7(2) and (3) JAL, Dubai Courts must enforce judgments of the DIFC Courts that are final and "appropriate for enforcement" without a review of merits.[193]

Al Tamimi emphasized that the DIFC is licensed to establish regulated financial services and non-regulated services, and that non-regulated, ancillary DIFC entities "once licensed, can offer their services and engage with businesses outside DIFC territory (subject to any limitations provided by the DIFC)".[194] Notably, Al Tamimi highlighted that "*there is nothing wrong with a restaurant in the DIFC delivering a pizza to Sharjah or for DIFC Caribou to deliver a coffee to Shaikh Zayed road. This does not contravene UAE Federal Law or the DIFC Law*".[195] In his view, while establishing the DIFC Arbitration Centre within Dubai would be a violation, the provision of services to entities outside the DIFC territory – while remaining strictly within the DIFC territory when providing these arbitration services – is

[189]Gulf News [20 November 2008], contribution by Dr. Habib Al Mulla: "*The fact that the new arbitration centre is offering its services to non DIFC entities and is covering activities that are not financial and ancillary services as defined in the Federal Law no 8, such as constructions cases, is a serious deviation of the federal laws establishing financial free zones. Awards issued in such violation will certainly face enforcement challenges when enforcement is sought outside the DIFC*".

[190]The National [31 August 2008].

[191]The National [31 August 2008]: "*The law is intended to widen the array of disputes that the DIFC court can handle, as well as to take advantage of Dubai's position as a bridge between the West and Asia, he said*".

[192]Profile of Essam Al Tamimi on his law firm's website, available at: https://www.tamimi.com/find-a-lawyer/essam-al-tamimi/ (last accessed on 27 October 2021).

[193]Article 7 JAL, before the 2011 amendment: "*(2) Should the subject of execution fall outside the Centre, judgements, awards and orders issued by the Courts and Arbitral Awards ratified by the Courts shall be enforced by an executive judge at Dubai Courts, subject to the following: (a) The judgement, award or order is final and is appropriate for enforcement; and (b) The judgment, award or order has been translated into Arabic. (3) The executive judge at Dubai Courts has no jurisdiction to review the merits of a judgement, award or order of the Courts*" (emphasis added).

[194]Gulf News [30 November 2008].

[195]Gulf News [30 November 2008].

not.[196]

Members of the international bar practicing in the UAE were quick to pick a side in the debate, with one noting that while there is uncertainty as to the conditions for enforcement of a DIFC award with no nexus to the DIFC, the hope was that all doubts would soon be resolved with some guidance from stakeholders.[197] Another suggested that parties were so eager for an institution with better rules and greater independence that they would disregard doubts surrounding enforcement and ultimately prefer the DIFC Arbitration Centre.[198] As for the DIFC Courts, they were quick to make assurances, with the Chief Justice stating that "nobody should have concerns about the enforcement of DIFC awards".[199]

In response, Dr. Al Mulla expressed concern about the misleading nature of the claims of easy enforcement, and that any friction with Dubai Courts over enforcement would reflect negatively on Dubai.[200] Dr. Al Mulla further articulated his views some months later, questioning how referring Dubai's arbitrations to London would ultimately add value to Dubai, and cautioning that such referral conveys a negative message regarding Dubai's capabilities in managing an international arbitration centre.[201] He concluded that by outsourcing arbitration work to a foreign jurisdiction, the JV essentially stunts the development of local arbitration culture.[202]

The "public row" between Dubai's arbitral institutions was recounted in Global Arbitration Review on 1 February 2009, reporting that Dubai's flagship arbitration institution, the Dubai International Arbitration Centre ("DIAC"), was "*accusing its younger neighbour, the DIFC-LCIA, of false advertising, and damaging the Emirate's long-term prospects as an international arbitration host*"[203] and reporting that "*it didn't help, observers say, that the*

[196]Gulf News [30 November 2008].

[197]Global Arbitration Review [1 February 2009].

[198]Global Arbitration Review [1 February 2009].

[199]Global Arbitration Review [1 February 2009]. *See also* [Krishnan and Purohit, 2015a, p. 25], reporting an interview of the author with the DIFC Courts Registrar Mark Beer on 8 June 2014: "*First, Beer flatly rejects the point that DIFC court judgments are difficult to enforce in Dubai, the greater UAE, or abroad. There is simply 'no problem,' Beer stated, and the concerns that lawyers have are either exaggerated or unfounded*".

[200]Global Arbitration Review [1 February 2009]: "*Al Mulla himself says he has no regrets about broaching the subject. Interviewed by Global Arbitration Review this week, he says he still thinks that the DIFC-LCIA's claim that enforcement is straightforward is 'misleading', and that negative outcomes could 'damage arbitration practice in Dubai'*".

[201]Global Arbitration Review [8 March 2009]: "*One also fails to understand the benefit for the parties to the transaction in dispute. If the parties to a contract wanted their dispute to be resolved under the auspices of the LCIA then they would have stipulated so in their contract. The parties certainly do not need to have the LCIA administrating their dispute through a Dubai 'agent' with all the additional expenses and time that this would incur*".

[202]Global Arbitration Review [8 March 2009]: "*Furthermore, this joint venture misses another important point. Having an arbitration centre is not merely a means of deriving income or merely resolving disputes. One of the advantages of having an arbitration centre in a particular city is to promote a viable arbitration culture and industry and to build local expertise and capabilities. Building local capabilities and expertise can only be achieved by having a fully operating and functional centre within the country and not by passing work off to other jurisdictions*".

[203]Global Arbitration Review [1 February 2009].

DIFC-LCIA marketing team moved more swiftly to exploit the opportunity provided by the IBA Arbitration Day. It announced events either side of the IBA event, leaving DIAC with only a two-hour window to occupy".[204]

The controversy had drawn a question mark over the DIFC Arbitration Centre's habilitation to administer disputes involving parties established beyond the DIFC borders, one that remained unanswered until a test case some years later.

3.3.2 After the backlash

As the debate between enforcement skeptics and believers died down, the impact of the public controversy on the attractiveness of the DIFC Arbitration Centre was unclear in the immediate aftermath, and for some time afterwards until a test case brought some practical clarity to the speculation. However, in contrast to its previous efforts, the DIFC Arbitration Centre appeared to take a less aggressive stance in its self-promotion activities, other than sporadic updates reporting on recent cases of general interest.

The enforcement of DIFC-LCIA arbitrations was eventually put to the test in two important cases. Both involved arbitrations under the DIFC-LCIA Rules, seated in London. The award creditors sought enforcement in Dubai. Based on the public record, the initial outcome in each case appears different. The first case *Property Concepts*[205] is described by the DIFC Courts registrar as being the first award issued under the DIFC-LCIA Rules to be recognized by the DIFC Courts.[206] Numerous articles have also cited the case as an example of an enforced DIFC-LCIA award, despite the DIFC Order seemingly having never been made public.[207]

The *Property Concepts* award underwent an interesting route: it was first ratified by the DIFC Courts,[208] then a joint committee composed of judges from both Courts approved the execution of the award.[209] Nonetheless, it is unclear when an actionable enforcement order was issued from the Dubai Courts: Although it would not be expected for the public registry of Dubai Courts judgments to contain a record since execution judgments are not

[204]Global Arbitration Review [1 February 2009].

[205]Property Concepts FZE v Lootah Network Real Estate & Commercial Brokerage, ARB 001/2010, 19 October 2010 (cited in DIFC Courts [25 April 2012]).

[206]Global Arbitration Review [10 December 2010]. *See* Al Tamimi and Al Houti (Al Tamimi & Co.) [November 2018]: "*So far, there have not been any reports of a DIFC-LCIA award being refused enforcement. DIFC-LCIA awards have been enforced in the UAE, two examples being Macsteel International FZE v. Airmec Dubai LLC and Property Concepts FZE v. Lootah Network Real Estate & Commercial Brokerage, both London seated DIFC-LCIA awards recognised by the Dubai Courts*".

[207]*See for example:* Lawry-White [13 January 2012]; Al Tamimi and Al Houti (Al Tamimi & Co.) [November 2018].

[208]Global Arbitration Review [26 April 2011].

[209]Global Arbitration Review [26 April 2011] (reporting that the joint committee was composed of the two Emirati DIFC Courts justices (Al Madhani and Al Muhairi), as well as the head of the Dubai Court of First Instance (Jassem Baqer), the head of the Dubai Commercial Court (Judge Omar Atiq Al Marri) and Yusif Al Suwaidi (director of strategy and corporate performance at Dubai Courts). Note that although the article title appears to state that the Dubai Courts approved the execution of the DIFC-ratified award, it was approved by a joint committee of judges, and not by an execution judge directly).

published, it would be expected that the award-debtor would contest the execution, leading to a dispute at the first instance court. It was suggested to a DIFC Courts scholar that the *Property Concepts* award faced issues related to difficulties tracing the assets of the award debtor.[210] To date, the outcome of *Property Concepts* remains unclear.

Although whether and when the *Property Concepts* award was enforced by Dubai Courts is uncertain, the public record of Dubai Courts cases clearly indicates that the award issued in the DIFC-LCIA arbitration (with a London seat) between Macsteel International FZE and Airmech Dubai LLC was enforced in Dubai Courts at the first instance on 12 January 2011,[211] and confirmed on appeal[212] and cassation.[213] The background of *Macsteel* is a dispute over a contract for the purchase of steel between two Dubai-based companies. The contract dispute clause provided for arbitration under the DIFC-LCIA Rules and the DIFC Arbitration Law, seated in London. Neither party had a connection to the DIFC. Notably, Airmech (the party resisting enforcement in Dubai) did not argue that the arbitration clause was invalid due to the lack of nexus with the DIFC.[214]

The enforcement of the *Macsteel* award was celebrated as the first reported case where the Dubai Courts had applied the New York Convention ("NYC") (which the UAE had acceded in 2006),[215] although one commentator made the point that the road to enforcement would be more straightforward going through the DIFC-Courts.[216] In enforcing the arbitral award in mainland Dubai, the Dubai Courts tacitly approved that Dubai-based parties, with no connection to the DIFC, may opt for the application of the DIFC Arbitration Law, and the DIFC-LCIA Arbitration Rules in their agreement.

Unlike *Property Concepts*, the *Macsteel* award was submitted directly to the Dubai Courts for enforcement, without ratification from the DIFC Courts. It is not clear whether the DIFC Courts' ratification of *Property Concepts* was based on nexus with or assets within the DIFC,

[210] *See* the pre-publication copy of the seminal socio-legal study on the DIFC: [Krishnan and Purohit, 2015b, p. 26]: "*Shortly before this paper entered into copy-editing review, the authors learned of how even though there may be an order of enforcement issued by the local Dubai courts upon receipt of a DIFC judgment, there nevertheless can be the practical problem of asset-tracing within Dubai, thereby making the physical seizure of assets from a defendant difficult. See e.g., DIFC ARB 001/2010*".

[211] Macsteel International FZE v Airmech Dubai LLC, DXB CFI 268/2010, 12 January 2011.

[212] Airmech Dubai LLC v Macsteel International FZE, DXB CA 126/2011, 22 February 2012.

[213] Airmech Dubai LLC v Macsteel International FZE, DXB CC 132/2012, 18 September 2012.

[214] Airmech's arguments against enforcement by Dubai Courts included that the arbitration clause was invalid because it was not signed by a habilitated person; that the arbitrator applied English law to the substantive dispute instead of DIFC law; that witnesses were not sworn in in accordance with the UAE Civil Procedure Code and on appeal that the award violated UAE public policy in awarding interest.

[215] Global Arbitration Review [28 January 2011]: "*Consultant Alec Emmerson in Dubai explains, 'Many foreign claimants are anxious to see the UAE courts establish a track record for fulfilling its obligations under the Convention, and refusing the sort of technical defences that were notorious before the enactment of the Convention... [We] hope that the latest decision indicates an alignment between judicial thinking and the UAE's international treaty obligations under the New York Convention.' Practitioners have queued up to praise the enforcement*".

[216] Global Arbitration Review [28 January 2011]: "*Herbert Smith partner Craig Tevendale, who regularly appears in cases in Dubai, argues that the award may be considered by some as having 'travelled the hard road of enforcement – as a London arbitration award coming before the Dubai courts.' He says that a DIFC-LCIA award coming before the DIFC courts would have a softer ride*".

or whether it may – despite being under the DIFC-LCIA Rules – constitute an early attempt at conduit enforcement. Irrespectively, as early as October 2010, the idea of using the DIFC Courts as a shortcut for rapid award enforcement in Dubai under the POE was being explored in legal commentary.[217]

3.3.3 The return of the DIFC-LCIA: 'Relaunch' and reinforcement

The questions about the jurisdiction of the DIFC-LCIA to provide services outside the DIFC borders had left their mark. In May 2014, the law which established the DIFC (Dubai Law No. 9 of 2004) was amended to address these issues.[218] In contrast to the original text which made no reference to an arbitration centre within the DIFC, the new law restructured the dispute resolution landscape in the DIFC under a single authority (the DIFC Dispute Resolution Authority ("DRA")), which comprised of the DIFC Courts and the DIFC Arbitration Institute ("DAI").[219] Under the new landscape, the Chief Justice of the DIFC Courts is the head of the DRA.[220] Perhaps most significantly, the law stipulated that "[a]ny contracting party, located inside or outside the Centre, may contract for the services of the Arbitration Institute".[221] The endorsement of the DAI's expanded jurisdiction was described as a "relaunch" of the DIFC-LCIA.[222] In November 2015, the DAI entered into a joint-venture with the LCIA.[223]

At the time of its relaunch, the DIFC-LCIA still boasted the most modern arbitration framework in the Arab world, based on the UNCITRAL Model Law, while the UAE had still yet to adopt the new arbitration act.[224] Interestingly, in later years following the expansion of the DIFC Courts jurisdiction, the narrative shifted to include the unlimited jurisdiction of the Courts as part of the original design.[225] One main advantage of the DIFC-LCIA was the enforcement of foreign arbitral awards, which was a streamlined, efficient process in contrast to the one in Dubai Courts, which was perceived as rife with uncertainty (on the outcome of the enforcement request) and delays (due to enforcement of foreign awards in Dubai being

[217]Global Arbitration Review [28 October 2010]: "*Therefore, one could argue that, by side stepping the notoriously cumbersome process of ratifying an arbitral award before all three levels of the Dubai courts ab initio, the protocol offers a potential shortcut to enforcement by providing parties with immediate access to the DIFC court, regardless of whether the DIFC-LCIA rules apply or not*".

[218]Dubai Law No. 7 of 2014.

[219]Article 8, First (1) of Dubai Law No. 9 of 2004 as amended by Dubai Law No. 7 of 2014.

[220]Article 8, First (5) of Dubai Law No. 9 of 2004 as amended by Dubai Law No. 7 of 2014.

[221]Article 8, Third (7) of Dubai Law No. 9 of 2004 as amended by Dubai Law No. 7 of 2014.

[222]The term "relaunch" has been described as a misnomer, since the arbitration centre had continued to function. *See* [El Ghatit, 2017, p. 29]: "*For some, this marked the relaunch of the DIFC-LCIA. I adopt that labeling, albeit with some reservation. It is important not to forget that the DIFC-LCIA was never moribund. It has continued to administer cases since its establishment in 2008, without interruption*".

[223]DIFC-LCIA website, FAQ, 'How was the DIFC-LCIA Arbitration Centre established and who runs it?'.

[224]Federal Law No. 6 of 2018 ("Federal Arbitration Act").

[225][El Ghatit, 2017, p. 30]: "*The idea was to create a court system (the now well-known DIFC courts), as well as a centre providing alternative dispute resolution services (i.e. arbitration and mediation, together ADR) for local, regional and international businesses, regardless of whether they operated or had dealings in the region. The latter is the role of the DIFC-LCIA Arbitration Centre*" (emphasis added).

under the jurisdiction of the Dubai CFI, subject to appeal and cassation).[226]

After the restructuring of the DRA, DIAC opened a branch office in the DIFC.[227] The reason for this was presented as confirming that DIAC awards may be enforced by the DIFC Courts[228] and increasing awareness that DIAC awards may be seated in the DIFC.[229] This decision was described by one commentator as "*no doubt a promotional exercise to address concerns that the offshore DIFC has gained increasing credibility in recent years as a preferred seat of arbitration over onshore Dubai*".[230]

3.3.4 Sudden death and September coronation

Since its 'relaunch', the DIFC-LCIA institute increased its caseload every year, until the consolidation of Dubai's arbitration centres in September 2021 by decree of the Dubai Ruler.[231] The decree abolishes the DIFC Arbitration Centre and the Emirates Maritime Arbitration Centre,[232] and stipulates that their assets, properties, receivables, lists of arbitrators and experts are transferred to DIAC.[233]

The Decree makes arrangements for the transition from the former landscape into the consolidated one under the flagship of a local Dubai institution. To that end, it stipulates that arbitration agreements under the abolished centers remain valid and enforceable with DIAC stepping into the role of the abolished centres, with tacit approval from the parties.[234]

The Decree provides some much-needed clarity on the curial court, making jurisdiction a function of the arbitral seats – or the lack thereof. Under the new regime, if the arbitration agreement provides for arbitration in Dubai, then the Dubai Courts have jurisdiction over disputes relating to the arbitration, whereas if the arbitration agreement provides for arbitration in the DIFC, then the DIFC Courts have jurisdiction. Significantly, if the parties fail to specify a seat within Dubai, then the DIFC is the default seat. This default jurisdiction crowns the DIFC Courts as the specialized courts for arbitration in Dubai.

Therefore, while the Decree abolished one foreign legal institution (the DIFC-LCIA), it also reinforced the powers of another (the DIFC Courts as the default courts for arbitration).

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[226] [El Ghatit, 2017, pp. 31–33].

[227] Global Arbitration Review [27 September 2016].

[228] Global Arbitration Review [27 September 2016]: "*According to Al Mulla, the agreement is significant because it confirms the DIFC courts' jurisdiction over DIAC enforcement proceedings and its power to enforce awards arising from disputes with no connection to the free zone*".

[229] Global Arbitration Review [27 September 2016]: "*Raza Mithani, partner at Berwin Leighton Paisner in Dubai, tells GAR that 'while it has previously been possible for a DIAC arbitration to take place with a DIFC seat, there will now be increased awareness within the business community of the option to combine DIAC Rules with a DIFC seat'*".

[230] Blanke [6 June 2016] (noting that parties were able to seat DIAC arbitrations in the DIFC without the need for a DIAC presence within the DIFC).

[231] Dubai Decree No. 34 of 2021 Relating to the Dubai International Arbitration Centre.

[232] Article 4 of Decree 34 of 2021.

[233] Article 5 of Decree 34 of 2021.

[234] Article 6 of Decree 34 of 2021.

3.4 Relationship between DIFC Courts and Dubai Courts

The relationship between the DIFC Courts and the Dubai Courts underwent transformation over the years. Starting from strong signals of cooperation in the early days (3.4.1), the legislative expansion of the DIFC Court's jurisdiction and the court's performance in the time after provide important context (3.4.2) to the development of the conduit jurisdiction (3.4.3).

3.4.1 Cooperation

Early on, the relationship between the two court systems in Dubai was marked by cooperation, through interactions aimed at resolving uncertainties regarding their respective boundaries. Through direct discussions between them, the courts played an active role in agreeing upon and defining their scope of jurisdiction. The first public manifestation of this was the Protocol of Enforcement ("POE") of 23 April 2009.[235]

Although it did not have force of law, the POE was an agreement between the Courts on how to enforce judgments between them. Although mutual enforcement was defined in Article 7 Judicial Authority Law ("JAL"),[236] it did not provide the conditions or procedures when the subject-matter of enforcement happened to be located outside the geographical boundaries of the court issuing the enforcement order (for example, the DIFC Courts issuing an enforcement order over assets located in mainland Dubai).[237] To fill the gap in legislation, the two courts entered into the POE on 23 April 2009.

The Preamble of the POE describes two courts working harmoniously together under the shared goal of improving the judicial system. It describes the motives of their cooperation:

> "*The Dubai Courts and the Dubai International Financial Centre Courts ("DIFC Courts") strongly believe that both courts are pillars of the Dubai Legal System.*

[235] Protocol of Enforcement Between Dubai Courts & DIFC Courts, 2009.

[236] Article 7 JAL: "*The Enforcement (1) Should the subject of execution fall within the Centre, judgements, awards and orders issued by the Courts and Arbitral Awards ratified by the Courts shall be enforced by the executive judge at the Centre. (2) Should the subject of execution fall outside the Centre, judgements, awards and orders issued by the Courts and Arbitral Awards ratified by the Courts shall be enforced by an executive judge at Dubai Courts, subject to the following: (a) The judgement, award or order is final and is appropriate for enforcement; and (b) The judgment, award or order has been translated into Arabic. (3) The executive judge at Dubai Courts has no jurisdiction to review the merits of a judgement, award or order of the Courts*" (Original version before 2011 amendment, available at: https://www.dfsa.ae/application/files/7315/8970/4768/Dubai_Law_No_12_of_2004.pdf). *See also* Article 5(C): "*The Chief Justice shall appoint one of the judges of the Court of First Instance as an executive judge with the jurisdiction to issue execution orders within the Centre*" (Original version before 2011 amendment, available at: https://www.dfsa.ae/application/files/7315/8970/4768/Dubai_Law_No_12_of_2004.pdf). Article 5(C) was amended in 2011 to allow for more than one execution judge.

[237] Article 2 POE [2009]: "*Article 7 of DIFC Law No. 12 does not set out the legal procedures to be followed either by the parties to litigation or the Dubai Courts and the DIFC Courts. This resulted in many difficulties and rendered its application almost impossible. Therefore, there is an urgent need to create an accurate mechanism to enact those rules and procedures in light of the applicable laws in the Emirate of Dubai*

> *The Dubai Courts and the DIFC Courts agree that both courts should have full judicial cooperation. The cooperation shall have a positive impact on effectively establishing and maintaining a strong Judicial System in Dubai. Furthermore, such cooperation will strengthen the enforcement of Judgments, Awards and Orders issued by both the Dubai Courts and the DIFC Courts, as well as arbitration awards which are ratified by them. This cooperation shall be carried out by facilitating and establishing the enforcement procedures to enable the parties to litigation to receive justice and a fair trial. Both the Dubai Courts and the DIFC Courts have a strong belief that the relationships between them have to be strengthened*" (emphasis added).

The POE entered into effect from 1 May 2009.[238] It clarified the requirements of Article 7 JAL for the reciprocal execution within Dubai and defined procedures for the execution of judgments, orders and awards from each court within the jurisdiction of the other. Notably, Article 3 POE stipulates that the Dubai Courts will enforce – without a review of merits, and under the UAE Civil Procedure Law – any DIFC judgment, order or arbitral award that is "final and is appropriate for enforcement".

The process of negotiating and entering into the POE illustrated the benefits of direct cooperation. This encouraged the two courts to formalize their direct interactions. Therefore, on 16 June 2009, they entered into a Memorandum of Understanding ("MOU").[239] The objective of the MOU was to "provide a formal basis for co-operation, including the exchange of information and ideas". Notably, the MOU emphasized the courts' belief that the MOU would create channels to promote mutual understanding of each other's laws, "encourage frank and open discussion" and develop closer ties and cooperation across a number of areas. The MOU refers to a joint court committee, comprised of two judges from each jurisdiction, set up to directly engage on issues of enforcement and jurisdiction.

Finally, on 7 December 2009, the courts entered into a Protocol of Jurisdiction ("POJ"), clarifying the boundaries of their respective jurisdiction.[240] The impetus behind the protocol was confusion over whether simply signing a contract in the DIFC freezone territory may open jurisdiction for the DIFC Courts.[241] Before its release, the POJ was described as further extending the DIFC Court's influence in the legal system,[242] under the example of the "coffee shop rule". However, this was clearly ruled out in the text of the POJ, which established jurisdiction solely on the basis of contract performance, without including contract

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to reflect the significance of this Protocol".

[238] Article 5 POE [2009].

[239] Memorandum of Understanding Between Dubai Courts and DIFC Courts, 2009. Notably, the MOU [2009] describes the DIFC Courts as "*the independent and limited judicial system*" within the DIFC, and notes that "*Headed by eminent judges who have varied and extensive experience in different jurisdictions around the world, the DIFC Courts can handle all disputes within its limited jurisdiction*" (emphasis added).

[240] Protocol of Jurisdiction between DIFC and Dubai Courts, 7 December 2009.

[241] This was referred to as the "coffee shop rule", *see* The National [7 December 2009].

[242] The National [4 December 2009]: "*Any day now – although the ongoing Dubai World imbroglio might affect the timing – the Courts plan to cosign with Dubai authorities a 'protocol for jurisdiction' that will further extend their influence in the emirate's legal system*".

formation.[243]

The POJ clarified that the act of signing a contract in the DIFC territory does not give rise to DIFC jurisdiction, which requires further elements such as DIFC membership of one the parties involved, or the provision of funds by the DIFC.[244] While the POJ reaffirmed the principle sources of exclusive DIFC jurisdiction,[245] it also stipulated that Dubai Courts have general jurisdiction whenever the DIFC Court's exclusive jurisdiction does not apply.[246]

Reports from the DIFC Courts have repeatedly confirmed the success of the inter-court enforcement mechanism. In 2016, the DIFC shared that "*[e]nforcement in Dubai of money judgments from the DIFC Courts has proved a reliable procedure to date*",[247] and that "*feedback received from practitioners during consultations attests to relatively smooth procedures for enforcement at the Dubai courts – with DIFC judgments, decisions and orders going straight to execution as per the relevant provisions [...] of the UAE Federal Procedures Law*".[248]

3.4.2 Court performance leading up to conduit jurisdiction

Despite being originally created with a strictly limited mandate, in October 2011, the jurisdiction of the DIFC Courts was expanded through legislation enacted by the Dubai Ruler. This section explores the social and legal context leading up to the enactment, to shed light on the potential impetus behind it.

[243]The National [7 December 2009]: "*Previously, there had been confusion over the existence of what was referred to as the 'Coffee Shop rule'. It led some parties to believe that merely signing a contract within the confines of the DIFC, in the coffee shop, for instance, meant the DIFC Courts would hear any resulting dispute case. That, said Mr Beer, is not the case. 'The protocol clarifies that simply signing a contract at the DIFC is not enough to bring it within our jurisdiction. However, if an element of a contract has been fulfilled in the DIFC, then you are able to choose the DIFC Courts.' Such elements could include official DIFC membership by one or more companies involved, or the provision of funds by the DIFC regarding specific contracts. 'The [new] protocol clearly sets out the jurisdiction between both courts and defines which court will take which dispute. This further increases the efficiency of Dubai's judicial system by ensuring parties don't have to spend time and money trying to fight a case in the wrong court,' Mr Beer said*".

[244]The National [7 December 2009].

[245]Subparagraph 3 POJ [2009]: "*The Dubai Courts and DIFC Courts agree that the DIFC Courts shall have exclusive jurisdiction over: 3.1 Civil or commercial cases and disputes involving the Centre or any of the Centre's Bodies or any of the Centre's companies, and branches of companies and establishments that are established or licensed to operate in the DIFC; 3.2 Civil or commercial cases and disputes arising from or related to a contract that is to be or has been performed in whole or in part within the DIFC. 3.3 Civil or commercial cases and disputes arising from or related to a transaction that has taken place, in whole or in part, in the Centre, and which is related to Financial Banking Activities, Financial Activities, Ancillary Activities or any Activities licensed to be performed within the DIFC; 3.4 Civil or commercial cases and disputes arising from or related to an incident that has occurred in the Centre, except Criminal Proceedings relating to any Criminal Offence according to the Penal Codes; and 3.5 Disputes about Civil remedies flowing from or related to any criminal Offence that has occurred in the Centre*".

[246]Subparagraph 4 POJ [2009]: "*Dubai Courts have general jurisdiction except for the mentioned areas in subparagraph 3 of this protocol*".

[247][DIFC Courts, 3 January 2018, p. 3].

[248][DIFC Courts, 3 January 2018, p. 4].

Although the DIFC Courts had been slowly expanding its jurisdictional reach since 2010 through a literal interpretation of its role as a court of Dubai, I argue that the central role played by the DIFC justices in restructuring Dubai's debt strengthened its institutional credit with government authorities and was a decisive factor in favor of expanding its jurisdiction. This is in light of the context of Dubai's financial crisis that created important shifts in Dubai's financial situation, as well as in behavior towards and expectations for Dubai legal institutions. No one single event led to the policy shift towards wider DIFC jurisdiction – rather, a number of major shifts in financial and social environment, coupled with the Court's expansionist desire to increase its caseload, offer potential explanations behind the shift. Throughout this section, DIFC Courts statistics are presented to paint a clearer picture of the context, and not to make any causal claim.

A Context until 2011 expansion

The role played by Justice Evans of the DIFC Courts in hearing claims arising out of Dubai's debt crisis was a significant factor in building towards the jurisdictional spread (A.1). Although no causal relationship can be established between the DIFC Courts' caseload and its jurisdictional expansion, understanding the Court's performance up to 2011 provides important context (A.2).

A.1 Opportunity for the DIFC Courts: Dubai World comes crashing down

The financial crisis which rocked the world in 2008 produced global waves which took some time to reach Dubai. Although in the immediate aftermath of the global financial crisis, Dubai experienced an increase in foreign investment, Dubai would eventually also face its own financial crisis due to its accumulated debt. The debt crisis was exacerbated by an announcement in November 2009 that Dubai World – a company tasked with managing investments for the Dubai government – would be unable to make timely payments on some of its $\$59b$.[249]

Dubai's debt crisis was accompanied with a massive uptick in litigiousness, with courts and arbitration centres marking an increase in the number of registered cases. This was particularly demonstrated in the Dubai Courts, where the caseload almost doubled between 2008 to 2009 (see Figure 3.2). In DIAC, new cases rose from 100 in 2008 to 293 in 2009.[250] The financial crisis also increased the DIFC Court's caseload.[251] The sudden increase in casework placed significant strain on courts and dispute resolution authorities, who struggled

[249]Bajaj and Bowley [29 November 2009]: "*The Dubai crisis began last week, when the emirate said Dubai World would not be able to make on-time payments for some of its* $59 *billion in debt. The company invested in lavish real estate projects, including artificial islands in the shape of a palm tree and a globe, and spent heavily to acquire stakes in glittering properties like Barneys in New York and the MGM Mirage in Las Vegas*".

[250]Global Arbitration Review [5 July 2010].

[251]Global Arbitration Review [8 February 2010]: "*During the seminar, Evans revealed that the DIFC courts have seen a "rapid upsurge" in caseloads since mid-2009, attributing it to the financial crisis and the estate sector*" (also reporting that Dubai owed a significant amount of money to British banks, prompting a trip from the Lord Mayer of the City of London "*to help British banks retrieve money owed by the emirate*").

to keep up with the new influx of work. Perhaps more significantly, the debt crisis gave rise to complex business issues – particularly bankruptcy – that the local legal apparatus lacked the sophistication and maturity to handle, especially in the absence of a body of applicable law.[252]

The Dubai debt crisis breathed new life into the DIFC Courts. In December 2009, the Dubai Ruler issued a decree establishing a special tribunal – the Dubai World Tribunal ("DWT") – within the DIFC Courts for disputes related to the Dubai World debt restructuring.[253] The Decree provided that the DWT would be composed of three DIFC Courts justices, and presided by the Chief Justice.[254] Under the Decree, onshore Dubai Courts have no jurisdiction over any lawsuits related to Dubai World, against the main company, its subsidiaries, directors and employees. Despite some early complaints about DWT delays, exacerbated by the fact that most of the justices do not regularly reside in Dubai, those were eventually smoothed out.[255]

Although by early 2010, no claims had been filed at the DWT, despite reports that more than 100 potential claimants had made inquiries, the creation of the DWT and its patronage by the DIFC Courts were nonetheless already making a mark on the legal landscape.[256] From the early days when news of Dubai's debt crisis broke, the DIFC Courts were painted as the antidote to nervous investors worldwide, with the DIFC Court's Chief Justice "who got the call to sort out the nuts and bolts"[257] in a new role "trying to sort out the mess surrounding Dubai World".[258] The DWT was described as "*a crucial test case for the emirate's legal system, as well as its ambitions to be a world-class financial centre*".[259] In particular, the

[252]The National [16 December 2013] (reporting the local courts are unable to handle complex disputes, particularly since modern bankruptcy laws still need to be adopted). See also The National, Sheikh Khalifa decrees bankruptcy law, 23 October 2016 (reporting that the UAE bankruptcy law was issued).

[253]Dubai Decree No. 57 of 2009 Establishing a Tribunal to decide the Disputes Related to the Settlement of the Financial Position of Dubai World and its Subsidiaries. In April 2010, Dubai Decree No. 11 of 2010 amended Decree 57 of 2009 to include a provision in the jurisdiction of the tribunal that exempts the claims brought against Dubai World, its subsidiaries and any persons related to their financial obligations from the application of the procedures provided in article (3/d) of Government Claims Law No. 3 of 1996.

[254]The National [13 December 2009]. *See also* https://www.dubaiworldtribunal.ae/about-the-tribunal/ (last accessed on 10 November 2021).

[255]The National [28 September 2010].

[256]The National [27 February 2010].

[257]The National [14 December 2009].

[258]The National [14 December 2009]. For a case study on the DWT, *see* Krishnan and Koster [2016] (Under the lens of elite theory, Jayath Krishnan studied the origins, functioning and casework of the Dubai World Tribunal to argue that local and foreign officials worked together in tandem to reach and adopt an effective solution that would safeguard Dubai's image as a global financial capital. Krishnan proposes this as a case study of an area that is unaccounted for in the binary literature that describes interactions between local and foreign legal elites: one where the foreign players did not wish nor seek to extend their influence beyond the task they were hired to perform, and where the local receiver did not resist the foreign intervention, but rather invited it in. This work was based on interviews with stakeholders involved in Dubai's financial crisis, including foreign business consultants and accountants, members of the DWT, the registrar and one Emirati government official, as well as publicly available information).

[259]The National [4 December 2009]: "*Experts say the Nakheel sukuk – scheduled for redemption in just nine days – is governed by English law, so litigants have the option of getting their case heard in London, if*

Court representatives emphasized the "*potential for the Courts to be a force for good in the confusing and sometimes confused arena of Dubai legal practice*", with the DIFC Courts registrar's earnest statement that "*[w]e can show everybody that it is possible to get world-class legal justice in Dubai*".[260]

The Dubai World situation revealed the lack of trust in the capacity of UAE legal institutions to deal with crises. The essential role played by the DIFC Courts Justices in filling the legal and institutional gap to manage the debt restructuring, coupled with signs of the Court's growing appetite for more casework, provide important context for 2011 legislation.[261] In February 2010, a major local English-language newspaper published an opinion piece strongly advocating that the DIFC Courts – if allowed to continue playing a gap-filing role – would be an asset for Dubai vis-a-vis investors. Notably, it was highlighted that "*[t]he legal system in the UAE has been ill-equipped to handle the complex disputes that arise in an international marketplace. This will undoubtedly improve with time, but the nation cannot wait. Solutions must be found to bridge the gap, and the DIFC courts proposal is one such solution*".[262]

The financial crisis left a deep mark on Dubai society, in the form of marked increase in litigious behavior. Where previously, Dubai (and UAE residents) preferred to either 'split the difference' or simply bear the costs of any unforeseen costs (especially in construction contracts, where profit margins were high enough to support that), the crisis led to new penny-pinching behavior from impacted businesses – especially small and medium size firms. For Dubai particularly, which had experienced a sudden influx of foreign investors with little to no ties to the local community, many abandoned their Dubai life and fled. Those with stronger community ties – and no better alternatives – found themselves (for the first time in their decades of operation) turning to the courts to seek relief. At the same time, the expectation was that a wave of disputes would arise in the context of the financial crisis, and the question was whether Dubai's litigation and arbitration bodies would be able to meet the challenge adequately, or whether they would fall behind the DIFC Courts.[263]

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it comes to that. But they believe Dubai authorities would be reluctant to enforce decisions by foreign courts, especially if it involved the handing over of substantial assets in the emirate. What better compromise than the DIFC Courts? Independent, run by international standards, but simultaneously part of the Dubai set-up and operating with the blessing of the Dubai authorities, they could be expected – by both parties – to deliver fair and impartial decisions, with substantially fewer enforcement difficulties".

[260]The National [4 December 2009].

[261]The National [11 February 2010]: "*The fallout left by Dubai World's debt problems highlighted how brittle confidence in the UAE was. The response must be to build institutions that ensure that should another crisis happen disputes will be settled justly and the economy will carry on. That is happening, particularly in the courts system, as shown in The National's interview with Sir Anthony Evans, the chief justice of the Dubai International Financial Centre (DIFC) courts. The proposed widening of the DIFC court's jurisdiction is welcome and, if implemented, would do more to bolster confidence in Dubai than any support fund*".

[262]The National [11 February 2010].

[263]The National [20 March 2010]: "*Fraud and mismanagement disputes in the Emirates are expected to multiply in a surge of litigation connected with the global financial crisis. An increasing number of civil cases are likely to be pursued by shareholders seeking damages against companies and directors as investors learn more about their legal rights, lawyers say*".

A.2 Performance of DIFC Courts until 2011

Although the number of claims filed with the DIFC CFI was low in its first years of operation compared to later years, it was a faring well for a new institution. The low number of claims filed with the CFI in its first few years of operations, coupled with the strong settlement rate within the DIFC Courts translated to a healthy number of trials: 4 disputes completed (out of 9 registered) in 2008,[264] 19 disputes completed (out of 36 registered) in 2009[265] and 10 disputes completed (out of 27 registered) in 2010.[266] These figures are represented in Table 3.1.

Furthermore, separate from the number of disputes tried at the first instance, the aggregate value of disputes was significant. Since it began operation in 2008, the total value of cases heard at the first instance of the DIFC Courts was in the low triple digits of millions of USD dollars, although it experienced a temporary dip to double digits in 2011. The total value of CFI cases (see Table 3.1) was USD 214 million in 2009,[267] USD 112 million in 2010[268] and USD 33 million in 2011.[269] Since the legislation expanding DIFC jurisdiction was ended at the end of 2011, it is not expected that 2011 figures would demonstrate any significant increase in caseload or value of claims, since it would take time for parties to amend their contracts and opt-into the DIFC Courts' jurisdiction.

B Expansion in the air and on the ground

On 31 October 2011, the Dubai Ruler enacted legislation widening the jurisdiction of the DIFC Courts. The amended JAL was welcomed by businesses and practitioners who highlighted its potential to "change the nature of litigation" in the UAE.[270] In a move calculated to generate a maximum amount of buzz, the announcement was timed to coincide with the meeting of the International Bar Association in Dubai.[271]

The advantages of the expansion were noted as including benefits for small and medium size businesses who may not afford a DIFC office location, saving the cost of having to translate English contracts into Arabic for litigation, increasing Dubai's appeal as a global commercial hub and decreasing frivolous claims since the losing party must pay legal fees.[272] The

[264] [DIFC Courts Annual Review 2009, p. 28].
[265] [DIFC Courts Annual Review 2009, p. 28] and [DIFC Courts Annual Review 2010, p. 36].
[266] [DIFC Courts Annual Review 2010, p. 36].
[267] [DIFC Courts Annual Review 2010, p. 36].
[268] [DIFC Courts Annual Review 2010, p. 36].
[269] [DIFC Courts Annual Review 2011, p. 10].
[270] Gulf News [1 November 2011].
[271] Global Arbitration Review [2011].
[272] *See* Gulf News [1 November 2011]; Global Arbitration Review [2011].

director of the Dubai Courts also welcomed the expansion,[273] as did Justice Al Muhairi,[274] who became Deputy Chief Justice in 2018, and was recently appointed as DIFC Courts Director (an important indicator that the DIFC Courts as an institution continue to benefit from the strong backing from the Dubai Ruler).[275]

2011 was a significant year for the re-defining of the DIFC Court's scope of action, starting in February 2011 with Corinth (B.1). After 2011, the value of the DIFC Court's casework experienced a significant increase (B.2).

B.1 Corinth v Barclay's

The Corinth claim arose out of a steel purchase contract from a Greek company to a company based in Dubai for approximately USD 35 million.[276] The purchaser failed to pay the outstanding sums owed under the contract. The purchaser presented to the seller an email exchange with its bank representing that bank orders had been lodged for payment to be made.[277] When no payment was made after some time had passed, the seller filed a claim against the bank arguing that the bank made fraudulent representations that delayed it from seeking injunctive relief by requesting the attachment of the purchaser's assets.[278] The bank (Barclay's) is incorporated in England, and the emails were sent from one of its Dubai branches.

The bank opposed the DIFC Court's jurisdiction on the basis that it did not fit within any of the heads of jurisdiction of Law No. 12.[279] The claimant argued that since the bank had a branch within the DIFC, it is a DIFC entity that is subject to DIFC Courts jurisdiction as provided in Article 5(A)(1)(a) JAL. This argument was ultimately rejected by the CFI, where Justice Colman – the Deputy Chief Justice – found that jurisdiction over the bank for actions taken by a branch outside the DIFC, that do not constitute DIFC-related business, would be improper.[280]

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[273]Khaleej Times [1 November 2011]: "'*The DIFC Courts and Dubai Courts share a commitment to justice and the rule of law, and have always worked together for the benefit of the community. This is a very positive development for justice, and a reflection of Dubai's commitment to supporting investors and businesses both domestically and from around the world,' Dr. Ahmed bin Hazeem, director general of Dubai Courts said 'We believe it provides the business community, which Dubai has so successfully developed, with even greater choice as they seek swift and effective resolution to commercial disputes,' he said*".

[274]Khaleej Times [1 November 2011]: "*Justice Omar Juma Al Muhairi said: 'As an Emirati and as one of the founding members of the DIFC Courts, I am very proud to have played a role in bringing the Courts to this moment, when we are now able to further enhance Dubai's reputation as the leading regional business hub. It is hard to believe how far we have come as an institution in such a short period of time'*".

[275]Khaleej Times [1 November 2011]: "*Justice Omar Juma Al Muhairi said: 'As an Emirati and as one of the founding members of the DIFC Courts, I am very proud to have played a role in bringing the Courts to this moment, when we are now able to further enhance Dubai's reputation as the leading regional business hub. It is hard to believe how far we have come as an institution in such a short period of time'*".

[276]Corinth Pipeworks SA v Barclays Bank PLC, DIFC CFI 024/2010, 9 February 2011, para. 2.

[277]Corinth Pipeworks [DIFC CFI 2011], para. 4.

[278]Corinth Pipeworks [DIFC CFI 2011], para. 7–8.

[279]Corinth Pipeworks [DIFC CFI 2011], para. 10.

[280]Corinth Pipeworks [DIFC CFI 2011], para. 54: "*The fact that all the branches of the corporation may be*

However, when the dispute was heard by the CA – by a three-judge panel composed of Justices Hwang (the Chief Justice), Chadwick and Al Madhani – in January 2012, a different outcome was reached.[281] On appeal, the claimant argued that the DIFC license had been granted not to the bank's DIFC entity exclusively, but rather to the bank's entire corporate entity such that jurisdiction over the main entity (i.e. Barclay's in England) was established.[282] The CA found that "the DIFC Courts have jurisdiction over the conduct of the Respondent's Dubai branch, as it would have over any other branch of the Respondent, wherever located".[283]

With Corinth, the DIFC Courts widened their net to include any entity with a DIFC branch. This led to a flurry of commentary from attorneys of international companies, who advised their clients to seek legal advice about the structure of their corporate operations. sent the message that the DIFC Courts had a wide net, and were boldly – perhaps even aggressively – looking for new "catch".

B.2 Performance of DIFC Courts from 2011 to 2014

As discussed above, and as presented in Table 3.1, the aggregate value of CFI disputes experienced dips in 2010 (where it was USD 112 million compared to USD 214 million the year before) and 2011 (where it was USD 33 million). With the wide net cast in Corinth and the new opt-in jurisdiction, the DIFC's caseload experienced a boost – both in terms of the number of claims and their value.[284]

As shown in Table 3.1, the number of claims increased from 27 in 2010,[285] to 31 in 2011[286] and to 42 in 2012;[287] experiencing a decrease to 28 active cases in 2013[288] (although the value of claims continued to increase) and regaining some strength in 2014 at 36 active

part of a single legal person with a single corporate name emphatically does not result in all the branches of the corporation being part of a Centre's Establishment. The international corporation is a Centre's Establishment only to the extent to which its branch is authorised to conduct business in and from the DIFC and a claim or dispute only 'involves' a Centre's Establishment when that claim or dispute is connected with or arises out of activities of the corporation conducted by its DIFC branch or division".

[281] Corinth Pipeworks SA v Barclays Bank PLC, DIFC CA 002/2011, 22 January 2012.

[282] Corinth Pipeworks [DIFC CA 2011], para. 36.

[283] Corinth Pipeworks [DIFC CA 2011], para. 66.

[284] Despite more parsimonious reporting that distinguished between claims filed and those tried during the year in the DIFC Court's first few Annual Reports, reporting changed to the number of active cases during the year from 2011 onwards. For example, DIFC Courts Annual Review 2011 does not distinguish the number of cases filed from those tried, nor does it report the total value of claims. Instead, it reports that 31 CFI cases were tried in 2011, compared to 27 in 2010 (which contradicts the 2010 report, where 27 is the number of cases registered) (p. 6). Similarly, DIFC Courts Annual Review 2012 reports that 42 cases were registered in 2012, compared to 30 in 2011 (p. 10).

[285] [DIFC Courts Annual Review 2011, p. 6].

[286] [DIFC Courts Annual Review 2011, p. 6].

[287] [DIFC Courts Annual Review 2011, p. 6] and [DIFC Courts Annual Review 2012, p. 9].

[288] [DIFC Courts Annual Review 2014, p. 22]. Note that the 2013 Annual Review simply reported a 54% in case value (p. 10), without reporting any other figures.

cases.[289] The value of claims at the first instance was reported at USD 33 million in 2011,[290] USD 169 million in 2012,[291] USD 225 million in 2013[292] and USD 479 million in 2014[293] (see Table 3.1). The average case value increased from AED 33.5 million in 2013 to AED 42 million in 2014.[294]

The DIFC Courts statistics show a healthy caseload for a brand-new institution, although perhaps not the immediate boom that might have been anticipated. The impact of the Court's wide interpretation of its jurisdiction, and that of the legislative amendment are difficult to quantify in terms of the resulting increase in the load and value of DIFC cases. It is unlikely – although possible – that there was no impact whatsoever, and that these statistics would be the same in the absence of the expansions.

More importantly, irrespective of the relationship between each expansion and the caseload (i.e., the effect of the expansions on the caseload), there is the entirely separate question of the relationship between each expansion and the immediately subsequent action of the DIFC Courts (i.e., the effect of each expansion on every subsequent expansion). It is clear that as every expansion went unchecked, the DIFC Courts became increasingly emboldened in the shaping of their identity as a relevant court of Dubai and of the world of international business disputes.

Each of these factors was a stepping stone for the DIFC Courts which solidified the foundation of the path towards the new identity as a conduit court.

3.4.3 Conducting experiments: The Court constructs a new identity

The conduit role carved out by the DIFC Courts is part of the "enforcement court" identity. This section discusses the series of DIFC Courts judgments that established the concept of conduit jurisdiction.

A "Getting Egan": Conduit jurisdiction for foreign awards

On 1 January 2014, Justice Chadwick rendered a judgment that set the foundation for the Court to subsequently widen its jurisdictional reach in enforcement cases.[295] The Claimants – companies incorporated outside the UAE – sought orders for the recognition and enforcement of arbitral awards issued in October 2012 in their favor.[296] The arbitrations were seated in

[289] [DIFC Courts Annual Review 2014, p. 22].

[290] [DIFC Courts Annual Review 2012, p. 10].

[291] [DIFC Courts Annual Review 2012, p. 10].

[292] [DIFC Courts Annual Review 2014, p. 22]. Note that the 2013 Annual Review simply reported a 54% in case value (p. 10), without reporting any other figures.

[293] [DIFC Courts Annual Review 2014, p. 22]. In 2014, the total value of claims and counterclaims filed in the first instance DIFC Courts crossed the one billion dirham mark, reaching AED 1.76 billion.

[294] [DIFC Courts Annual Review 2014, p. 6].

[295] (1) Egan (2) Eggert v (1) Eava (2) Efa, DIFC CFI 002/2013, January 2014. It should be noted that Justice Chadwick's judgment was redacted, and the reference made by the Court here is to the redacted judgment.

[296] Egan [DIFC CFI 2014], para. 1 and (1) Egan (2) Eggert v (1) Eava (2) Efa, DIFC CFI 002/2013, 29

London, and conducted under the Maritime Arbitrators Association Terms.[297] In turn, the Defendants – incorporated within Dubai, but outside the DIFC – sought a declaration that the DIFC Courts lacked jurisdiction over the application, and alternatively, that if the DIFC Courts have jurisdiction, it should not exercise it.[298] Justice Chadwick ultimately refused the Defendants' application, and confirmed the DIFC Courts' jurisdiction.

A.1 Parties' arguments

The Claimants argued that a combination of Article 5(A)(1)(e) JAL,[299] Article 42(1) DIFC Arbitration Law,[300] Article 7 JAL[301] and Article 24(1) DIFC Courts Law[302] form the basis of the DIFC's enforcement jurisdiction.[303] Their argument can be presented in the following syllogism:

1. When DIFC laws provide for DIFC Courts jurisdiction, that jurisdiction is exclusive;
2. DIFC Arbitration Law provides that the Courts have jurisdiction to enforce arbitral awards irrespective of the state or jurisdiction in which the awards are made;
3. ⇒ therefore, the CFI has jurisdiction to enforce the arbitral award in this case.[304]

In turn, the defendants argued that DIFC Courts had no jurisdiction over the application under consideration. A significant portion of the defense was based on public policy considerations. The defendants argued that any construction of the principles of jurisdiction to

July 2015, para. 2.

[297]Egan [DIFC CFI 2015], para. 8.

[298]Egan [DIFC CFI 2014], para. 1–2.

[299]Article 5(A)(1)(e) of Dubai Law No. 12 of 2004: "*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*".

[300]Article 42(1) of DIFC Law No. 1 of 2008: "*Recognition and enforcement of awards (1) An arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognised as binding within the DIFC and, upon application in writing to the DIFC Court, shall be enforced subject to the provisions of this Article and of Articles 43 and 44. For the avoidance of doubt, where the UAE has entered into an applicable treaty for the mutual enforcement of judgments, orders or awards, the DIFC Court shall comply with the terms of such treaty*" (emphasis added).

[301]Article 7 of Dubai Law No. 12 of 2004: "*(1) Should the subject of execution fall within the [Dubai International Financial] Centre, judgments, awards and orders issued by the Courts and Arbitral Awards ratified by the Courts shall be enforced by the executive judge at the Centre. (2) Should the subject of execution fall outside the Centre, judgments, awards and orders issued by the Courts and Arbitral Awards ratified by the Courts shall be enforced by an executive judge at Dubai Courts, subject to the following: a) ... (b) ... (c) The executive judge at Dubai Courts has no jurisdiction to review the merits of a judgment, award or order of the Courts*".

[302]Article 24(1) of DIFC Law No. 10 of 2004 ("DIFC Courts Law"): "*(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 Award; (d) Foreign Arbitral Award; or (e) orders for the purposes of any subsequent application for enforcement in the courts of Dubai [...]*".

[303]Egan [DIFC CFI 2014], para. 15.

[304]Egan [DIFC CFI 2014], para. 15.

encompass the claim was an abuse of process and a violation of UAE public policy, since it would entirely displace review by Dubai Courts, which is untenable in light of the complete lack of connection or nexus with the DIFC.[305] Here, defendants argued that UAE public policy required that the enforcement claim be heard in Dubai Courts, in the language of the parties, and under the UAE laws which apply to the parties as entities incorporated in the UAE.[306]

The defendants also argued that "*it cannot have been the intention of the Dubai legislator in promulgating the Judicial Authority Law or of the Supreme Council of the UAE in amending the constitution to allow the creation of financial free zones within the Emirates that the DIFC Courts be used as a conduit jurisdiction for enforcement of an arbitration award against assets in Dubai (outside the DIFC) in circumstances where the owner of those assets has a legitimate expectation that such enforcement action can only properly be brought in the Dubai Courts*".[307]

A.2 Holding of the First Instance Court on jurisdiction

Starting from the position that it is bound to recognize and enforce arbitral awards, unless the subject-matter is inarbitrable under DIFC Law or if the enforcement of the award would be contrary to the public policy of the UAE,[308] the Court made a number of holdings.

It highlighted that the jurisdiction of the DIFC Courts and Dubai Courts is simultaneously mutually exclusive[309] and complementary: the court found that the legislature's intent was clearly that enforcement within the DIFC would fall exclusively to the DIFC Courts, while enforcement in Dubai would fall exclusively to the Dubai Courts.[310] The Court therefore found that the dispute parties were correct in their shared position that each Court has

[305] Egan [DIFC CFI 2014], para. 21.

[306] Egan [DIFC CFI 2014], para. 22.

[307] Egan [DIFC CFI 2014], para. 22, quoting para. 56 of the Defendant's skeleton argument.

[308] Article 44(1) DIFC Arbitration Law: "*Recognition or enforcement of an arbitral award, irrespective of the State or jurisdiction in which it was made, may be refused by the DIFC Court only: (a) At the request of the party against whom it is invoked, if that party furnishes to the DIFC Court proof that: (i) ... (v) ... (b) if the DIFC Court finds that: (vi) the subject matter of the dispute would not have been capable of settlement by Arbitration under the laws of the DIFC; or (vii) the enforcement of the award would be contrary to the public policy of the UAE*" (emphasis added).

[309] Egan [DIFC CFI 2014], para. 35: "*The jurisdiction of the Dubai Courts does not extend to the recognition or enforcement of foreign arbitral awards within the DIFC. The jurisdiction of the DIFC Courts, within the DIFC, is exercisable to the exclusion of the Dubai Courts. The DIFC Courts do not have jurisdiction to recognise or enforce foreign arbitral awards outside the DIFC. The jurisdiction of the DIFC Courts and the jurisdiction of the Dubai Courts in relation to the recognition and enforcement of foreign arbitral awards are mutually exclusive*" (emphasis added).

[310] Egan [DIFC CFI 2014], para. 36: "*Not only are the jurisdiction of the DIFC Courts and the jurisdiction of the Dubai Courts in relation to the recognition and enforcement of foreign arbitral awards mutually exclusive, they are also complementary. It is plain that, in enacting Article 7 of the Dubai Judicial Authority Law, the legislator contemplated that both the DIFC Courts and the Dubai Courts would have power (in appropriate cases) to ratify (or recognise) arbitral awards (including foreign arbitral awards); that the enforcement of such awards within the DIFC (in the sense of execution against assets within the DIFC) would be for the DIFC Courts; and that the enforcement of such awards outside the DIFC would be for the competent entity*

exclusive jurisdiction to enforce the award within its own territory.[311]

The Court then went on to reject the arguments of the defense regarding its jurisdiction. Notably, the Court refused to give any weight to the location of the enforcement assets, rejecting the argument that the absence of assets within the DIFC (and the potential that the DIFC enforcement order be used as a shield against review by Dubai Courts) was determinative for the question of establishing jurisdiction, while admitting that asset location may be relevant for the question of whether the court should exercise its enforcement jurisdiction.[312]

Furthermore, the Court found the legislator clearly envisaged that the DIFC Courts would be used as a conduit jurisdiction:

> "*I reject the submission – advanced under paragraph 56 of the Defendants/Applicants' skeleton argument – that it cannot have been the intention of the Dubai legislator in promulgating the Judicial Authority Law to allow the DIFC Courts to be used as a conduit jurisdiction for enforcement of an arbitration award against assets in Dubai (outside the DIFC) in circumstances where the owner of those assets has a legitimate expectation that such enforcement action can only properly be brought in the Dubai Courts*"[313] (emphasis added).

The Court reasoned that the legislator had clearly intended for the conduit jurisdiction to apply in instances where assets were present in mainland Dubai and the DIFC: one single enforcement order from either court would be sufficient for enforcement in both jurisdictions.[314] The Court also quickly rejected the public policy argument as pertaining to establishing the

having jurisdiction outside the DIFC (which, in a case where execution was sought against assets outside the DIFC but within the Emirate of Dubai, could be expected to be the Dubai Courts)" (emphasis added).

[311]Egan [DIFC CFI 2014], para. 37: "*It follows that, in the context of a claim for recognition of a foreign arbitral award, the Defendants/Applicants are correct to submit [...], and the Claimants are correct to accept, that the effect of the phrase "exclusive jurisdiction" in the introductory words of Clause (1) of Article 5(A), when applied to the jurisdictional gateway which sub-paragraph (e) of that clause provides in the present context, is that the DIFC Courts have jurisdiction, to the exclusion of the Dubai Courts, to make an order for the recognition of such an award – and to enforce such an award – within the DIFC. The corollary, as it seems to me (while recognising that the extent of their jurisdiction is a matter for determination by the Dubai Courts), is that the Dubai Courts, and not the DIFC Courts, have jurisdiction to make an order for the recognition of such an award – and to enforce such an award – within the Emirate of Dubai other than in the DIFC*" (emphasis added).

[312]Egan [DIFC CFI 2014], para. 39: "*I reject, also, the submission – advanced under paragraph 41 of the Defendants/Applicants skeleton argument – that, as a matter of jurisdiction, the Court should not entertain a claim for recognition and enforcement in cases other than those where the claimant seeks to rely on the award in on-going DIFC proceedings, to use recognition of the award as a shield against some attack by the respondent or to enforce against assets within the jurisdiction. Those may be circumstances in which the Court may think it appropriate to refuse recognition (and, in particular, the absence of assets within the jurisdiction against which to enforce the award may be fatal to an application for an order for execution, given the terms of Article 42(4) of the DIFC Arbitration Law); but they are not reasons for refusing to entertain the claim on the grounds of lack of jurisdiction*" (emphasis added).

[313]Egan [DIFC CFI 2014], para. 41.

[314]Egan [DIFC CFI 2014], para. 41: "*It seems to me plain, from the provisions in Article 7 of the Judicial Authority Law, that the legislator did contemplate that there could be circumstances in which recognition of a*

Courts' jurisdiction, rather its relevance was limited to the question of jurisdiction should be exercised.[315]

Ultimately, Justice Chadwick refused to issue a declaration that the DIFC Courts lacked jurisdiction. His judgment on jurisdiction had an important effect in a case that was heard a mere few months after.

A.3 Commentary

Although Justice Chadwick highlighted the exclusive nature of each court's jurisdiction within its territory, the Justice nevertheless adopted a literal interpretation of the Court's treaty obligation to enforce a foreign award that contradicts the exclusive jurisdiction provision and voids it of all meaning. This interpretation essentially defines exclusive jurisdiction as prohibiting the DIFC Courts from issuing an order for enforcement within Dubai (since that is exclusively under Dubai Courts jurisdiction), but ignores that the obligation of Dubai Courts to execute any DIFC judgment or order without review essentially translates to hiding jurisdictional overreach behind the extra step of execution. As long as the DIFC Courts do not order enforcement within Dubai, the legal requirement of exclusive jurisdiction is upheld, even if the DIFC Courts issue an enforcement order in a dispute that is entirely unrelated to the DIFC. In other words, although they are prohibited from directly ordering enforcement within Dubai, they may order enforcement within the DIFC, even when the claimant is clearly obtaining the DIFC Courts order to bypass enforcement proceedings in Dubai.

B "Under the Banyan Tree": conduit jurisdiction for domestic awards

The Egan judgment of 2014 set the stage for the DIFC Court's conduit jurisdiction role in the context of a foreign arbitral award. On 27 May 2014, Justice Al Muhairi applied the conduit jurisdiction doctrine to a domestic award.[316] The facts of the dispute were as follows. Banyan Tree, a Singapore company – petitioned the DIFC Courts, seeking the enforcement of a DIAC arbitral award.[317] The arbitration was seated in Dubai, and conducted under Dubai

foreign arbitral award by the DIFC Court could trigger enforcement proceedings, through the Dubai Courts, against assets in the Emirate of Dubai (but outside the DIFC) without the need for separate recognition of the award by the Courts of Dubai; and vice versa. An example of such circumstances might be a case in which the party against whom the arbitral award had been made had assets in the Emirate of Dubai of which some were within the DIFC and others were not. In such a case it seems to me most unlikely that the legislator intended that the party seeking to enforce the award should be required to seek recognition of the award from both the DIFC Court and the Dubai Courts".

[315]Egan [DIFC CFI 2014], para. 41: "*I find no support in public policy for the proposition that Articles 42 and 43 of the DIFC Arbitration Law should be construed restrictively in the manner which the Defendants/Applicants contend. Whether or not, as a matter of public policy, a foreign arbitral award should be recognised or enforced is for consideration, in the particular case, under Article 44(1) (b) of the DIFC Arbitration Law. It does not go to the question of jurisdiction to entertain the claim*".

[316]Banyan Tree Corporate PTE Ltd v Meydan Group LLC, DIFC CFI 003/2013, 27 May 2014.

[317]Banyan [DIFC CFI 2014], para. 1–3.

law.[318] Meydan (the award debtor, a company incorporated in mainland UAE, owned by the Dubai government)[319] opposed the enforcement request, on the basis that Dubai Courts were the proper forum, and that the DIFC Courts lacked jurisdiction due to the total absence of any connecting factors between the parties and the DIFC.[320] The judgment issued was limited to determining the issue of jurisdiction.[321]

B.1 Parties' arguments

Meydan argued that since the award has no connection with the DIFC, the DIFC Courts have no basis for jurisdiction and Dubai Courts have exclusive jurisdiction. Meydan's argument was based on the UAE Civil Procedure Law that determines personal jurisdiction, "*in order to establish jurisdiction within the DIFC Courts, Banyan must show that some special requirement has been met such as to trump the general jurisdiction of the Dubai Courts*".[322] Meydan also argues that even if the DIFC Courts have jurisdiction, they should abstain from exercising under the doctrine of *forum non conveniens*.[323]

In its arguments, Banyan relied on the same legal authorities as the Claimant in Egan.[324] While admitting that the parties and the arbitral award have no connection to the DIFC, Banyan argued that applicable DIFC Laws did not condition the Courts' jurisdiction on a connection with the DIFC.[325]

B.2 Holding of the First Instance Court on jurisdiction

The Court found that despite being issued in the context of a foreign award, the Egan judgment was nevertheless binding in the present case.[326] The Court notably emphasized that the jurisdiction of the DIFC Courts is based on its own laws, and that "*[t]he Federal legislation [forming the basis of Meydan's defense] is therefore irrelevant and not applicable*

[318]Meydan Group LLC v Banyan Tree Corporate PTE Ltd, DIFC CA 005/2014, 3 November 2014, para. 3.

[319]Diligencia Group, Report on Meydan Group LLC: "*Based in Dubai, United Arab Emirates, Meydan Group LLC is a Private Limited Company that was established in 2007. The organisation operates in the Holding Companies sector. The organisation is owned by Emirati based enterprises. It currently has 7 branches, subsidiaries and associated companies. This entity is identified as a State-Owned Enterprise (SOE)*".

[320]Banyan [DIFC CFI 2014], para. 16.

[321]Banyan [DIFC CFI 2014], para. 15, 28.

[322]Banyan [DIFC CFI 2014], para. 18.

[323]Banyan [DIFC CFI 2014], para. 21.

[324]These are based on Article 42 of the DIFC Law No. 1 of 2008 (DIFC Arbitration Law), Article 24 of the DIFC Courts Law and Article 5(A)(1)(e) Dubai Law No. 12 of 2004 (JAL). *See* Banyan [DIFC CFI 2014], para. 22–25.

[325]Banyan [DIFC CFI 2014], para. 26.

[326]Banyan [DIFC CFI 2014], para. 26. *See also* Banyan [DIFC CFI 2014], para. 30: "*[I]t is clear Justice Chadwick uses Article 5(A)(1)(e) of the Judicial Authority Law to act as the "gateway" by which Articles 42, 43 and 44 of the DIFC Arbitration Law confer jurisdiction on the DIFC Courts to recognize that the arbitral award in question is binding within the DIFC. I am in full agreement with this analysis*".

as jurisdiction of the DIFC Courts is to be determined by the Center's own laws".[327]

After making the two points above, the Court then affirmed its jurisdiction over the enforcement claim at hand, highlighting that no connection with the DIFC is required for the enforcement of domestic arbitral awards to fall under the Court's jurisdiction.[328] Furthermore, the Court rejected Maydan's *forum non conveniens* argument, on the basis that it only applies when the alternative form is a foreign court; rather, the doctrine does not apply where the alternative forum is one within the UAE.[329]

In response to Meydan's argument that allowing the enforcement action would constitute allowing Banyan to circumvent the ratification process in Dubai Courts amounts to abuse of process, the Court relied on the JAL to find that either one of the onshore or offshore courts may enforce the same arbitral award.[330] The Court relied on Justice Chadwick's opinion to reject the argument that the DIFC Courts must cede jurisdiction to the Dubai Courts in matters of arbitral enforcement.[331] The Court ultimately affirmed its jurisdiction over the claim.[332]

B.3 Appeal of judgment on jurisdiction

Meydan appealed Justice Al Muhairi's first instance judgment. The appeal was heard by Justices Steel, Giles and Al Madhani and the appeal judgment was issued in November 2014.[333] Writing for the majority, Justice Steel noted his "*difficulty in understanding the*

[327]Banyan [DIFC CFI 2014], para. 31.

[328]Banyan [DIFC CFI 2014], para. 33: "*Furthermore, I accept Banyan's argument that a connection with the DIFC to hear an application for recognition of an Award is not required. The gateway to jurisdiction, as set out above, is Article 5(A)(1)(e) of the Judicial Authority Law, which does not include such a requirement and such a requirement cannot be found in the DIFC Arbitration Law or DIFC Courts Law either*" (emphasis added).

[329]Banyan [DIFC CFI 2014], para. 34–36. *See* para. 36: "*For the purposes of discussion, since the alternative forum in this case is the local Dubai Courts, the doctrine of forum non conveniens is unrelated to the present case*". The holding that the doctrine does not apply when the alternative forum is a court of the UAE was elaborated in a previous judgment by Justice Al Madhani in Allianz Risk Transfer AG Dubai Branch v Al Ain Ahlia Insurance Company PJSC, DIFC CFI 012/2012, 30 April 2013. Notably, in contrast the Taaleem Court found that the contract's exclusion of *forum non conveniens* was a further pointer in favor of its jurisdiction since the doctrine does not apply in the Dubai Courts. In determining that the doctrine does not apply when UAE Courts are the alternative forum, the DIFC Courts render the doctrine inoperative in their courts too.

[330]Banyan [DIFC CFI 2014], para. 39: "*It is clear from the legislation above that the DIFC Courts and Dubai Courts cooperate to facilitate the recognition and enforcement of arbitral awards and it is customary, as evidenced by the legislation above, that both the DIFC Courts and Dubai Courts may recognize and/or enforce the same arbitral award*".

[331]Banyan [DIFC CFI 2014], para. 41: "*I agree with the opinion of Justice Chadwick [that the jurisdiction of the two courts is both exclusive and complementary] and as such reject Meydan's claim that it is an abuse of process for Banyan to approach the DIFC Courts for recognition and enforcement of the Award and that the DIFC Courts are required to cede jurisdiction to the Dubai Courts, as put forth in paragraph 3.14 of Defendant's Skeleton Argument*".

[332]Banyan [DIFC CFI 2014], para. 42.

[333]Banyan [DIFC CA 2014].

basis of the challenge to jurisdiction".[334] The Court rejected the abuse of process defense, finding that "*the question whether the bar on considering the merits of the DIFC order before the execution judge would also inhibit the Dubai courts from ruling on a challenge to the validity of the underlying award is a matter for the Dubai courts and is a matter on which we have heard no argument*".[335]

Relying heavily on Justice Chadwick's reasoning in Egan on the legislator's views on conduit jurisdiction, the jurisdiction of the DIFC Courts was confirmed.[336] The judgment was noted as confirming "*that the DIFC Courts will not entertain arguments to the effect that another court of the UAE is a more appropriate forum, or that bringing such a claim before the DIFC Courts is an abuse of process*".[337]

B.4 Holding of the First Instance Court on enforcement

After the court of appeal's confirmation of DIFC jurisdiction, in April 2015, Justice Al Muhairi – sitting in first instance – issued a judgment on the substantive claim for enforcement.[338] The Court ordered the enforcement of the Banyan award.[339]

Meydan informed the DIFC Courts that it would not take part in the proceedings.[340] Instead, Meydan filed a claim in Dubai Courts, requesting the annulment of the DIAC award. The request was rejected at each instance of Dubai Courts.[341] All Meydan's claims related to the Banyan award were rejected in Dubai Courts.

In 2013, Meydan filed a claim in Dubai Courts against DIAC and the members of its executive council, requesting the annulment of the award. The claim was refused by CFI,[342] and confirmed at appeal[343] and cassation.[344] Meydan was also unsuccessful in claims filed against the arbitrator who issued the award.[345]

C Confirmation of conduit jurisdiction in the Egan enforcement judgment

Following Justice Chadwick's judgment on jurisdiction in Egan, the claimants sought an order enforcing the awards from the DIFC Courts. On 29 July 2015, Justice Colman (sitting in the CFI) issued a ruling on the substantive claim.[346]

[334]Banyan [DIFC CA 2014], para. 15.
[335]Banyan [DIFC CA 2014], para. 44.
[336]Banyan [DIFC CA 2014], para. 50.
[337]Clifford Chance [16 November 2014].
[338]Banyan Tree Corporate PTE Ltd v Meydan Group LLC, DIFC CFI 003/2013, 2 April 2015.
[339]Banyan [DIFC CA 2014], para. 48.
[340]Banyan [DIFC CA 2014], para. 19.
[341]Meydan Group LLC v DIAC et al, DXB CC 210/2014, 25 June 2015.
[342]Meydan Group LLC v DIAC et al, Civil CFI 386/2013, 26 December 2013.
[343]Meydan Group LLC v DIAC et al, Civil CA 10/2014, 30 April 2014.
[344]Maydan [DXB CC 2015].
[345]Banyan [DIFC CA 2014], para. 12.
[346]Egan [DIFC CFI 2015], para. 1: "*This arbitration claim raises issues of some importance in relation to the ability of the DIFC Courts to recognise and enforce foreign arbitration awards. Those issues extend also to the enforcement of foreign judgments*".

The defendants challenged the enforcement on a number of grounds, including that in the absence of assets in the DIFC, enforcement is contrary to public policy under Article 44(1)(b)(vii) of the DIFC Arbitration Law as it deprives the parties of the judicial protections under UAE Law, which include Shariah principles.[347] As discussed above, this legal provision provides that the Court may refuse enforcement if it finds that enforcement would be contrary to the public policy of the UAE. More specifically, the defendants argued that since no assets were present in the DIFC, the action is an attempt to by-pass the procedures of the Dubai Courts and the application of the UAE Code of Civil Procedure, which is contrary to the UAE's public policy.[348] In addition, the defendants argued that the Court should exercise its discretion to refuse the enforcement.

The Court highlighted that the UAE's adhesion to the NYC was an important factor, and that consideration of the UAE's public policy must be done in light of the NYC.[349] Applying a literal interpretation of Article 7(2) JAL, the Court found that the use of the singular term "subject" was a clear indication that this provision "*expressly contemplates orders for execution of awards recognised by the DIFC Courts where the only subject of execution is in non-DIFC Dubai*".[350]

The Court highlighted that "*it cannot have been the legislative purpose of the JAL that it would be open to that executive judge to second guess the DIFC judge's decision to order recognition and enforcement*".[351] Furthermore, it found that the presence of assets within a court's jurisdiction has no bearing on the enforcement application, since an arbitration creditor may wish to obtain an execution order in anticipation of funds entering the territory.[352] Ultimately, Justice Colman found that:

> "*If the arbitrator creditor has chosen to obtain an order for enforcement in a state where no assets turn out to be currently available for execution, that is his misfortune and not the concern of the judge making the order for recognition*".[353]

The Court relied on evidence presented by legal experts from each side on the interpretation of "contrary to the public policy of the UAE" under Article 44. On the defendant's side was James Whelan, a British solicitor fluent in Arabic, with 14 years of experience practicing in the UAE and the unique distinction of having been admitted to the UAE bar in 1994.[354] An important part of his testimony hinged on his interpretation that by-passing the Dubai Courts would deprive the parties of their legitimate expectation to have

[347]Egan [DIFC CFI 2015], para. 18.

[348]Egan [DIFC CFI 2015], para. 38.

[349]Egan [DIFC CFI 2015], para. 40.

[350]Egan [DIFC CFI 2015], para. 42. *See* Article 7(2) Dubai Law No. 12 of 2004 (JAL): "*Should the subject of execution fall outside the Centre, judgments, awards and orders issued by the Courts and Arbitral Awards ratified by the Courts shall be enforced by an executive judge at Dubai Courts, subject to the following: [...]*" (emphasis added).

[351]Egan [DIFC CFI 2015], para. 43.

[352]Egan [DIFC CFI 2015], para. 44.

[353]Egan [DIFC CFI 2015], para. 44.

[354]Mr. Whelan's biography, available at: https://www.saudilegal.com/james-whelan (last accessed on 30

the arbitration agreement construed under the laws of the UAE in accordance with Shariah principles.[355] The court noted that during testimony, Whelan confirmed that he was not aware of any UAE court judgment that held a legislative provision contrary to public policy, and conceded that if there were assets in the DIFC and mainland Dubai, then enforcement in the DIFC Courts would not be contrary to public policy, even in the absence of any other link with the DIFC.[356]

The claimants' legal expert was Dr. Habib Al Mulla, who argued that enforcement would not give rise to any public policy issues.[357] Highlighting the arbitration-friendly practice of Dubai Courts, he affirmed that both courts would apply the NYC in a similar matter, and that the division of jurisdiction within Dubai as between the Dubai Courts and the DIFC Courts is a matter of public order.[358] Under that allocation, foreign awards may be enforced in Dubai either in the Dubai Courts or in the DIFC Courts, irrespective of the location of the assets or any other connecting factor with either jurisdiction.[359] The Court quoted an excerpt of his expert report which stated:

> "*Article 7 of the JAL establishes a regime of mutual recognition between the DIFC and Dubai Courts, which is intended to facilitate the free movement of judgments, decisions and orders between the Dubai and DIFC Courts and vice versa. This regime is based upon a statutory relationship between the two courts, which in turn finds its origin in both the DIFC and Dubai Courts belonging to the same family of courts, namely the Dubai Courts. This is supported by the fact that both courts have been established by decrees of the Ruler of Dubai and render their rulings in the name of the Ruler of Dubai. In other words, the DIFC Courts form part of the legal system of the Emirate of Dubai and as such ultimately qualify as a Dubai Court. With this in mind, it is the Ruler of Dubai, who is the fountain of powers in the Emirate, who has ordained the co-existence of the two sets of courts in the same Emirate*".[360]

In its discussion, the Court noted that while the public policy issue had not previously been raised as a defense to the recognition and enforcement to foreign awards in DIFC enforcement proceedings, the issue of abuse of process had been a subject of dispute in Banyan. The Court found the Banyan CFI's approach to be applicable to the dispute at hand, and rejected the public policy defense, finding that the claimant's were merely requesting the application of the DIFC Law, under which the UAE laws of procedure are inapplicable, and that any prejudice would be minimal given that expert evidence established

October 2021).

[355]Egan [DIFC CFI 2015], para. 46 and 47.

[356]Egan [DIFC CFI 2015], para. 50.

[357]Egan [DIFC CFI 2015], para. 51.

[358]Egan [DIFC CFI 2015], para. 52.

[359]Egan [DIFC CFI 2015], para. 53.

[360]Egan [DIFC CFI 2015], para. 53.

that Dubai Courts would adopt to same approach as the DIFC Courts.[361]

The Court ultimately granted the enforcement petition.[362]

D Problem-solving enforcement issues

With these two cases, the conduit jurisdiction of the DIFC was created and cemented. With the Egan case as the starting point, the DIFC Justices build on each judgment to issue a subsequent one. While the conduit jurisdiction doctrine was created in the context of enforcing a foreign award under an international treaty (Egan), it was applied some months later to enforce a domestic, Dubai-seated award, with a state-owned corporation as the award debtor (Banyan). Although initially the Banyan judgment relied on Egan, at the end of the saga, the Egan judgment relied heavily on the reasoning in Banyan, such that the two cases become both equal parts of the conduit jurisdiction doctrine. The fact that the Banyan judgments against a state-owned corporation were issued at first instance by an Emirati judge (Justice Al Muhairi), and that another Emirati judge served on the appeals bench is also significant – an important signal of the Courts' independence from the government, and of the political support towards this independence.[363]

The adoption of the conduit jurisdiction doctrine by the DIFC Courts was a showcase of the Court's daring, experimental nature. Although it is plausible – and even likely – that the DIFC Courts Justices had sounded out potential reactions to the doctrine through the Emirati Justices, in discussions with the Dubai Courts in the Joint Committees and through other informal channels, it was a bold assertion of jurisdiction and an excellent marketing tool for the Courts. All the pieces fell together, with the Dubai Courts seemingly supporting this initiative from the DIFC Courts, cementing the latter's position as "enforcement courts".

[361]Egan [DIFC CFI 2015], para. 62: "*The core of the Defendants' reliance on this argument is that such an order would drive them into a position in which, notwithstanding there being no proof of assets currently in the DIFC and there being no domicile there, they were exposed to DIFC Courts procedure whereas, had recognition been sought in non-DIFC Dubai they would have had the benefit of the CPC and in particular the Arabic language. In other words the Claimants' deployment of the DIFC Courts as the port of entry for enforcement of foreign awards was not only unjustifiable on the grounds of the location of assets and the Defendants' domicile but was procedurally prejudicial to the Defendants. However, in adopting the course of recognition which they did the Claimants were doing no more than the enacted procedure of the Emirate permitted. The locale of assets or domicile in the place of application (DIFC) was not mandatory under the Arbitration Law or the JAL and the unavailability of the CPC Procedure was a necessary consequence of the operation of the JAL. The extent to which that latter consequence would be procedurally prejudicial would indeed be minimal, given that the expert evidence indicates that the non-DIFC Dubai Courts would confine their investigation of the award to those same matters under Article V.2(b) of the New York Convention which the DIFC must consider in deciding whether to order recognition*".

[362]Egan [DIFC CFI 2015], para. 67.

[363]Although most contracts concluded with state-owned entities would typically provide for disputes to be resolved in local courts, this is not the case for high-stakes contracts concluded with power international companies that have significant bargaining power (a significant portion of these provide for arbitration). There are other disputes like Banyan, that share these characteristics (state-owned entity and powerful international company), although whether they would be brought before the DIFC Courts depends on the most appropriate enforcement strategy for each case.

Despite an initial set-back,[364] the application of the conduit jurisdiction doctrine to the enforcement of foreign judgments was blessed by the DIFC Court of Appeal in February 2016.[365] In 2016, enforcement claims were described as having contributed to significant increase in the DIFC Courts workload.[366]

After adopting, in January 2014, the conduit doctrine through the conversion of arbitral awards to DIFC judgments, the DIFC Courts' announced their adoption of another enforcement tool. The "*brainchild of a number of locally and London based practitioners*",[367] the idea was to convert money judgments into arbitral awards, and therefore benefit from the treaty regime of the NYC for enforcement.

During the annual DIFC Courts Lecture on 19 November 2014, DIFC Courts Chief Justice Hwang introduced it as an "*experiment without parallel*"[368] and "*an initiative that the DIFC Courts have formulated which could be the model for other countries to adopt so as to make state court judgments as enforceable as arbitration awards*".[369] The consolidation of the DIFC Courts and the DIFC-LCIA Arbitration Centre under the direction of Justice Hwang in May 2014 made this expansion of jurisdiction by the DIFC Courts a possibility, since the courts and the arbitration centre were no longer independent from each other.[370] During the lecture, Justice Hwang noted that while he was confident that common-law jurisdictions would welcome such conversions, it was unclear whether this would be the case in civil-law jurisdictions.[371] However, he encouraged parties to adopt the proposed clause, stating:

> "*This is not a universal panacea to the problem of cross-border enforceability of judgments but what have you got to lose by adopting such an arbitration agreement in your submission to the jurisdiction of the DIFC Courts? Your judgment will always remain in force, whatever happens to your post-judgment arbitration, so all that would be at risk would be the costs of starting the arbitration and (if there is still a refusal to pay the judgment sum) the costs of actually taking the arbitration to its conclusion which, given the fact that it is based on a binding court judgment, will likely not be significant*"[372] (emphasis added).

[364] DNB Bank ASA v (1) Gulf Eyadah Corporation (2) Gulf Navigation Holding PJSC, DIFC CFI 043/2014, 2 July 2015 (Justice Al Madhani found that the conduit jurisdiction doctrine is limited to foreign awards, and does not apply to foreign judgments).

[365] DNB Bank ASA v (1) Gulf Eyadah Corporation (2) Gulf Navigation Holding PJSC, DIFC CA 007/2015, 25 February 2016 (overturns the first instance judgment and confirms that the conduit jurisdiction doctrine applies to both foreign awards and foreign judgments).

[366] The National [30 July 2016]: "*DIFC said that the biggest increase in its workload came from a huge growth in the number of enforcement cases in which DIFC judges can force parties to pay up once an award has been made against them*".

[367] Global Arbitration Review [11 July 2014] (quoting Natasha Bakirci, assistant registrar of the DIFC Courts).

[368] [DIFC Courts, 16 February 2015, para. 5].

[369] [DIFC Courts, 16 February 2015, para. 1].

[370] Global Arbitration Review [30 May 2014].

[371] [DIFC Courts, 16 February 2015, para. 9(b)].

[372] [DIFC Courts, 16 February 2015, para. 9(c)].

The proposal was the object of a public consultation that took place between July and August 2014.[373] In May 2015, a practice direction was issued by the DIFC Courts to that effect, inviting parties to explicitly agree that in the case of a dispute, their final judgment would be converted into a DIFC-LCIA arbitration award.[374] The DIFC reported "*overwhelmingly positive*" responses to the proposal.[375] While some commentators highlighted some potential obstacles to the success of this approach, they nevertheless noted that "*the [Practice] Direction demonstrates the forward-thinking nature of the DIFC and its appetite to address big issues*".[376]

Support for the conduit jurisdiction concept was high. With Dr. Al Mulla's expert testimony in Egan endorsing the doctrine, the disagreements about the DIFC's field of action appeared long gone. Across the board, conduit jurisdiction was viewed as a welcome arrangement that would yield faster enforcement results than within Dubai Courts. Some commentators noted that it remained to be seen whether the execution judge of Dubai Courts would ultimately order the execution of the DIFC Courts order on enforcement, but given that Dubai Courts had refused to annul the Banyan award, cautious optimism was in the air.

3.4.4 Enter the Oger: For whom the bell tolls?

The conduit jurisdiction doctrine appeared firmly established. In 2015, Oger Dubai LLC ("Oger")[377] sought the enforcement of a DIAC arbitral award seated in Dubai in its favor against Daman Real Capital Partners LLC ("Daman").[378] Both parties were DIFC entities.

On 26 September 2015, the DIFC Courts granted a freezing order to Oger on the basis that Daman was engaging in immoral commercial conduct. Daman petitioned the Dubai Courts seeking the annulment of the arbitral award. On 30 December 2015, the DIFC

[373]DIFC Courts [30 July 2014]. A second public consultation took place in December 2014 (*See* DIFC Courts [17 December 2014]).

[374]DIFC Courts [27 May 2014] (recommending the following clause: "Any Judgment Payment Dispute (as defined in DIFC Courts Practice Direction No 2 of 2015) that satisfies all of the Referral Criteria set out in the Practice Direction may be referred to arbitration by the judgment creditor, and such dispute shall be finally resolved by arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause. There shall be a single arbitrator to be appointed by the LCIA Court pursuant to Article 5.4 of the DIFC-LCIA Arbitration Rules. The seat, or legal place of arbitration, shall be the Dubai International Financial Centre. [...]".

[375]Lilley et al. (Bryan Cave Leighton Paisner) [3 November 2014]: "The feedback was overwhelmingly positive, and the DIFC Courts were praised for what is seen as an innovative proposal to increase enforcement options for clients who choose the DIFC Courts to resolve their disputes".

[376]Marsh and Alnumairy (Al Tamimi & Co.) [September 2015].

[377]Diligencia Group, Report on Oger Dubai LLC: "Oger Dubai LLC is a Private Limited Company that was established in 2005 in Dubai, United Arab Emirates. The organisation operates in the Business Support Services sector". The Oger group is owned by the Hariri political family of Lebanon.

[378]Diligencia Group, Report on Daman Real Capital Partners Company: "Established in 2004, Daman Real Estate Capital Partners Limited is a Private Limited Company based in Dubai, United Arab Emirates. The organisation is owned by American, Dutch, and Emirati based enterprises. The organisation operates in the Real Estate sector. This entity is identified as a State-Owned Enterprise (SOE)".

Courts issued a conditional enforcement order under the following terms: the DIFC Courts will stay proceedings until Dubai Courts issue a judgment on the annulment action, and Daman must post security with the DIFC Courts by a certain after, after which the failure to do so will lead to an automatic enforcement order for the arbitral award. On 26 January 2016, the Dubai Courts of First Instance refused the annulment application, on the basis that the DIFC Courts have jurisdiction over disputes relating to DIFC entities.

On 8 June 2016, the Dubai Court of Appeal dismissed the appeal filed against the lower court judgment, and confirmed the absence of jurisdiction over the annulment action. On 16 June 2016, the DIFC Courts, acting on the basis that since Dubai Courts had refused to annul the award twice beforehand that the annulment action had therefore little to no chance of success, ordered the winding-down of Daman. Presumably, the DIFC's Court did not anticipate that this judgment against the background of Daman, the knell had sounded for the conduit jurisdiction doctrine.

On 6 June 2016, the Dubai Ruler issued a Decree creating a Joint Tribunal to resolve conflicts of jurisdiction between the DIFC Courts and Dubai Courts. In its first judgment, the JT ordered the DIFC Courts to cease entertaining the Oger enforcement claim since there was a clear conflict of jurisdiction between the two courts. The JT highlighted that since Dubai Courts were seized first with the annulment action, they have exclusive jurisdiction over the claim seeking annulment of the arbitral award, and that the DIFC Courts must stay proceedings until a final ruling on annulment. The JT also made a point of distinguishing the present enforcement claim from that for an international award under the NYC.[379] While it has been suggested that the Daman judgment led to the creation of the Joint Tribunal, this is unlikely given that the Decree featuring predates the judgment.

In its original iteration, the legitimacy of the conduit jurisdiction was questionable. As the number of Emirati justices on the DIFC bench increases, the DIFC Courts legal position that safeguard the public policy of the UAE against enforcement of awards and judgments will become increasingly fine-tuned. As it currently stands with the majority-international bench, the DIFC Courts have had very little direct engagement with local law in their judgments (see Section 3.5 below).

The DIFC Courts are also not always coherent in their jurisprudence. According to the principle of '*exequatur sur exequatur ne vaut*', it is not possible to hide a judgment behind a judgment. This principle under which "judgment bleaching" is banned was recently upheld in English law.[380] In the recent judgment reiterating the principle, the London Court notably does not refer to the DIFC Courts' conduit jurisdiction jurisprudence. That the DIFC Courts would allow for Dubai what is categorically banned in England is inconsistent at law, and also sends the wrong message that principles can be bent based on the circumstances.

[379]Daman Real Capital Partners Company LLC v Oger Dubai LLC, DIFC JT CC 001/2016, 19 December 2016: "There is no similarity between this case and the case when it's sought to enforce or annul a foreign arbitral award in several jurisdictions pursuant to the New York convention 1958".

[380]Strategic Technologies Pte LTD v Procurement Bureau of the Republic of China Ministry of National Defence, EWHC 362 (QB), 21 February 2020 (refusing to enforce a judgment on a judgment under the Administration of Justice Act, 1920). For the position on the European Union level, *see* Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA. (Convention on Jurisdiction and the Enforcement

While the conduit jurisdiction experiment proved short-lived, the DIFC Courts' forward-looking approach to arbitration issues earned it significant recognition recently, when the DIFC Courts was declared the default arbitration seat in Dubai, thereby crowning the DIFC Courts as the arbitration courts of Dubai.

3.5 Intercourt dynamics: How do the Courts of Dubai engage with each other?

How do the interactions between the two court systems of Dubai fit within Slaughter's model of judicial relationships? Section 3.4.1 above describes the cooperation networks set up between the two court systems in Dubai, which allow them to meet privately, exchange information and engage together. The two courts have also issued joint protocols outlining the outcome of their discussions on difficult topics, such how jurisdiction is divided between them and what conditions apply to the reciprocal enforcement of judgments and orders. This section takes a step further in studying their interactions, by scrutinizing a subset of judgments from each first instance court for signs of "judicial dialogue" i.e., cross-referencing.

References by Dubai Courts to DIFC Courts were studied and analyzed (3.5.1), as were those by DIFC Courts to Dubai Courts (3.5.2).

3.5.1 References to DIFC Courts judgments by Dubai Courts

Judicial dialogue exists where courts refer to or cite judgments from other courts in their own decisions – not as binding precedent, but rather as persuasive authority. Of particular interest for the discussion of this paper is whether there are cross-references between the courts of Dubai. One may argue that given that Dubai Courts follow the civil law system – of which the absence of judge-made law is a defining characteristic – there would not be any references to any judgments whatsoever, let alone judgments issued by the DIFC Courts. This argument misrepresents the practice and function of past judgments in civil law legal systems: while judgments do not have force of law equal in weight to legislation, they play an important role in maintaining consistency over time between the interpretation and application of legal principles derived from legislation.

As will be discussed in (A) below, Dubai Courts frequently reference judgments from the Dubai Court of Cassation – and sometimes from the Dubai Court of Appeal or courts in other Emirates – in their legal reasoning. Textual analysis of Dubai Courts judgments reveals that references are made to the DIFC Courts and to DIFC law (B). However, due to the difference in legal systems (and not due to the civil law system in Dubai Courts), the

of Judgments), EUECJ C-129/92, 20 January 1994 (finding that the Brussels Convention does not apply to enforcement proceedings in EU Contracting States pertaining to the recognition and enforcement of judgments issued outside the EU). *See also* Einhorn [2010]. For an example of a case where an American judgment enforcing a foreign arbitral award was recognized in a third country (France), *see* Cour de Cassation, Civ. 1, 17-19.240, 26 June 2019.

expectation remains that Dubai Courts would not cite DIFC Courts jurisprudence in their legal reasoning. This hypothesis is tested in (C) below.

A Background: Judgment publication in Dubai Courts

Prior to 2018, Dubai Courts judgments were not widely available to the public. Legal consultants (or any member of the public) could purchase a yearly court reporter of several volumes in paper format (and in some years, a CD-ROM) that was published mid-year, containing judgments from the year prior. The digital publication of Dubai Courts judgments took place in two phases. During the first phase in 2018, judgments from 2016 onwards in four court divisions (Civil, Commercial, Real Estate and Labor) were published.[381] In 2019, in a move towards greater transparency and accessibility, the Dubai Courts website published judgments in the 4 court divisions from 2010 onwards, with judgments prior to 2010 available to court subscribers.[382] The record of published judgments on the Dubai Courts website is regularly updated.[383]

Although the Dubai Court judgments are published, they are not indexed for legal research purposes.[384] The search function on the website is limited to references of the judgment, by year and case number. There is also an option to search by a predetermined selection of keywords. For those reasons, in May 2018, I started scraping the Dubai Courts judgments on a private database for this research. Since then, the database has been updated regularly, and contains more than a quarter million Dubai Courts judgments for cases registered in the 4 departments above since 2010.

Although judgments were not publicly reported in real-time, prior to 2018, it was established practice for Dubai Court litigators to routinely refer to past judgments in their pleadings, and for Dubai Court judges to regularly – if not always – refer to higher court judgments in their own discussion of applicable legal principles. Therefore, since the practice of referring to past judgments was already in place, one may argue that the impact of faster, real-time judgment publication on the practice of law in the Arabic-language, civil-law Courts of Dubai would be limited, at least in the short term.[385]

The expectation of limited impact in the short-term is reinforced in light of the relatively lower fees charged by civil-law lawyers, compared to their common-law counterparts: although there is no evidence that research of applicable legal principles under common-law legal systems would take significantly longer (and therefore, lead to higher legal fees), – unlike the discovery process – changing long-term habits of the practice may arguably lead to a short-to-medium term increase in legal fees.

Perhaps the greatest argument is that as long as they maintain a steady client base, civil-

[381] Prior to 2018, there had been an attempt at digitization, with judgments published comprehensively in a telephone application, but that was discontinued shortly after.

[382] Gulf News [17 June 2020].

[383] *See* Dubai Courts, Judgment Publication.

[384] English-language summaries of some judgments are available on LexisNexis Middle East.

[385] If, in contrast, there had been no pre-existing practice of referencing past judgments from higher courts, then the mass digital publication might be expected to produce greater short-term effects.

law lawyers might take the view that they have little-to-no incentive to modify their practices. However, an exodus – through forum-selection clauses – out of the civil-law courts into the DIFC Courts or arbitration would – or should – lead them to evaluate the quality of their legal services, and their communication and transparency with clients on their understanding of the law and court proceedings. Here, more understanding of jurisprudence through the wider study of court judgments would be helpful, not only in improving the overall quality of the legal process, by encouraging the court to distinguish past judgments from present disputes, but also in improving the transparency and accessibility of the law, such that lay court users would be able to have some level of understanding of how the law applies to fact-patterns.

B Patterns of references

Textual analysis of Dubai Courts judgments reveals that the Dubai Courts do indeed refer to DIFC law and to the DIFC Court. After describing the text analysis methodology (B.1), this section analyzes the results with respect to patterns of reference (B.2).

B.1 Methodology

For the text analysis, a Structured Query Language ("SQL") search was conducted using the private database of collected Dubai Courts judgments. Features in the SQL database were used to search for various iterations of Arabic terms that include: "DIFC Court(s)", "Court(s) of DIFC", "Court(s) of the International Financial Centre", "Court(s) of the Financial Centre", in addition to common typographical errors that were observed in these. The search terms that include the phrase "DIFC" were conducted both in English and Arabic. The total yield was 693 judgments.

The number of judgments with references can paint an incomplete picture: in the examples given above, the 1000-word document with a single reference is counted as one judgment, just as the 500-word document with 10 references. To complete the picture, a built-in feature in SQL was used to calculate the relevance of these keywords within the document. For example, if a 1000-word document contains one single reference to "DIFC Court(s)" (and other iterations), and a 500-word document contains ten references throughout, the relevance score reflects the fact that the second document is more relevant than the first. The higher the relevance score, the more relevant the document.[386] This technique is commonly used in search engines to sort results in order of relevance.

B.2 Findings

First, the number of judgments with references was studied. In this analysis, any judgment with at least a single reference to DIFC Courts (and other iterations) would be included irrespective of the actual number of references within or their relevance. The first question

[386] *See* MySQL, 12.10.1 Natural Language Full-Text Searches.

was the number of such judgments issued per year.

As seen in Figure 3.3, the number of judgments with references remains below 10 in 2010, 2011 and 2012, before increasing ten-fold in 2013. The number remains stable in 2014, followed by and decreases approximately 20% in 2015. The 2015 level is maintained through to 2018. The number then increases by around 40% in 2019, and by 20% in 2020.

Figure 3.4 depicts the relevance score. When the average relevance score per judgment, per year was calculated, a steady increase in relevance is observed. In the first three years (2010, 2011 and 2012), there are 3, 6 and 8 judgments respectively, which are small sample sizes. Therefore, the average relevance score in those years is not reliable for inference, and cannot be used as such.

Although 2013 and 2014 have an equal number of judgments (84) with at least one reference, the reference score in 2014 is lower than 2013. In 2015, despite the lower number of judgments with at least one reference (62), the reference score is almost double that of 2013 and 2014. This is also the case in 2016, where the number of judgments with at least one reference was even lower than 2015 (53), but the relevance score was double the previous year. The relevance score then increased again in 2017, before dipping in 2018. Since 2018, it has maintained a steady upwards trajectory.

C Nature of references

The number of judgments that contain at least one reference to DIFC Courts, together with the relevance score, provide important information about the relationship between the two court systems. To complete the painting of judicial interactions, the nature of the references must be examined more closely. This section describes the methodology of determining the nature of references (C.1) and the findings (C.2).

C.1 Methodology

After determining how many Dubai Courts judgments contain at least one DIFC Courts reference, and establishing how often references are made per judgment, we now delve deeper into these judgments to understand their nature. Studying the nature of references gives rise to one important question: do Dubai Courts rely on DIFC judgments in their legal analysis the way they do with appeals and cassation decisions from UAE Courts? Given the differences in the legal system and language between the two courts, the suspected answer is "no."

Starting from the assumption that any citation to a DIFC Courts judgment would also contain a reference to DIFC Courts, the search was limited to DIFC Court(s) in various iterations, following which the results were manually sorted through to search for references to DIFC Courts judgments. Since there is no standard style of referencing DIFC Courts judgments, running a search query with the exact or approximate terms would not be sufficiently reliable. Therefore, manual search of a subset of judgments is the most appropriate method.

In order to verify this answer, one could read all 693 Dubai Courts judgments that

reference DIFC Courts. However, in the interest of practicality, and since the hypothesis is that these are not justification references, reading a subset of these 693 judgments would establish, with statistical confidence, an answer to this question.

To determine whether or not at least 10% of the 693 Dubai Courts judgments refer to DIFC Courts judgments in their legal reasoning, the hypothesis to be tested may be defined as follows: H: There are fewer than 69 judgments in the set of 693 Dubai Courts judgments refer to DIFC Courts in their legal reasoning.

This yields the following null hypothesis: H_0: There are at least 69 judgments in the set of 693 Dubai Courts judgments that refer to DIFC Courts in their legal reasoning.

Formally, the hypothesis test is defined as follows. Read N random judgment texts (from the 693 judgments), to determine if any of them contains a reference in their legal reasoning. If none of the N judgments contain such a reference, then the null hypothesis H_0 may be rejected. If at least one of the N judgments contains a reasoning reference, then the null hypothesis H_0 may not be rejected.

There are two parameters that characterize the level of confidence in statistical hypothesis testing. The first is the type I error (also known as α, the false-positive rate), which is the probability that the test incorrectly rejects the null hypothesis (i.e., despite being correct, the null hypothesis is (incorrectly) rejected). The second such parameter is type II error (also known as β, the false-negative rate), which is the probability that the test is unable to reject the null hypothesis (i.e., despite being incorrect, the null hypothesis is (incorrectly) not rejected). The values of these two parameters dictate the size of the sample, N, that is to be manually inspected in the proposed statistical test. Acceptable values for these parameters in the literature are $\alpha = 5\%$ and $\beta = 20\%$ (lower is better).

Power analysis shows that by setting N to 50, we achieve $\beta \leq 20\%$ and $\alpha \leq 0.5\%$ (which is significantly better than the literature-acceptable value of $\alpha = 5\%$). In other words, by reviewing a sample of 50 randomly selected judgments (out of the 693 total judgments), the proposed test would meet the aforementioned standards.

C.2 Findings

After reviewing 50 randomly selected Dubai Courts judgments, none contained a reference to a DIFC Courts judgment in their legal reasoning. Therefore, the null hypothesis H_0 is rejected, and the original hypothesis H is accepted. In other words, with a low probability of being wrong (less than 0.5%), it can be inferred that fewer than 10% of the 693 judgments make reasoning references to DIFC Courts judgments in justifying their own decisions.

3.5.2 References to Dubai Courts jurisprudence by DIFC Courts

With respect to DIFC Courts, the some 200 judgments issued at the first instance between May 2007 and August 2021 were examined to observe and evaluate interactions of the DIFC Justices with judgments from the mainland Dubai Courts, in the form of citation or reference.

In a judgment issued on 12 May 2013, Justice Colman discussed the reception of non-

DIFC law that may be material to disputes before the DIFC Courts.[387] There, the justice highlighted that while foreign law must be proven as fact before the court, the question was whether UAE law (including law of mainland Dubai) would be treated as foreign law.[388] Justice Colman established the method under which UAE law would be received in the DIFC Courts, which is different depending on the composition of the court under the particular dispute: when the bench is composed of common-law trained justices, then UAE law must be proven as evidence; but when a UAE judge – trained in UAE civil-law and in DIFC law – is sitting on the bench, then the judge would not necessarily require evidence of UAE law, although they may be assisted by it.[389]

A number of interesting trends were observed. Firstly, as expected, the DIFC Courts predominantly refer or cite to judgments issued by courts in England.[390] However, there were a number of instances where the DIFC Courts referred to precedent from other common-law courts such as Australia[391] and Canada.[392]

As for judgments issued by the mainland Dubai Courts, these are predominantly referred to in the discussion of past or pending proceedings related to the dispute before the DIFC Court.[393] However, a small number of instances were identified where the DIFC Courts cited

[387]Taaleem P.J.S.C. v (1) National Bonds Corporation P.J.S.C. (2) Deyaar Development P.J.S.C., DIFC CFI 014/2010, 10 July 2013.

[388]Taaleem [DIFC CFI 2013], para. 4: "*There is no doubt, in my judgment, that if one were dealing in this court with the law of a country in, for example, western Europe, let us say French law, and that was pertinent to the issues which had to be determined by the court, it would be necessary, applying general principles of English commercial law, to prove that law as a question of fact. I do not think there was any really serious issue between the parties as to that proposition. The peculiarity which arises, however, in this case is whether non-DIFC Dubai law should be treated in the same way as a real and genuine foreign law and which has to be proved in exactly the same way as it would have to be proved if it were, for example, French law*".

[389]Taaleem [DIFC CFI 2013], para. 7–8: "*For these reasons it seems to me that the DIFC Courts should take a realistic and practical approach to the problem to which this present case gives rise. That approach, in my judgment, should be this. In a case where the court is manned by a non-Dubai national, that is to say a judge whose training is in the Common Law system, the judge in the ordinary way can be expected to require that the Dubai non-DIFC law will be established by evidence. I hesitate to say by evidence given by expert witnesses because it is appropriate that it should be, if necessary, established by any receivable evidence of appropriate quality, including textbook writings which can be explained to the judge in question and from which he can derive the conclusions necessary for the purpose of resolving the issues of non-DIFC Dubai law between the parties. 8. Where the case is manned by a judge who has been trained in Dubai non-DIFC law, it seems to me that in the ordinary way it should not be necessary for such a judge to require that expert evidence should be called, either evidence given by witnesses or evidence given in a written form, for him to resolve the issues which may arise. Of course, he may feel that he would be assisted by that kind of evidence. There may be cases where the issues of Dubai non-DIFC law are particularly complex or where views of writers upon the subject, or decisions of the courts in Dubai, are in conflict. In those circumstances it may be of assistance to the judge in question to hear the views of writers and academic opinion as to what the law may be*".

[390]*See for example:* Howard Norman Leedham v Oxford Investment Managers Limited, DIFC CFI 006/2008, 21 June 2010; Hussain Saleh-Farid Al-Awlaqi, Andrew Tamplin Clout and Tabarak Partners LLP, Khuram Hussain, Ziad Naim Baya'a, DIFC CFI 023/2009, 22 December 2010.

[391]Ibrahim Saad v Rasmala Investments Limited, DIFC CFI 007/2009, 22 November 2009.

[392]Tvm Capital Healthcare Partners Limited v Ali Akbar Hashemi, DIFC CFI 045/2012, 22 May 2014 and Asif Hakim Adil v Frontline Development Partners Limited, DIFC CFI 015/2014, 3 April 2016.

[393]*See for example:* Mahesh Srichand Tourani v (1) Dusty Tourani (2) Duzty LLC, DIFC CFI 007/2018, 13

Dubai Courts judgments in their discussion of local UAE law.

In a judgment issued in November 2010, in the context of a dispute concerning which of the two courts (Dubai or DIFC) have jurisdiction, the Court reported evidence presented by a party-appointed legal expert – a UAE advocate with rights of audience in UAE Courts – which included judgments issued by Dubai Courts in 1998 and 2004 in application of the UAE Civil Procedure Code.[394] After citing the two Dubai Courts judgments and their interpretation by the claimant's legal expert, Justice Chadwick took the position that Dubai Courts would not apply the UAE Code of Civil Procedure, but rather, would reach the same conclusion (in favor of DIFC Courts jurisdiction) using a different route. The Justice distinguished the two Dubai Court cases from the present dispute, highlighting that the Dubai Courts would have applied the same law as the DIFC Courts, which would have led to a conclusion in favor of DIFC Courts jurisdiction.

While the absence of any citation to DIFC Courts judgments by Dubai Courts may be expected and explained by its civil law nature, the lack of meaningful commentary from the DIFC Courts on Dubai Courts judgments is puzzling. In a context where courts located at great geographical distance actively engage in cross-fertilization and communication through their judgments, the absence of any outward sign of communication from these courts within walking distance from one another is significant. One potential explanation is that there is some arrangement for their communication to take place directly and in private, rather than indirectly, in public judgments. Another explanation is that, out of deference to the civil law courts, the DIFC Courts avoid any public interpretation of non-DIFC UAE law. Either way, this is a lost opportunity for both courts to lead the way in bridging cultural, linguistic and 'legal system' gaps between them.

3.6 Conclusion

The case studies in this chapter – on the DIFC Arbitration Centre and the DIFC-Court's conduit jurisdiction – illustrate the expansive nature of foreign legal institutions. While the former encountered resistance from the outset, the latter was initially well received by the competing institution, before its constriction by the state. The initiative taken by the state to extend the DIFC Courts jurisdiction through legislation is an example of how states use the dynamic nature of legal systems to their advantage, augmenting or decreasing the power of their foreign agent based on their current interests.

The recent abolishment of the DIFC Arbitration Centre in September 2021 gives rise

December 2018; DIFC Investments LLC v Mohammed Akbar Mohammed Zia, DIFC CFI 001/2017, 15 May 2017; Hussain Saleh-Farid Al-Awlaqi, Andrew Tamplin Clout and Tabarak Partners LLP, Khuram Hussain, Ziad Naim Baya'a, DIFC CFI 023/2009, 22 December 2010.

[394] Taaleem PJSC v (1) National Bonds Corporation PJSC and (2) Deyaar Development PJSC, DIFC CFI 014/2010, 21 October 2010. The legal expert relied on the Civil Procedure Code, and two Dubai Court of Cassation judgments from 1998 and 2004 to argue that jurisdiction lies with the court where the real property is located, or at the domicile of the defendant, at the sole discretion of the claimant. The legal expert argued that in the present case, the Dubai Courts would apply the Civil Procedure Code, similarly to the application in the two judgments cited, and conclude in favor of DIFC Courts jurisdiction.

to the question of whether the DIFC Courts might also follow the same trajectory, and will eventually also be abolished, with their caseload absorbed by the local courts. In the meantime, the endorsement of the DIFC Court's default jurisdiction over arbitration softens the blow of the dissolution, and acknowledges the common law court's prime specialization in international disputes. Its result is deeper cementation of the DIFC Courts in Dubai's legal system. This endorsement may have an impact on the Joint Tribunal, where the majority Dubai Court judges give more deference to the DIFC Courts Justices in matters of arbitration. In that case, that would open the door for the DIFC Courts to engage meaningfully with mainland arbitration law, and offer interpretations that bring the law in line with international best practice.

The case studies illustrate the tensions faced by transplanted foreign legal institutions and highlight the risks for both the agent and the principal that occur from agency slack. Together, they suggest that principals view transplanted foreign institutions as forming one homogeneous entity. That is, the constriction or elimination of one agent (for example, the DIFC Arbitration Centre), that occurs simultaneously with the bolstering of another agent (here, the DIFC Courts) maintains the same net result as prior to the constriction and bolstering.

The chapter also empirically investigates the relationship between the two court systems in Dubai for signs of spillover between them. To that end, it uses a curated database of approximately 250,000 Dubai Courts judgments issued between 2010 and August 2021, as well as the some 200 DIFC CFI judgments issued during the same period. Building on the finding in the previous chapter that the DIFC Courts took the lead in defining their identity as a member of the family of courts of Dubai, this chapter shows that being family does not necessarily translate to having a close relationship. It argues that this is a lost opportunity for the two courts to foster valuable dialogue.

Together, the second and third chapters introduce the background under which foreign law was invited into Dubai and the UAE. The institution of the DIFC Courts in 2004 was made some 30 years after the UAE (formerly known as the Trucial States) had gained legal independence from British extraterritorial jurisdiction. The next chapter focuses on the UAE's dual legal system pre-1971, by constructing a historical account of the road away from legal pluralism, towards legal unification.

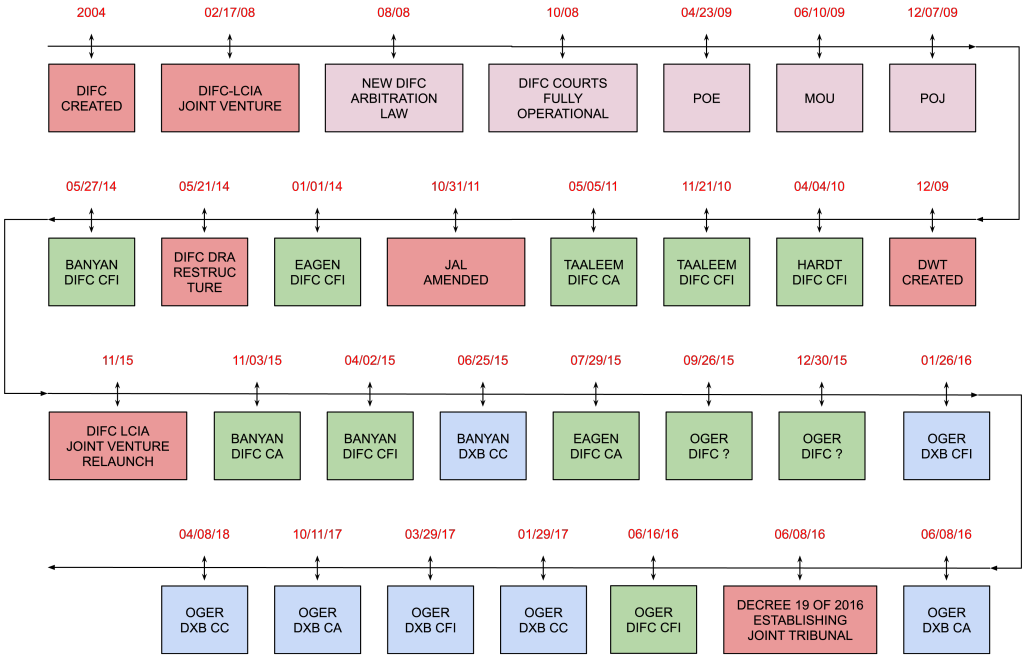


Figure 3.1: Timeline of Key Events and Disputes.

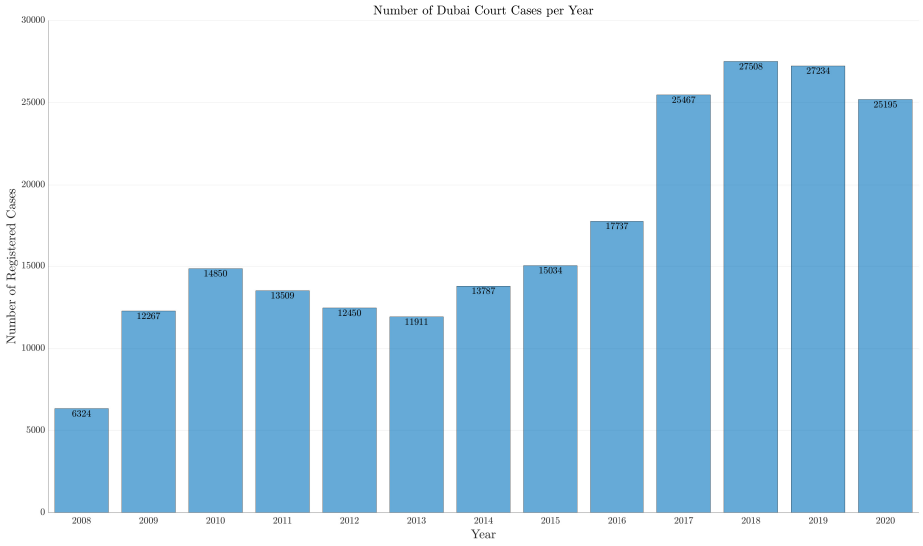


Figure 3.2: Number of Disputes Registered in Dubai Courts From 2008 to 2020.

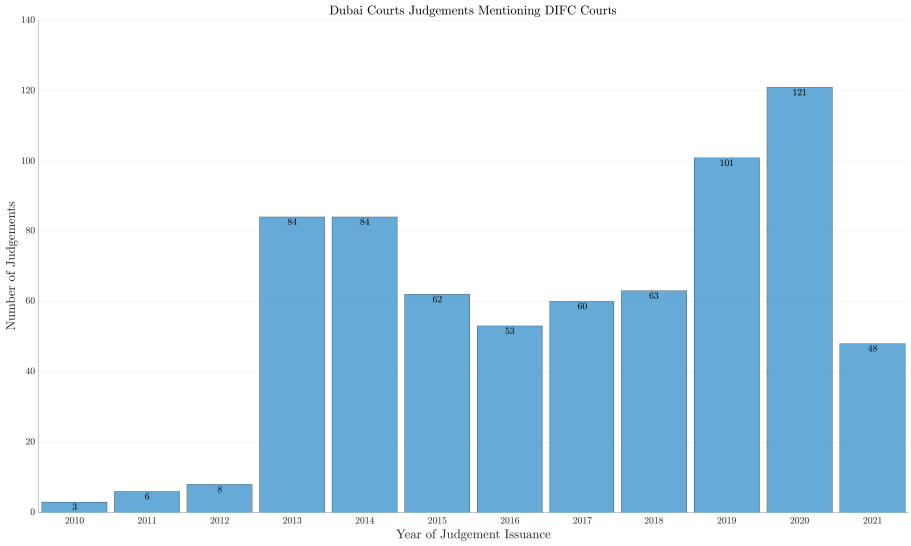


Figure 3.3: Number of Dubai Courts Judgments Mentioning DIFC Courts per Year.

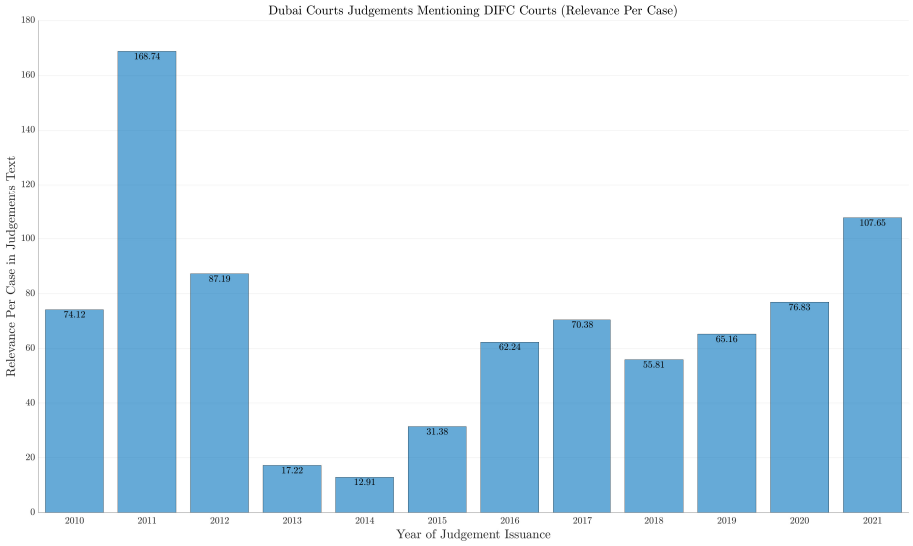


Figure 3.4: Text Analysis Calculating The Relevance of DIFC Courts Reference Per Judgment For Each Year Between 2010 and 2021.

Year	**Number of active CFI Cases**	**Number of Enforcement Cases**	**Number of Arbitrations**	**Total value of claims in CFI (in USD million)**	**Total value of Enforcement claims (in USD million)**
2008	9				
2009	36			214	
2010	27			112	
2011	31			33	
2012	42			169	
2013	28		1	255	
2014	36	8	6	479	
2015	25	42	12	1200*	293
2016	26	82	14	817*	749
2017	54	92	11	128*	926
2018	81	284	5	2800*	2800
2019	92	251	24	844*	708
2020	123	284	35	2400+	299

Table 3.1: Number of cases and total value of claims filed in DIFC Court of First Instance ("CFI"). * indicates claims filed in the DIFC CFI and the arbitration division. + indicates claims filed in the DIFC CFI, the Arbitration division and the Technology and Construction division.

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Chapter 4

The Retrocession of British Extraterritorial Jurisdiction in Abu Dhabi: The Road Away From Legal Pluralism

4.1 Introduction

In May 1972, W. J. Palmer, Judge of the Chief Court for the Persian Gulf ("Chief Court") departed from Dubai.[395] With him left the last remaining vestiges of British jurisdiction in the Trucial States.[396] In his last annual report on the Chief Court, Judge Palmer announced that in Abu Dhabi "*everything went smoothly and we were able to retrocede without difficulty*",[397] while in Dubai "*we can say that we have done quite as well as could possibly have been expected*".[398]

Upon their exit, British officials congratulated themselves on their success in implementing "*basic legal machinery in all the former protected states*".[399] In his last annual report, Judge Palmer concluded that "*[t]he passing of the British Courts will be regretted by many, but of course it was inevitable sooner or later. We can only hope that the example set by these courts has had some affect and that the principles of British justice will not be entirely forgotten in the Gulf. I hope that one day a history of our jurisdiction here may come to be written*".[400]

This paper seeks to write a piece of that history. Few studies have delved into the history of British jurisdiction in the Gulf in the years prior to 1971. These are often comparative in nature, and tend to focus on the states that were more developed at the time such as Bahrain, Kuwait and Qatar.[401] This is particularly the case for legal studies, where the central approach of the British Foreign Office translated into a unified policy for the whole Gulf region.

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[395]FCO 8/1820. Judge Palmer had been appointed to replace Judge Whyatt, who retired in 1966 (*see* FCO 8/97). At the time, there three resident British judges in the Gulf who all held appointments in the British Courts in Bahrain, Qatar and the Trucial States: Judge Palmer, the senior judge, resided in Bahrain and advised the Political Resident on legal policy, particularly with respect to retrocession, and heard appeals from the other two judges.

[396]Although British jurisdiction in other Gulf states had been entirely terminated during 1971, and despite retrocession of jurisdiction by Queen's Regulation in November 1971, followed closely by the formation of the United Arab Emirates ("UAE") in December 1971, it was nevertheless agreed that in the interest of tidiness, British jurisdiction would be exceptionally maintained for disputes that were pending a final decision in the Trucial States.

[397]FCO 8/1820, Annual Report of Judge of Chief Court for Persian Gulf, dated 19 March 1972.

[398]FCO 8/1820, Annual Report of Judge of Chief Court for Persian Gulf, dated 19 March 1972.

[399]FCO 8/1820, Letter from D G Allen enclosing Annual Report by the Judge of the Chief Court for the Persian Gulf, dated 11 April 1972.

[400]FCO 8/1820, Annual Report of Judge of Chief Court for Persian Gulf, dated 19 March 1972.

[401]Albaharna [1968]. *See also* Zahlan [1989]; Rabi [2006]; Sato [2017] (arguing that British withdrawal from the region resulted from a series of domestic decisions instead of deliberate foreign policy, and that peaceful transition spontaneously resulted from a series of ad hoc decisions that were not imposed by a central authority, but rather collaboration); Joyce [1999]. For a contemporaneous report on legal systems in the Arabian Gulf, *see* Liebesny [1956]: "*In the Trucial States there has as yet been no oil exploitation and consequently no impetus for the rapid development witnessed in the other Persian Gulf principalities. [...] There are no British advisers in the Trucial Coast and there is no developed administrative machinery. The shaykhs of the various states rule with the help of just a secretary. There are no municipal services and no organized local police force, order being maintained by the British-organized and British-commanded Trucial Levies. Legal cases are as a rule referred to the Ruler or a member of his family. If he cannot settle the*

This paper fills the gap. Using historical British Foreign Office documents from the Arabian Gulf Digital Archives, it reconstructs an account of Abu Dhabi's path away from British extraterritorial jurisdiction and legal plurality towards a single legal system under the Ruler's exclusive jurisdiction. Although this paper focuses on the Trucial States (mainly, Abu Dhabi and Dubai), where relevant, the parallel happenings and the trajectories of neighboring states are discussed, particularly where lessons learned in one state influenced British policy in another.

The paper makes a number of contributions. First, it shows that while Abu Dhabi's attempts at forging a path towards legal autonomy were initially frustrated by its relatively poor state of development, an unlikely chain of events – including a blunder on the part of the British Foreign Office – provided an opportunity for a retrocession that had thus far been out of the question. Second, it offers a deep look at British (post)colonial legal policy, and how policy was periodically adapted to meet British interests. Throughout, the paper presents a detailed historical account of the dualist legal system of the Trucial States, and the process and challenges of introducing modern western legal culture.

4.2 Methodology

The account in this paper is based on digital fieldwork that began in 2018. Early research was conducted using the Adam Matthews online records[402] titled "Confidential Print: Middle East, 1839-1969",[403] and "Foreign Office Files for the Middle East, 1971-1981",[404] but was not fruitful with regards to the Gulf legal systems.

The main venue for conducting this digital research was the Arabian Gulf Digital Archives ("AGDA"), "a joint project between the National Archives of the United Arab Emirates and the National Archives of the United Kingdom".[405] This digital archive contains materials

matter he passes it to the qadi. If one of the parties is dissatisfied with the qadi's decision, he can appeal to a qadi in another of the Trucial States. In commercial cases, two or three merchants act as a tribunal and refer the matter to the Ruler if they cannot settle it. If the Ruler likewise fails to settle the case, it is referred to the qadi. In consonance with Islamic thinking, the emphasis is thus upon arbitration and amicable settlement, with the qadi taking the case if measures of conciliation fail. Cases are decided primarily according to equitable rules and custom, except for personal status cases where the rules of Islamic law are observed". For biographical accounts, *see* Kelly [1968] and Hawley [1970].

[402]For the webpage pertaining to Middle East records, *see* Adam Matthew, Empire and Globalism.

[403]Adam Matthew, Confidential Print: Middle East, 1839–1969: "*Confidential Print: Middle East, 1839-1969* is part of *Archives Direct*, a cross-searchable multi-product platform, sourced from The National Archives, UK". *See also* Adam Matthew, Information on Archives Direct: "With our digital scanning facility based permanently at The National Archives, UK, Adam Matthew Digital is able to offer a range of area studies and theme-based, self-contained collections, all made available through a single portal".

[404]Adam Matthew, Foreign Office Files for the Middle East, 1971–1981.

[405]The National Archives, Research Guides – Foreign Office and Foreign and Commonwealth Office records from 1782 - 3. Online and published records: "Most in-depth research into Foreign Office records requires a visit to our site in Kew. There are, however, some online and published resources which allow you to search for and view a limited number of records without having to visit".

dating as far back as 1820. The AGDA was launched in May 2019,[406] and I began using it for digital fieldwork in July 2019.[407]

The AGDA search engine is rudimentary. Research can be conducted using "OCR [optical character recognition] keywords, date ranges and document references".[408] Despite the rudimentary nature of the ADGA search engine, the wealth of information it provided access to was quickly apparent, as even the most basic searches yielded in the output documents that provided insight into the pluralist legal system in the Gulf region.

The research was a long, painstaking and reiterative process, beginning with the initial preliminary searches, followed by the subsequent searches. The initial searches were based on searching for basic terms using the AGDA search engine: "court", "law", "legal", "retrocession", "Abu Dhabi" and "Dubai", followed by combinations of these terms (such as "Abu Dhabi law" and ""Dubai" AND "court"". Starting from the initial searches, information was then collected into a Microsoft Word table, that categorized the source based on the Year as cataloged by AGDA, Record Reference as cataloged by AGDA, Title of the File or Record as cataloged by AGDA, Description of the File or Record as cataloged by AGDA, followed by any notes taken about relevant information.

Subsequent searches were conducted on the basis of search terms obtained from prior searches. For example, a search for "retrocession" yields numerous Files, including FCO 8/1259, a 106-page document that includes a reference to "Salih Farah, the Ruler's legal advisor". Subsequently, the following searches would be conducted: "Salih", "Farah", "Salih Farah", ""Salih" AND "Farah"", "legal advisor", ""legal" AND "advisor"". Thus, over a three-year period, a curated personal catalog of AGDA was constructed, with the objective of collecting primary sources on the dual legal system of the Trucial States. This paper is based on a total of relevant 47 Files and Records that were found using the reiterative search process described above on AGDA.[409]

As it eventually became apparent, AGDA is not a complete record of Foreign Office documents pertaining to the Gulf region. The first phase of the digital archive features 500,000 digital documents.[410] In the second phase, which is scheduled to begin in 2023, three million documents will be added to the archive. This paper is based on digital fieldwork that was conducted using AGDA that were accessible online between July 2019 and April 2022.

A research trip to the National Archives located in Kew (United Kingdom) was contemplated to fill in any gaps. This did not materialize due to the restrictions to international travel that resulted from the global COVID-19 pandemic that took place between 2020 and 2022.

In spite of the above, the primary materials that form the basis of this paper are complete enough to construct a meaningful narrative of the dualist legal system in Abu Dhabi and

[406]UAE Government Portal, Public Consultation: The Arabian Gulf Digital Archive.

[407]According to my records, I first downloaded materials and began taking notes of my searches on AGDA in July 2019.

[408]The National Archives, Research Guides – Foreign Office and Foreign and Commonwealth Office records from 1782 - 3. Online and published records.

[409]See Bibliography below for a list of Files and Records.

[410]Telephone conversation with UAE National Archives in March 2022.

Dubai between 1950 and 1972, that may serve as a foundation for future research based on expansion of the AGDA record.

4.3 British extraterritorial jurisdiction in parallel to local law

British extraterritorial jurisdiction in the Gulf created two parallel legal systems: one administered by the British government under the Orders in Council, and one administered by the Rulers. Eventually, the pluralist legal system was a cause of friction between the Rulers and the British government representatives, the origin of which was the increasing desire for the Shaikhs to extend their territorial jurisdiction to the exclusion of the British. To allay the Abu Dhabi Ruler's pressure for wider jurisdiction than the British wished to give up, the implementation of Joint Courts was presented as a compromise. This plan ultimately backfired with the 1962 Ross case, which set off a chain of events that culminated in the development of a new compromise under which the first complete retrocession of British jurisdiction in a delineated subject-matter took place in Abu Dhabi, resulting in the first manifestation of absolute territorial jurisdiction for the Ruler.

The history of the British extraterritorial jurisdiction in the Gulf (4.3.1), is followed by an analysis of the Rulers' demands for territorial jurisdictional equality as an issue of sovereignty (4.3.2).

4.3.1 History of British extraterritorial jurisdiction in the Gulf: A series of *ad hoc* arrangements

British extraterritorial jurisdiction in the Trucial States came at the expense of the Shaikh's jurisdiction. The result was a pluralist legal system typical of the colonial era: a dual legal system, one foreign (British) and one indigenous/native. Gulf Rulers had expressly consented to this arrangement in the Orders in Council. Thus, the concept of legal diversity and pluralism, which necessarily requires the exclusion of the corresponding Shaikh's jurisdiction, did not face serious pushback for some time.[411]

While the fact that certain foreigners were shielded from the Shaikh's territorial jurisdiction did not seemingly tarnish the Shaikh's view of their own sovereignty – its exercise through legislative and judicial functions over certain categories of foreigners was not a relevant metric to measure sovereignty -, this was not the case for all categories of foreigners or disputes.

[411] [Brown, 1997b, p. 134]: "*The rulers had no serious objections to allowing a Christian power (which already exercised control over defense and foreign affairs) assume jurisdiction over Christians. [...] In most cases, local rulers accepted British jurisdiction over Indian Muslims but opposed it over Muslim Arabs. Beyond such an obvious source of conflict, local rulers were reluctant to accept the establishment of joint courts for mixed cases, because they might involve forcing shari'a judges to share the bench with British judges*".

A Origins of British extraterritorial jurisdiction in the Gulf

At the origin, British extraterritorial jurisdiction in the Gulf was a Bahraini initiative.[412] On 16 June 1909, the Bahrain Ruler requested that the British government exercise jurisdiction in cases involving foreign subjects that would normally fall under Bahraini jurisdiction, including where one party was a subject of Bahrain.[413]

At the time, the Bahraini Ruler simultaneously requested the maintenance of his jurisdiction over all Gulf nationals, including those who were non-Bahraini. The British agreed on the condition that the respective Rulers provide the prerequisite consent to the Bahraini Shaikh exerting jurisdiction over their subjects. Since the Shaikh of Saudi Arabia and Qatar did not consent to the arrangement, the 1909 Bahrain Order in Council provided for British jurisdiction over all foreigners.[414]

The jurisdictional arrangements between the British and Gulf Rulers were all enshrined in Orders in Council, which were concluded with each Ruler separately.[415] The Orders in Council were not entered into with all the Gulf Rulers simultaneously; the first was with Bahrain in 1919, while the Trucial States Order in Council was not enacted until 1945.[416]

Although British policy towards these nations emanated from a central authority, its manifestation in each was far from homogeneous. As a result, the division of jurisdiction between the tribunal Shaikhs and the British government was different for each state. While the common denominators were that the Rulers had jurisdiction over their own nationals, and not over British, Europeans and Americans, the extent of that jurisdiction over nationals over a subset of foreign populations differed greatly.

For example, the Qatar Order in Council of 1939 stipulated that the Ruler has jurisdiction over his subjects and the subjects of non-Muslim Foreign Powers,[417] and Kuwait Order in Council, 1935 provided that ""Kuwait subject" means a subject of the Shaikh of Kuwait, or

[412]Under British law, the origin of British extraterritorial jurisdiction is the Foreign Jurisdiction Act, 1890.

[413]FO 539/109. *See also* FO 1016/189, Letter from Bahrain Ruler, dated 8 March 1952.

[414]FO 539/109, Supplementary Memorandum on Bahrain: "*As regards the first and most important request, the Government of India agreed that he should exercise jurisdiction over the subjects of other Arab rulers, subject to the formal concurrence of those rulers. Ibn Saud and the Sheikh of Qatar, however, the one previously, the from other subsequently, took exception to the exercise of control over their subjects by the Sheikh of Bahrein, and requested the Political Agent to exercise the jurisdiction in question. The Political Agent in consequence issued on 20th November 1920, a notice that all foreign subjects, including Persians and subjects of Arab rulers and Chiefs other than those of Bahrain, while in Bahrain, entitled to British protection*".

[415]*See* FO 371/168665, Despatch No. 172, dated 12 November 1963: "*A convenient date from which to begin this survey is the year 1948 when His Majesty's Government took over from the Government of India full responsibility for Persian Gulf affairs. The position at that time was that His Majesty had formally exercised jurisdiction in Bahrain for some 30 years over all foreigners, in Qatar for 10 years over all foreigners other than the subjects of Muslim countries, and in the Trucial States for 2 years over all foreigners. In each case the Order in Council establishing His Majesty's Courts and jurisdiction was issued on the basis of a written agreement from the Shaikh concerned, though it referred also to the custom and usage by which British jurisdiction had been exercised prior to the Shaikhs' written agreements*".

[416]FO 539/109, Trucial States Order in Council, dated 1946 (provides in Article 8 that British jurisdiction extends over any foreigner).

[417]FO 371/109929, Letter from Ruler of Qatar, dated 18 April 1935. The 1949 Order in Council excluded

any person, not being a British subject, who is the national of any other Muslim State",[418] while the Bahrain Order in Council of 1919 limited the Ruler's jurisdiction to nationals of Bahrain.

B British extraterritorial jurisdiction in the Trucial States

Like its neighbors, the jurisdictional arrangements between the British and the Trucial States were enshrined in an Order in Council. The Trucial States Order in Council, 1946 ("TSOC 46") was entered into on 26 June 1946.[419] The TSOC 46 set out the delimitation between the two legal systems in the Trucial States, one under the Ruler's authority and the other under British authority. Trucial States residents who came under British extraterritorial jurisdiction were shielded from the application of laws made by the Ruler, and from being subject to the Ruler's judicial arrangements for dispute resolution. Instead, any disputes involving them (including criminal) was decided by a configuration of courts where the Political Resident and the Political Agent sat as judges.[420]

British civil and criminal jurisdiction in the Trucial States was exercised on the basis of Indian Legislature, and of the Bombay Legislature, including the British Indian Code of Criminal Procedure and the Indian Penal Code.[421] However, when both complainant and defendant in a criminal case were Muhammadans, then the case may be heard by a local Qadi, whose judgment was then ratified by the Political Agent before being enforced.[422]

On 29 March 1949, TSOC 46 was amended to reflect the dissolution of the British government in India. Simultaneously, amendments were made under which a professional judge would sit as assistant judge to the Political Resident.[423] More than one year later, on 8 December 1950 a new TSOC was issued to further reflect reforms instigated by the dissolution of the British government in India.[424] As explained in the Explanatory Note to the TSOC 50, "[t]his body of law and procedure [i.e., the Indian codes] is too complicated and unwieldy for application by small courts largely staffed by lay judges whose work is done with no access to legal libraries and for the most part without the assistance of professional

subjects of the Sheikhs of Bahrein, Kuwait and the Trucial States from being characterized as British-protected persons, thereby placing them under the Ruler's jurisdiction (FO 539/109).

[418]FO 539/109, Kuwait Order in Council, dated 1935. In the 1949 Order in Council this definition was updated to ""Kuwait subject" means a subject of the Sheikh of Kuwait and any person, not being a British subject, who is the national of any other Moslem state".

[419]It was the second international agreement concluded with the Trucial States, the first being the Treaty between Trucial State Rules and British government, 1853 relating to pirate activities.

[420]Trucial States Order in Council [a], 1946, Part I, Article 4 (defines various types of courts, including "Chief Court" as a Court held by the Political Resident; "The Court" as a Court held by the Political Resident, the Political Agent, or the Judicial Assistant to the Political Resident; "District Court" as a Court held by the Political Agent or by the Judicial Assistant and "Joint Court" as a court composed of the Political Agent and the Trucial Sheikh whose subject is party to the proceedings or their representatives).

[421]*See* Trucial States Order in Council [a], 1946, Part II, Article 11.

[422]*See* Trucial States Order in Council [a], 1946, Article 15(I).

[423]Trucial States Order in Council [b], 1949, Explanatory Note.

[424]In December 1949, Haines submits his report on Judicial Arrangements, and the TSOC is amended in December 1950 to reflect the positions that emanated from the report.

advocates". TSOC 50 annulled and simplified the applicable law in the court of the Political Agent.[425]

C The future of the pluralist legal system

Information about the organization and functioning of the local justice system of the Trucial States is sparse, particularly in comparison to the level of detail in reports on other Gulf nations such as Bahrain or of the Political Agency court. Two contemporaneous reports allow us to paint a picture, and stipulate the overarching goal of legal unification which future legal policies should aim to achieve.

C.1 The 1949 Report by Judge Haines[426]

In December 1949, Judge Cyril Henry Haines[427] delivered his findings on judicial arrangements in the Gulf region. His report also contained a number of suggestions, including that a tailored body of law for the region be established to replace the more complicated Indian Codes, together with some remarks on the courts held by the Political Agents in the Gulf.

The Haines report provided a contemporaneous assessment of the British courts in each Gulf nation, as well as of the indigenous courts in each. In each of these categories, the Trucial States were significantly lagging behind their neighbors.[428] This was particularly the case in terms of local legal infrastructure and legal system modernization. For example, in parallel to the British courts, the court that had been formed by Qadis in Bahrain, Kuwait and Muscat had been replaced by "Courts of Justice" established by the Ruler.[429]

In contrast, at the same time, the Trucial States were still described as "very primitive", and lacked a municipality and a police force.[430] The British Courts had been used very little, and the Joint Courts not at all – the result of a relatively small number of Western residents, coupled with lack of awareness of the existence of the British Courts.[431]

[425] 8 December 1950, Trucial States Order in Council [c], 1950, Explanatory Note, para. 4: "*The task of providing these courts with a suitably simple system of law is begun by the present Order. Thus, for instance, a number of simple provisions in the Order itself replace in several matters–notably in regard to the cases when appeals lie-the provisions of the Indian codes of procedure. Further, many obsolete or complicated provisions of the previous Orders either disappear or are simplified, and the Order is made more convenient for reference by grouping in schedules of matter which was previously dispersed throughout the Order*".

[426] FO 1016/121, Haines' Report on Judicial Arrangements in the Persian Gulf, dated 19 December 1949.

[427] At the time, Judge Haines served at the Claims Department of the Foreign Office. Later he served as Assistant Judge and eventually Judge of the Chief Court for the Persian Gulf.

[428] FO 1016/121, Haines' Report on Judicial Arrangements in the Persian Gulf, dated 19 December 1949: "*Courts of the Political Agent and of the Political Resident have been functioning in Bahrain under Order in Council since 1913. They are, by far, the best organised in the Gulf*".

[429] FO 1016/121, Haines' Report on Judicial Arrangements in the Persian Gulf, dated 19 December 1949.

[430] The Haines report does not provide specific information on each Trucial State, but rather treats them as a single entity. That he did not even visit the Trucial States speaks to the relative importance these emirates occupied at the time.

[431] FO 1016/121, Haines' Report on Judicial Arrangements in the Persian Gulf, Annexe IV, dated 19

C.2 The Foreign Office recognition of the inevitability of retrocession

Following the submission of the Haines report, a meeting was held between Sir Eric Beckett and W.V.J. Evans (Legal Advisors), Judge Haines (Assistant Judge, Chief Court) and Mr. Rogers (Eastern Department) at the Foreign Office to discuss the findings early in 1950. During that meeting, the idea of future retrocession of jurisdiction was floated, in the context of identifying long term goals to shape the formulation and implementation of policies going forward. According to the official record, at the meeting "*[i]t was also thought that, as a long term matter, our aim should be to develop our courts and the law applied by them in such a manner that they could eventually be taken over by the Sheikh and his own courts and law merged in them*".[432]

Having set the goal of legal unification, the attendees began drawing out a plan to modernize the local legal systems in preparation for future retrocession. The plans included legal training and education abroad for a selection of individuals connected to the Ruler's families who may serve on the Rulers courts in the future,[433] and using the Joint Courts as a tool to "*gradually to educate the Sheikh and his judges into the administration of justice on more modern lines*".[434]

After the meeting record was shared with other British officials for comment, numerous exchanges of opinion took place. Although almost all agreed that the Rulers' legal systems should be modernized with British support, the principle of future retrocession was not unanimously accepted as an overarching policy goal.

This was particularly the case for the Political Resident, who wrote back: "*The suggestion that our aim should be to develop our courts and the law applied by them in such a manner that they could eventually be taken over by the Shaikh and his own courts and law merged in them is an entirely new idea to me. Our courts should certainly be a model for the Shaikhs to follow, but it is not at all desirable to let any idea get abroad that we propose that the Shaikhs should eventually take them over. I consider that we should retain our extra-territorial jurisdiction in these parts for as long as we possibly can, more especially in those states for whose Foreign relations we are responsible and I am most averse to any kind of planning for its eventual surrender. I agree that we should encourage the Shaikhs to improve their local judicial system wherever possible, but this will have to be done very tactfully as*

December 1949, "Report on the Trucial States Order in Council 1949": "*Criminal Jurisdiction There have been no cases so far. A large number of the foreign persons resident in these States are Muslims and appear to be content with the present arrangements which seem to consist of settlements out of court. This may be due to the fact that the Court has not long been established in the Trucial states and is not sufficiently well known. Civil Cases There are very few civil cases and these are usually commercial disputes which can be referred to the Majlis el Tujara (or Majlis al urf) for an opinion which is subsequently issued as a decree by the Court*".

[432]FO 1016/121, Record of Meeting Held at the Foreign Office, dated 6 January 1950, para. 2.

[433]FO 1016/121, Record of Meeting Held at the Foreign Office, dated 6 January 1950, para. 2: "*As a first step towards achieving some modernisation of the local legal system as distinct from our own, we should arrange for suitable members of the Sheiks' families to be sent for legal training. It might thus be hoped that the path would be smoothed for effecting improvements in the present local law and procedure and then gradually bringing the Sheikhs courts up to the standard of our own*".

[434]FO 1016/121, Record of Meeting Held at the Foreign Office, dated 6 January 1950, para. 8.

the matter is one which concerns their internal independence".[435]

The Political Resident's alarm at retrocession and unification was not shared by all. Notably, the Political Agent at Kuwait highlighted that the British experience with extraterritorial jurisdiction demonstrated that retrocession was inevitable, and that taking this into account would allow the formulation of more effective policies that assist British interests much more than ignoring it.[436]

In November 1950, the Foreign Office made a series of recommendations to the Political Resident regarding the future of British jurisdictional arrangements in the Gulf.[437] The question was how to develop the legal systems (both the British and the local ones), and whether the development policies should be formulated under the presumption that the system would remain pluralist, or instead, whether development policies should take into account, or even plan to bring about, legal unification. It was decided that the ultimate long-term goal was the unification of the legal systems, and that policies should be formulated and implemented to develop both legal systems with the long-term goal of jurisdictional fusion in mind.[438]

[435]FO 1016/121, Letter No. 4/17/50 from Rupert Hay (Political Resident from 1941, and from 1946 to 1953, replaced by B A B Burrows) to T. E. Rogers (Eastern Department), commenting on Judge Haines report, dated 3 March 1950.

[436]FO 1016/121, Letter No. 108/9/50 from G. Gethin (Assistant Political Agent in Kuwait) to Rupert Hay (Political Resident), dated 2 April 1950, para. 2: "*I hope you will not mind my disagreeing with you somewhat regarding the idea that our Courts and law should be run in such a way that they can be taken over by the local Government. I concur with the Meeting that as a long term policy, we should draft our laws with a view to eventual hand-over. The history of Capitulations in countries such as Egypt and Ethopia shows that we shall have eventually to surrender our ex-territorial rights; and with the growth of local education not to speak of local nationalism, which will certainly be increased once we get Kuwaiti undergraduates, I forsee that we may at least be under pressure to start to make that surrender in a matter of ten or fifteen years. It will certainly assist our own interests here if we have arranged matters that such a surrender can be achieved with the minimum dislocation, which would be provided by such planning as the meeting appears to have envisaged*". *See also* FO 1016/25, Letter No. 1/29/50, from H. G. Jakins (Political Agent in Kuwait) to Rupert Hay (Political Resident), dated 12 December 1950: "*I have taken advantage of the presence of Judge Haines in Kuwait in connection with two appeals to discuss with him at some length the question of jurisdiction in Kuwait raised by Foreign Office Despatch No. 76. May I say at the outset that I entirely agree that the ultimate aim should be to unify the two local systems of justice into one set of Courts that would be those of the Ruler?*".

[437]FO 1016/25, Dispatch No. 76 (EA 1643/75) from Foreign Office to Rupert Hay (Political Resident), dated 20 November 1950: "*I have had under review the questions of (a) future judicial arrangements in the Persian Gulf States, and (b) the drafting of new Orders in Council, in the light of the discussions held with Your Excellency in London and correspondence exchanged on these subjects. It now seems appropriate to set down certain general principles on which I would invite your comments*".

[438]FO 1016/25, Dispatch No. 76 (EA 1643/75) from Foreign Office to Rupert Hay (Political Resident), dated 20 November 1950, para. 3: "*In differing degrees all these States are coming more and more into touch with the outside world; their administrations require therefore to be modernized and developed according to the circumstances of each individual State. In particular, the judicial systems of all need to be improved, and this applies not only to the Courts established under the Orders in Council but also to the Rulers' Courts so far as they deal with cases affecting any foreign interest. Looking ahead, there are two alternative lines of development:- (i) Following the precedent of French Morocco, to maintain indefinitely a dual system of Courts; or (ii) eventually to unify the two systems so that there is only one set of Courts, which are those*

C.3 The 1952 Beckett Report

In April 1952, the Legal Advisor to the Foreign Office, Sir Eric Beckett, set out on a visit to the Gulf states, accompanied by Judge Haines. Together they visited Kuwait, Qatar and Sharjah. In June 1962, Beckett submitted his report making recommendations on legal and judicial matters in the Gulf.[439]

On the preparation of codes tailored for the Gulf, Beckett recommended that efforts should be hastened, and vetted by people with judicial experience in Muslim countries, and that the Rulers of Bahrain, Kuwait and Qatar should be persuaded to adopt Arabic texts of codes as soon as possible, thereby ensuring that the same law is applied both jurisdictions (British and local).[440] In addition, he recommended that the Rulers of Bahrain, Kuwait and Qatar should be persuaded to each hire a British legal official to draft local legislation, act as advisor to the Rulers in matters of Muslim law, take charge of offices required for company registration and keep in close contact with Agency and Resident on legal matters. With respect to Joint Courts, he recommended no change to Joint Courts in Bahrain and Kuwait, while taking the position that the Joint Court system should be implemented in the Trucial States in application of the Foreign Office recommendation that Joint Courts be used as an educational tool for the Rulers to familiarize themselves with the standards and methods of the Western legal process.[441]

On the future development of the legal systems in the Gulf, Beckett took the position

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of the Rulers. Of these two courses I consider that, having regard to all the circumstances, the second is preferable as the ultimate aim in these States. This however is essentially a long term project, and it is not essential to make a final choice at this stage. What is necessary in the short term is to encourage the development of the local judicial systems and so to improve our own that both may be better equipped to meet modern requirements" (emphasis added).

[439]FO 371/98445, Report by Sir Eric Beckett, dated 9 June 1952: "*My immediate task is to make recommendations and comments with regard to the legal and judicial system at present in force in the Persian Gulf States under British protection, primarily with regard to the British courts in these territories, but also with regard to the laws and courts of the Rulers of the territories, since, as Sir Roger Makins made clear, Her Majesty's Government are internationally responsible for the manner in which the Rulers exercise the internal independence which they enjoy*".

[440]FO 371/98445, Report by Sir Eric Beckett, dated 9 June 1952: "*When we have got these codes, or some of them, in force in our own courts we should then endeavor to persuade the Rulers of the various territories to enact and adopt them for their own courts. The population of the three most important of the Gulf States is likely, as far as one can see, to continue to be predominantly Moslem and Arab but with a foreign and non-Moslem minority which is of great importance. In a word, these States will remain more like miniature Egypts than miniature Jordans and I think that a codified law has always been found to be and is likely to be the most satisfactory legal system for a Moslem State with a large and important non-Moslem minority*".

[441]FO 371/98445, Report by Sir Eric Beckett, dated 9 June 1952: "*Foreign Office in Despatches to the Political Resident Nos. 76 and 77 of 20th November, 1950 recommended to the development of the Joint Court system in all territories. [...] The reason for this recommendation by the Foreign Office was that it was thought that the Joint Court system was not merely a means of securing justice in a mixed case but also a method by the Ruler or his judicial officers might by sitting with the Political Resident acquire a knowledge of the principle of justice and procedure which we should wish them to apply generally. I think that the Foreign Office's recommendation should still be applied fully to the Trucial States, except in criminal cases where the accused is subject to our jurisdiction, which should go to the Agency Court because of the uncertainty of securing under the Joint Court system an effective appeal*".

that retrocession and unification were inevitable. Echoing the recommendation made by the Foreign Office in November 1950, he wrote: "*I am convinced that for political reasons we shall have to be ready to agree at some future time that the present dual judicial system shall be replaced by a single judicial system, which will all be under the Ruler, and that therefore, in all that we do now, we should have this probable ultimate development in mind. [...] I do not even suggest that we should take steps now which would hasten such a change, but rather that the steps that we take now should be such as to make the single judicial system work as well and as satisfactorily as possible when the time comes when it will be necessary to accept it*".[442]

Notably, Beckett highlighted that "*[t]he movement towards nationalism will lead to a demand for the abolition of the dual judicial system and the movement towards democracy will lead to the end of the paternal and palm-tree system of justice all based on vague principles in the Koran and administered solely by the Ruling Family (some times as in Bahrain and Qatar assisted by the Adviser) which generally prevails in the native courts of these territories, though this is not entirely true of Bahrain*".[443]

The prediction that the Gulf Rulers would not tolerate the limitations on their sovereignty as a result of British extraterritorial jurisdiction was not without any basis. At the time these recommendations and policies were being formulated, Gulf Rulers were beginning to make formal requests for narrower British extraterritorial jurisdiction in favor of increasing their own.

4.3.2 Increasing recognition of territorial jurisdiction as an essential element of Shaikhly sovereignty

From early in the 1950's, the Foreign Office had the foresight to predict that the dualist legal system that had been functioning in the Gulf was destined to eventually come to an end as development led to advancements in education, which in turn would garner deeper feelings of national pride and calls for independence.

We know today that this prediction – that extraterritorial British jurisdiction in the Gulf would eventually dissolve, with each state regaining its full territorial jurisdiction – was correct. However, the trajectory towards the dissolution of British extra-territorial jurisdiction did not follow the same path in each Gulf state, let alone in each Trucial State, nor were any of these paths linear.

The earliest signs of discontent with British jurisdiction appeared after the discovery of jurisdictional disparity between Gulf Rulers. These discoveries resulted in calls to increase the Rulers' jurisdiction at the expense of British extraterritorial jurisdiction. The increasing interest in widening jurisdictional reach was used as an incentive to affect change within the Ruler's legal systems.

The exercise of jurisdiction by Gulf Rulers over other Arabs, especially nationals of other Gulf states, had long been a sensitive one. At the end of the 1940's, when whole-scale

[442]FO 371/98445, Report by Sir Eric Beckett, dated 9 June 1952.
[443]FO 371/98445, Report by Sir Eric Beckett, Annexe III, dated 9 June 1952.

reform of the Orders in Council was being studied, the hodgepodge state of local jurisdiction over Arabs was noted, as the discrepancy between the extent of this jurisdiction and the development of the local legal system was highlighted as an anomaly. A plan was put in place to achieve more alignment between this jurisdiction and level of development.[444]

The disparity between the extent of the Ruler's jurisdiction over certain populations eventually became known to the Shaikh of Bahrain, who repeated the request to exercise jurisdiction over Gulf nationals in 1949.[445] By early 1950, the British had already decided to grant this request,[446] and in April 1950, the transfer of jurisdiction to the Bahrain Ruler over nationals of Kuwait, Qatar and the Trucial States was confirmed.[447]

However, in Bahrain the satisfaction with the expanded jurisdiction was short-lived, as the question arose again in 1952 when the draft Order in Council was examined by Bahrain. In 1952, the Ruler of Bahrain repeated his request for jurisdiction over subjects of other Arab Gulf states.[448] The Ruler emphasized: "*As you are aware we have no wish to become involved with subjects of European countries, with Americans or with subjects of countries such as Egypt, Iraq, India, or even Persia but we consider that we should exercise our judicial authority over the subjects of other Arab states in the Gulf as is done by the Ruler of Kuwait and, we believe, by other rulers*".[449] On 19 April 1952, the Ruler's request for jurisdiction over nationals of Saudi Arabia, Yemen, Kuwait, Qatar, Muscat and Oman and the Trucial States was granted.[450]

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[444]FO 1016/25, Dispatch No. 77 (EA 1643/75) from Foreign Office to Rupert Hay, dated 20 November 1950: "*There are some anomalies in the present position. For example Bahrain, the most advanced State, has the most limited jurisdiction, whereas Qatar, where there are no local Courts, has the widest. I appreciate however that, whether or not it is desirable in principle to achieve uniformity or, alternatively, to ensure that the extent of the Rulers' jurisdictions is commensurate with the stage of development of their judicial systems, the scope for manoeuvre is limited and in practice each State must be dealt with individually*".

[445]FO 1016/121, Haines' Report on Judicial Arrangements in the Persian Gulf, para. 15.

[446]FO 1016/121, Record of meeting held on 6 January 1950 regarding Haines' report, dated 6 January 1950, para. 7.

[447]FO 1016/112, Letter from C. J. Pelly to Ruler of Bahrain, dated 17 April 1950 (informing him that at his request, they will cede jurisdiction over subjects of Kuwait, Qatar and the Trucial States and will amend the Bahrain Order in Council).

[448]FO 1016/189, Letter from Bahrain Ruler, dated 8 March 1952 (Foreigners was understood to include subjects of the Great Powers, British, Indians, Egyptians, Europeans, Turks and others).

[449]FO 1016/189, Letter from Bahrain Ruler, dated 8 March 1952 (requesting "*that unless we agree otherwise the foreigners who live in our country should be subject to our laws and regulations in the same way as foreigners living in other countries are subject to the laws of the country in which they stay*"). *See also* FO 1016/189, Jurisdiction in Bahrain over Persian Gulf Arabs, etc., dated 17 March 1652 from Laver, reporting that the Bahrain Ruler had asked "*when he was going to be given jurisdiction over the nationals, resident in Bahrain, of other Arab States in the Gulf. He spoke for some 20 minutes with considerable force on the subject, pointing out that Bahrain alone of all the Gulf States did not enjoy "internal independence", and that as a result he was despised by the general public. He suffered by comparison particularly with the Shaikhs of Kuwait and Qatar. He pointed out that the reason for Shaikh Isa's letter of the 16th July, 1909, requesting H.M.G. to assume jurisdiction over foreigners, was a certain incident between Bahrainis and a German, and that it had never been intended that the term foreigners should mean in this context anything more than the nationals of the Great Powers*".

[450]FO 1016/189, Letter C18/5/15/52 from Laver to Bahrain Ruler, dated 19 April 1952.

In October 1954, the Ruler of Kuwait requested the Acting Political Agent's consent for the exercise of his jurisdiction over all Muslims except nationals of Pakistan.[451] After considering this request, the British informed him that they were prepared to cede jurisdiction over "the nationals of Libya, Morocco, Tunisia, Afghanistan, Indonesia and the Sudan, Protected persons from the Aden Protectorate, the French Somaliland Protectorate, the Italian Trust Territory of Somalia, and Stateless persons of Palestinian origin not already under the Ruler's jurisdiction".[452] Indignated, the Kuwaiti Ruler insisted that his "*jurisdiction should embrace Pakistanis, as well as all other Muslims and Arabs whatever their origin and status*". The British response was that they would not consider further concessions until a modern criminal law was adopted.[453]

The British demands for a modernized legal system in exchange for retrocession were taken seriously. The Kuwait government tasked the famous Dr. Sanhouri of Egypt to draft a set of modern legal codes, and appointed a bevy of foreign judges to implement them. As a result of these advancements, the announcement that British jurisdiction in Kuwait would be retroceded was made. By mid-1961, British extra-territorial jurisdiction in Kuwait was put to an end, and the British courts in Kuwait permanently closed on 1 July 1961.[454]

The announcement of impending retrocession in Kuwait led to other Gulf nations to inform themselves on how they might achieve a similar outcome.[455] Although the Rulers initially exerted strong pressure on the British, this eased after a few months.[456] In contrast,

[451]FO 371/126977, (16427/31/56) Despatch No.17 from G. W. Bell, dated 20 December 1956.

[452]FO 371/126977, (16427/31/56) Despatch No.17 from G. W. Bell, dated 20 December 1956.

[453]FO 371/126977, (16427/31/56) Despatch No.17 from G. W. Bell, dated 20 December 1956: "*I replied that I felt certain that Her Majesty's Government would not consider surrendering the persons from Aden Colony or Pakistanis at the present time and that only the adoption of a criminal code and a code of criminal procedure in Kuwait would make it possible for Her Majesty's Government to entertain the idea of further concessions in the future*".

[454]FO 371/168665, Despatch No. 172, dated 12 November 1963: "*In 1960 there occurred an event of major importance in the history of British jurisdiction in the Persian Gulf. In that year, under strong pressure from the Ruler of Kuwait, Her Majesty's Government agreed to progressive retrocession of their jurisdiction in that State. During the ensuing year a spate of laws was promulgated in Kuwait and foreign judges, mostly Egyptian, were engaged. On April 1, 1961 retrocession was completed and Her Majesty's Court closed down finally on July 1. Thus, in the case of Kuwait, Sir Eric Beckett's prediction, quoted in paragraph 2 above, came true rather more quickly than he had probably expected. What he had not perhaps foreseen was that on the emergence of a single judicial system in Kuwait 9 years after the formulation of the 1952 policy not one vestige of British law or of the British judicial system would remain, although British jurisdiction had been exercised in Kuwait for many years. The new laws, prepared by an Egyptian jurist, are based on the code Napoléon and the judiciary is neither secure nor independent*" (emphasis added).

[455]FO 371/168665, Despatch No. 172, dated 12 November 1963: "*The announcement in 1960 of Her Majesty's decision to retrocede jurisdiction in Kuwait by progressive steps produced immediate reactions from the Rulers of other Gulf States, notably Bahrain, Qatar and Abu Dhabi*".

[456]FO 371/149107, Letter from Beaumont, dated 28 March 1960: "*The Ruler of Bahrain is not at present pressing strongly for a transfer of jurisdiction, and the Ruler of Qatar is not pressing at all. The Ruler of Bahrain has told us that he wished to have the same treatment as Kuwait" and that he thinks that Bahrain is at least as well qualified as Kuwait for a transfer of jurisdiction, but the matter has been left over for further talks. I am inclined to think that there would be some advantage in taking an initiative with the Ruler of Bahrain on the lines of the approach to the Ruler of Abu Dhabi recommended above*".

in Abu Dhabi, Shaikh Shakhbut's long standing demands to extend his jurisdiction became more frequent in light of the steps towards retrocession taken in Kuwait.[457]

The British response to the jurisdictional aspirations of the Abu Dhabi Ruler played an important role in determining the wobbly trajectory of Abu Dhabi's pathway to retrocession, one marked by two major crises in relations between Abu Dhabi and the British.

4.4 Abu Dhabi's wobbly path towards retrocession

The Foreign Office process was to formulate uniform legal policy goals to achieve across the Gulf, that were applied to each Gulf State based on its level of development. The uniform nature of the legal policy resulted in limited flexibility for modifications between different Gulf states. Retrocession in Kuwait and Bahrain had set a clear precedent that a minimum level of legal development was a prerequisite for the widening of the Ruler's jurisdiction. This was essentially the "carrots-and-sticks" approach employed by British officials to induce positive change in local legal systems.[458]

The rigidity of the approach was not beneficial to the relationship with Shaikh Shakhbut of Abu Dhabi, and led to a major crisis in relations between him and the British government, which was ultimately resolved by some concessions on the part of the British (4.4.1). Turnover within the Foreign Office resulted in the concessions being temporarily discarded, and their terms not being applied. This blunder caused a second crisis with Shaikh Shakhbut, and led to a re-examination of the terms of the concessions (4.4.2).

4.4.1 First crisis with Shaikh Shakhbut

Similarly, to his Gulf counterparts, the significance and value of exercising jurisdiction over certain categories of foreigners (namely, Arab and Muslim foreigners) was not lost on the Abu Dhabi Ruler. With neighboring Gulf states on a fixed path to retrocession, Shaikh Shakhbut began pressing for more jurisdiction. The delay in addressing his demands led to a major crisis – the first of its magnitude – with the British.

The British made plans to deal with Shaikh Shakhbut's requests delicately, expecting that they would have to extend the same privileges to the other Trucial States, as well as Bahrain and Qatar. The major difficulty was that since Kuwait, Bahrain and Qatar were significantly ahead of Abu Dhabi in modernizing their legal infrastructure, the great divide meant that any conversation on retrocession in Abu Dhabi was greatly premature.[459] This position was

[457]FO 371/149106, Letter from Beaumont, dated 23 February 1960: "*Independently of the pressure from Kuwait for transfer of jurisdiction there, we have for long been pressed by the Ruler of Abu Dhabi to agree to a far-reaching surrender of jurisdiction in his territory*". FO 371/149107, Letter from Beaumont, dated 28 March 1960: "*As a result of a Cabinet decision on December 3, 1959 [Flag B] and a further Cabinet discussion on January 4, the Ruler of Kuwait was informed that H.M.G. agreed in principle to the 19.45121460) eventual abolition of H.M. jurisdiction in Kuwait and the progressive transfer of sections of that jurisdiction. Paragraph 7 of the Cabinet paper (C(59)174 of November 22, 1959) [...]*".

[458]*See generally:* Brown [1997a].

[459]FO 371/149107, Minute from Beaumont, dated 28 March 1960: "*Unfortunately Abu Dhabi, like its*

further exacerbated by the necessity of maintaining the "carrots-and-sticks" approach: for the approach to produce results, it must be applied in a consistent and uniform manner across the Gulf.

A Shaikh Shakhbut's formal request for retrocession

At the end of 1959, Shaikh Shakhbut had formally requested the retrocession of British extraterritorial jurisdiction in Abu Dhabi. Although at the time, Abu Dhabi lagged far behind its neighbors in terms of development, in light of its promising potential, Shaikh Shakhbut's request was given serious consideration. It was decided to tread delicately; it was agreed that the Ruler's request should be approached carefully, and that outright rejection was not a viable option.

Instead of engaging Shaikh Shakhbut on his request for retrocession, an alternative was proposed to expand Abu Dhabi's jurisdiction, such that it would cover the same populations that were under the Kuwait Ruler's jurisdiction prior to British retrocession in Kuwait.[460] The Political Resident insisted internally that Shaikh Shakhbut must agree to a certain number of conditions before any discussion on partial or complete retrocession.[461] "*No action however was taken on these, because the Political Agent in Dubai, Mr. Hawley, raised strong objections and eventually made alternative proposals. A decision on these alternative proposals was postponed pending the outcome of discussions on the transfer of jurisdiction in Kuwait*".[462]

Despite the pressing need to formulate an appropriate response to Shaikh Shakhbut's request, by February 1960, internal discussions were still ongoing. Internal discussions on the potential retrocession in Abu Dhabi were lengthy and detailed. The holdup was that the Foreign Office was sizing-up the extent to which jurisdictional concessions could be leveraged – leading up to full retrocession – in exchange for internal reform. The question was how to maximize the discussions on jurisdiction to obtain the most commitments from Shaikh Shakhbut, as well as the most suitable pathway towards retrocession in Abu Dhabi.

In mapping out Abu Dhabi's pathway to retrocession, the Political Agent (Donald Hawley) and the Political Resident (George Middleton) had different views. Despite agreeing that a Joint Court should be instituted,[463] and that some partial retrocession of jurisdiction

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Ruler, is extremely primitive and the conditions of "justice" there cannot be compared to those in Kuwait or even in Bahrain and Qatar".

[460]Telegrams Nos. 270 and 271 Saving of September 4.

[461]FO 371/149106, Telegram No. 3 Saving, dated 27 January 1960.

[462]FO 371/149106, Letter from Beaumont, dated 23 February 1960.

[463]Henderson had particularly advocated for the Joint Court as necessary to secure Shaikh Shakhbut's cooperation (*See* FO 371/149106, Minute from Henderson, dated 18 February 1960: "*I feel, however, that as there is now a British Police Officer who is allowed to do his duties without any interference from the Shaikh, and as there is I think, good prospects of the Shaikh taking on a legal adviser, the proposal for Joint Courts which the Shaikhs appear still to favour would give us the best chance of establishing a proper system of law. If we do not allow the Shaikhs to play a part in jurisdiction we shall not gain their cooperation. There would then be a long and continued breakdown in relations, and we should not be able to influence them in the establishment of a proper legal system such as we should like to see*").

should be granted as a first step, when it came to the details, such as the subject-matter jurisdiction of the Joint Court and the extent of the retrocession, there were differences of opinion. While the Political Agent took the position that the Joint Court should have jurisdiction over criminal cases tried in British courts as well as mixed cases to serve as an educational tool on the standards of modern Western legal systems,[464] and that retrocession of jurisdiction should be a last resort, the Political Resident argued that the Joint Court should only hear mixed cases, and that jurisdiction over certain categories of persons should be retroceded.

The extent of Abu Dhabi's lack of legal development, coupled with its future potential significance to British interests, led to lengthy internal discussions on Abu Dhabi's pathway to retrocession. It was important to draw a plan that would achieve legal development in the fastest time possible, and it was necessary that the concessions to be made to Shaikh Shakhbut achieve the twin goals of securing his cooperation in implementing a modern legal system, all while maintaining good relations with the Shaikh. Numerous configurations were envisaged, and their relative merits and disadvantages debated.

For example, one interesting proposal was made by the Political Resident, who suggested that instead of a Joint Court, a sole Arab judge from Palestine, Aden or Sudan be appointed simultaneously on the British Courts and the Ruler's court.[465] The Abu Dhabi Political Agent was enthusiastic about the idea of one judge in each of the parallel courts, but was concerned because "*there are scarcely enough cases in Abu Dhabi to warrant the full time services of a Judge*".[466] While agreeing with the Political Resident's stance, Richard A. Beaumont (the head of the Foreign Office Arabian Department) expressed strong reservations against the idea of a Joint Judge in lieu of a Joint Court, on the basis that the lack of clarity might give the Ruler the wrong impression that he might influence the judge.[467]

[464]FO 371/149106, Letter from Beaumont, dated 23 February 1960: "*Mr Hawley [Political Agent] hoped by this means to "educate" the Ruler in the meaning of justice. He also thinks that the Ruler would find this solution politically more acceptable*".

[465]FO 371/149106, Telegram No. 3 Saving, dated 27 January 1960: "*It occurs to me that a possible alternative solution would be to drop the idea of a Joint Court and for us to appoint an Arab judge to sit for Her Majesty's Court in Abu Dhabi (who could be a Palestinian, an Adeni or perhaps even a Sudanese) and for Sheikh Shakhbut simultaneously to appoint the same person to be the judge of his own local court. One and the same person would then hear all cases. Where the accused or defendant came under our jurisdiction our laws and procedures would automatically be applied. In fact the existing system would in no way be changed and no new Orders in Council would be needed. But Sheikh Shakhbut would be able to claim that "his" judge was hearing all criminal cases and so save face. Certain practical difficulties will have to be faced but, if you consider the idea worth exploring, I have little doubt that these can be overcome*".

[466]FO 371/149106, Reply from Hawley, dated 3 February 1960.

[467]FO 371/149106, Note from Beaumont, dated 11 February 1960: "*Quite apart from not liking a 'fuzzy' solution of this kind in a matter where clarity would seem essential, I fear that such a solution might lead us into a lot of trouble with Shakhbut. In the first place he would expect to influence the judge in cases within the Abu Dhabi jurisdiction and, after a time, he would expect to influence him likewise in cases that were within H.M.jurisdiction. This would lead to the judge being put in an extremely difficult position. If he refused to be browbeaten, he would probably not stay long in the Abu Dhabi jurisdiction and since he would incur Shakhbut's enmity, the jurisdictional quarrel would be exacerbated because Shakhbut would resent any cases being tried by a man who would then become his personal enemy. Since he would have to live at least part of the time in Abu Dhabi, it would need a man of very strong personality and probity, and indeed courage,*

B Identifying the British concessions to offer Shaikh Shakhbut

By mid-February 1960, with no definitive internal decision on jurisdiction, pressure was applied from within the British Foreign Office to reach an agreement with Shaikh Shakhbut "*very soon now*".[468] Firstly, the concern was that the time was particularly ripe for introducing the idea of Joint Courts since there was indication that "*the Ruler [was] at present favourably disposed towards mixed courts*",[469] a position that was liable to change quickly, and that implementing the jurisdiction concessions before oil revenues began pouring in would place the British in a favorable strategic position.

Secondly, credible reports indicated that Shaikh Shakhbut would make future strategic decisions on the basis of the outcome on jurisdiction. In other words, the British position on Abu Dhabi's jurisdiction would have far-reaching consequences beyond the question of what court a dispute should be brought before; a number of key strategic goals that were imperative to British interests, and the Ruler's choice of subject-matter advisors, including legal, were tied to it.

Perhaps the greatest, overarching concern was always to maintain a feeling of goodwill towards the British government in the Trucial States, in the hope that it would in turn produce benefits down the line. This became a pressing issue as competing governments were eyeing the Gulf nations, and attempting to cultivate their own strategic relationships that would eventually bear fruit. To that end, Hawley cautioned: "*It seems likely that our stake in Abu Dhabi may be very considerable – and we would naturally wish to ensure that Shaikh Shakhbut should invest in the United Kingdom rather than elsewhere, for example Egypt – and in my view the move proposed is political wisdom*".[470]

During that period, a flurry of urgent communications was exchanged between the Foreign Officials, as they sought to ascertain what commitments on retrocession may be proposed to Shaikh Shakhbut. Finally, on 25 February 1960, after consideration of the arguments raised by the Political Agent and the Political Resident, a decision was taken in light of the delicate

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to survive the political, moral and even physical risks which such an appointment would entail. There is also the minor difficulty, which is nevertheless of practical importance, that when this judge went on leave or fell ill, Shakhbut would probably expect to appoint some other judge to try both his cases and those of H.M. and would probably expect us to accept one of his cronies in this position".

[468]FO 371/149106, Letter from Hawley to Middleton, dated 17 February 1960: "*I am becoming concerned at the delay in giving an answer to Shaikh Shakhbut on jurisdiction and should be very grateful if you could give things a push*".

[469]FO 371/149106, Letter from Hawley to Middleton, dated 17 February 1960. *See also* FO 371/149106, Minute from Hawley, dated 15 December 1959 (explaining that in December 1959, the Ruler's court in Abu Dhabi tried three men for theft who were then sentenced to a beating. It was discovered that the men were British protected subjects and should not have been tried in the Ruler's court. A clumsy proposition was made to Shaikh Shakhbut that a Joint Court should settle the issue. The idea of a Joint Court was well-received, but the British officials did not seize the opportunity to negotiate Joint Courts further, and were instead occupied with determining the conditions for a person to be considered a Trucial States national). *See also* FO 371/149106, Minute from Man, dated 31 December 1959 and FO 371/149106, Minute from Haines, dated 26 January 1960.

[470]FO 371/149106, Hawley letter, dated 17 February 1960.

balance needed to maintain the carrot-and-sticks approach.[471] Authorization was granted to obtain a settlement from Shaikh Shakhbut, the terms of which included the immediate transfer of jurisdiction over a certain category of persons, the establishment of Joint Courts for mixed cases as already provided under Trucial States Order in Council and an invitation for the Ruler to send observers to the British courts.[472]

The feedback from Edward Henderson was negative; he communicated that the proposals were wholly inadequate, describing the odds of them meeting Shaikh Shakhbut's satisfaction as "*nothing short of a miracle*".[473] As part of his critiques on the settlement proposals, Henderson emphasized what was at stake, and that offering such severely deficient proposals introduces a serious risk of creating a concerning schism in the British relationship with Abu Dhabi, which he described as a "*prolonged breakdown*".[474]

To that end, he highlighted: "*It is impossible to predict with a man of Shakhbut's temperament what a continued breakdown in our relations may involve, but I can imagine a series of difficulties and considerable injury to British interests. If he remains on bad terms with us I cannot imagine that he will agree either to the appointment of advisers whom we would regard as suitable, or the development of a government machine on the lines which we would like to see. In the slightly more distant future we should probably have difficulty in making him follow any sound advice on the expenditure and investment of his money. We should probably find it difficult to get him to take our advice in development projects, and the use of what we regard as sound firms for his contracts*".[475]

Notably, Shaikh Shakhbut's insistence on regaining some territorial jurisdiction was so fundamental, and had become so tied to the Ruler's understanding of sovereignty, that he refused to participate in the act of governing at all under such a severe limitation.[476] It was reported that "*[t]he Ruler is at present so discontented with the position that he has retired to Buraimi and is difficult to reach let alone to do business with. Jurisdiction is not, it must be said, the sole cause of his disgruntlement; [...] We estimate, however, that jurisdiction is the root of the trouble. [...] The Ruler's feelings are so strong that at one stage he threatened to abdicate if he obtained no satisfaction from us on the question of jurisdiction*".[477]

Henderson identified a number of weaknesses in the settlement proposals. The main short-

[471]FO 371/149106, Letter from Secretary of State, dated 25 February 1960: "*There would also be disadvantages in departing from the pattern already established in the transfer of jurisdiction in Kuwait, more particularly since it is intended to use that pattern as a lever for improving the domestic system of Jurisdiction in Bahrain and Qatar*".

[472]FO 371/149106, Letter from Secretary of State, dated 25 February 1960.

[473]FO 371/149106, Letter from Henderson, dated 6 March 1960.

[474]FO 371/149106, Letter from Henderson, dated 6 March 1960.

[475]FO 371/149106, Letter from Henderson, dated 6 March 1960.

[476]FO 371/149106, Letter from Henderson, dated 6 March 1960: "*Should we fail to agree over jurisdiction, I think he will continue to follow the policy of Gandhi's passive resistance by living in Buraimi and refusing to take part in the governing of his country. In all these matters I am afraid he will have the full support of his family since Shaikh Zaid who is the only one capable of thinking for himself, feels if possible even more strongly over jurisdiction than does the Ruler; and as our treaty is with the Ruling Family I feel that such a breakdown of relations at this moment would be most dangerous to our interests*".

[477]FO 371/149107, Letter from Beaumont, dated 28 March 1960. *See also* FO 371/168659, Minute from

coming was that the proposals did not address Shaikh Shakhbut's main concern – shared by his family – to secure a commitment on total retrocession of jurisdiction down the line.[478] To add insult to injury, in addition to not giving any hope whatsoever of future retrocession, the proposals also make no attempt to bolster the Ruler's state-building capacities, "*allow[ing] for no means for him to build up his governmental machine sufficiently to take over eventually*".[479]

Furthermore, the proposals did not materially address Shaikh Shakhbut's offense at his limited territorial jurisdiction over crimes committed in Abu Dhabi. On that subject, Henderson provided some more insight: he highlighted that limiting the jurisdiction of the Joint Court to mixed cases would not materially increase the Ruler's criminal jurisdiction, since the vast majority of criminal cases would continue to be tried in British Courts. "*As far as I am aware in Shaikh Shakhbut's philosophy all criminal cases are regarded by the Abu Dhabi Ruling Family as mixed in that they constitute an offense against the State. I think that this is the basis of his present attitude; and because of this he considers that it is derogatory to his powers as a Ruler that he should not have a hand in trying criminal cases within his own territory. The new proposals do not appear to me to get over this difficulty in any way*".[480]

As an alternative, Henderson formulated a more concrete proposal, drawing a milestone-based, multi-step process towards retrocession.[481] Its details were as follows. As a preliminary step to open negotiations on complete retrocession, the Ruler would establish a court with a qualified Qadi.[482] The next step involved establishing and implementing a plan to codify Abu Dhabi law, to arrange for members of the Ruler's family to undertake the study of law abroad, and for the Ruler to send observers to the British court in Abu Dhabi. Finally, the last step involved planning a milestone-based reduction of British extra-territorial jurisdiction, until complete transfer to the Abu Dhabi Ruler.

While Henderson's multi-step proposal was not adopted, his insistence that some commitment on future complete retrocession was absolutely necessary to secure Shaikh Shakhbut's cooperation was fruitful.[483] Therefore, it was decided that the terms of the February proposal would remain unchanged, with no substantive concessions, but that these terms would

D. G. Crawford, dated 2 April 1963: "*In his own way he broke off relations with us by returning to Buraimi and even threatened to abdicate. Rather than encouraging him to carry out his threat, we decided to offer certain concessions to Shakhbut*".

[478]FO 371/149106, Letter from Henderson, dated 6 March 1960: "*The major difficulty with the points which are to put to be put to the Ruler seems to me that they offer no prospect in the near or even distant future of a gradual transfer of jurisdiction similar to that which has taken place in Kuwait*".

[479]FO 371/149106, Letter from Henderson, dated 6 March 1960.

[480]FO 371/149106, Letter from Henderson, dated 6 March 1960.

[481]FO 371/149106, Letter from Henderson, dated 6 March 1960.

[482]FO 371/149106, Letter from Henderson, dated 6 March 1960: "*PS It may be argued that Abu Dhabi is so far behind Kuwait that it would take a number of years to reach the point where Kuwait is today. However in point of fact Abu Dhabi is so tiny and has so few foreigners at present that the establishment of a single court with one judge and two or three officials would probably be sufficient to cope with the work of the immediate future. I think therefore if the proper officials were obtained Kuwait's present position could be reached in a very short time*".

[483]FO 371/149107, Letter from Beaumont, dated 28 March 1960: "*The Political Agent in the Trucial States and the Political Officer in Abu Dhabi both consider that there is no chance of persuading the Ruler*

be presented as the first step towards a complete transfer of jurisdiction in the future. The message to Shaikh Shakhbut had to achieve a delicate balance: to convey an openness and willingness to transfer jurisdiction, while avoiding a concrete commitment to retrocede by a particular date. Internally, it was recognized that "*[i]t would probably be more dangerous, at the present impasse in our relations with the Ruler, if we abstained from making a commitment than if we took the risk of doing so*".[484]

C Apex

In light of the concerns raised by Henderson, a new plan was made to secure Shaikh Shakhbut's cooperation. A memorandum summarizing the concessions was drafted and sent for Shaikh Shakhbut to discuss with his family in anticipation of formal negotiations.[485] The plan also included an attempt to curry favor with Shaikh Shakhbut by inviting him to visit England.[486]

From the plan's conception, it was recognized that the exclusion of nationals of India and Pakistan from the extended jurisdiction would be problematic for Shaikh Shakhbut.[487] It was therefore suggested that jurisdiction over these nationals might potentially be offered as a last resort, if absolutely necessary "*to seek to blunt the Ruler's appetite*".[488]

In the meantime, retrocession of jurisdiction was progressing rapidly in Kuwait. Despite initially showing no interest in obtaining similar concessions from the British, the Qatar Shaikh, inspired by the advancements made by Kuwait, showed interest in retaining Sanhouri to draft laws for them.[489]

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to accept these proposals unless we can represent them as the first step towards an eventual complete transfer of jurisdiction".

[484]FO 371/149107, Letter from Beaumont, dated 28 March 1960.

[485]FO 371/149106, Letter from Middleton, dated 10 March 1960: "*My idea is that Henderson should take along a memorandum to Shaikh Shakhbut. This document (which we are now preparing and will send down to Henderson tomorrow will start with some well-chosen phrases about H.M.G's desire to keep on the friendliest possible terms with Abu Dhabi, refer to Shakhbut's request asking for increased jurisdiction and declare that H.M.G. have now decided to go as far as possible to meet this request. The memorandum, of course, will make it quite clear what our concessions are in order to avoid any misunderstanding*".

[486]FO 371/149106, Letter from Middleton, dated 10 March 1960: "*It occurs to me that we might perhaps be able to soften the impact of these successive shocks to his system if we could tell Shakhbut that H.M.G. realise that these are far-reaching matters which he might wish to discuss in London and that they are accordingly inviting him officially this summer to visit the U.K. when the opportunity would be taken for further discussions we have already recommended (Ford's letter 1637 of February 18 to Walmsley) that Shakhbut should be our first choice for Gulf visitors this year. This might give Shakhbut the feeling that he was being treated with the consideration which he feels is his due, that he was not being held up at pistol point and that he could have some time to think matters over as well as the opportunity (which he has mentioned to me in the past) to seek legal advice in London*".

[487]For a retroactive interpretation of these terms by Brenchley some years later, *see* FO 371/168661, Note from T. F. Brenchley, dated 19 July 1963, para. 4: "*It appears from the 1960 papers that what Shakhbut really wanted at the time was jurisdiction over Indians and Pakistanis, not over British and other Europeans. The Joint Court project was apparently thought up by Mr. Henderson to divert him from his main objective*".

[488]FO 371/149107, Letter from Beaumont, dated 28 March 1960.

[489]FO 371/149125, Letter from Moberly, dated 5 April 1960. *See also* FO 371/149125, Letter from

The developments in Kuwait and Qatar created more urgency to the Abu Dhabi crisis. Shaikh Shakhbut was upset with the absence of an answer to his request. The whole thing came to a head on April 6, when Shaikh Shakhbut summoned Henderson to Buraimi.[490] Requests for information on how to proceed in the conversation with Shaikh Shakhbut were sent urgently.[491] London replied that instructions were forthcoming within at most 24 hours.[492] The instructions of April 7 followed the lines of 28 March.[493]

On 15 April 1960, Henderson provided a report on his visit with Shaikh Shakhbut. The outcome was overwhelmingly negative. As had been expected, Shaikh Shakhbut immediately inquired about jurisdiction over nationals of India and Pakistan, who he maintained had traditionally always been subject to his jurisdiction, while highlighting that he had no interest in exercising jurisdiction over British and European citizens. Notably, Shaikh Shakhbut refused to recognize that he had given up jurisdiction over all foreigners in the 1945 letter between himself and the British government.

Henderson was concerned. The divide had become so wide, and the risks associated with a rejection of the British settlement proposals so great, that some drastic measures were discussed as a back-up option to reinstating good relations with Abu Dhabi.[494] The Political Agent highlighted the significance of Henderson's severe characterization of his interaction with Shaikh Shakhbut, noting that the situation was alarming.[495]

D Detente

On 22 April 1960, George Middleton, the Political Resident, sent a letter to Shaikh Shakhbut, repeating the concessions offered, and highlighting that "*Her Majesty's Government look*

McCarthy, dated 25 April 1960, para. 2: "*Ahmad Hijazi has told Sanhoury that Qatar is thinking tentatively of following Kuwait in legal reform and that we have encouraged the Qataris to look to his services, we see no reason for not taking the credit for the suggestion). Sanhoury seemed pleased and rather touched by our gesture of confidence in him, and by what he described as the "very good faith" Her Majesty's Government had shown in the handling of these questions*".

[490]FO 371/149107, Telegram No. 246, dated 6 April 1960.

[491]FO 371/149107, Telegram No. 246, dated 6 April 1960.

[492]FO 371/149107, Telegram No. 246, dated 6 April 1960 and FO 371/149107, Telegram No. 461, dated 7 April 1960.

[493]FO 371/149107, Telegram No. 246, dated 6 April 1960.

[494]FO 371/149107, Henderson report on his visit with Ruler, dated 15 April 1960: "*In the event either of his refusing to answer it or of his turning down the proposals in writing, I imagine we may have to consider whether he is fit to rule, especially at so important a moment in his country's history. His refusal to discuss our proposals will I think involve his remaining in Buraimi. This will mean a continuation of the present position where there is really no effective government. It looks to me as if there is a great danger of the new Abu Dhabi oil state getting off to a bad start; and it may therefore be a matter of some urgency to bring all the pressure that we can to bear onto the Ruler, perhaps even to the extent (if this fails) of forcing him to give place for a time to another member of the family, if such a thing is indeed possible. I have mentioned this idea before in a tentative way*".

[495]FO 371/149107, Minute from Walmsley, dated 21 April 1960: "*Mr Henderson's letter gives a sombre picture also in respects other than jurisdiction. Mr Henderson would be the last person to speak of inducing the Ruler to abdicate even temporarily, if this had not become a serious possibility. Hitherto, of course we have taken the view that abdication might create more problems than it solved*".

forward to time when legislative and judicial conditions in Abu Dhabi have so developed as to permit a transference of jurisdiction in the same way as in Kuwait. The immediate proposals which Her Majesty's have now made to you about a transfer of jurisdiction are not of course more than a first stage in this situation, although they are substantial enough to involve a complete transfer of many categories of persons to your jurisdiction forthwith. Her Majesty's Government are prepared to bring these changes into effect as soon as they can put through the necessary legislation".[496]

The letter specified that the first concession would be immediate transfer of jurisdiction over nationals of "*i) nationals of: Saudi Arabia, Iraq, Jordan, Iran, United Arab Republic, Lebanon, Yemen, Muscat and Oman, Libya, Morocco, Tunisia, Afghanistan Indonesia, the sudan and subjects of the Rulers of the other Gulf Shaikhdoms; (ii) stateless persons of Palestinian origin*".[497]

Under pressure from his family, the proposed concessions were ultimately accepted by Shaikh Shakhbut. Planning began to enact the concessions, which would entail issuing a Queen's Regulation announcing the transfer of jurisdiction, and amending the Trucial States Order in Council to add language to the effect that the Joint Court will apply the law applied in British Courts (the Order in Council was silent on the question of applicable law).[498]

To maintain uniformity between different Trucial States, in November 1960, the consent of all six Trucial States Rulers was obtained for the transfer of jurisdiction over the agreed nationals.[499] By December 1960, the Trucial States Transfer of Jurisdiction Regulation was signed, made under Article 77 of Trucial States Order, 1959, under which British jurisdiction over subjects of Muslim countries was ceded to the Trucial Shaikhs.[500] It was hoped that "*with the increased responsibility they will have to assume as a result of the transfer of jurisdiction, all the Rulers will realise the necessity of establishing proper courts*".[501]

The crisis with Shaikh Shakhbut that resulted from his request for a wider jurisdictional net was averted by agreement on the instauration of a Joint Court for mixed cases, and an open invitation for the Ruler to send observers to British court hearings. When the terms of the agreement were not respected by the British some years later, a new crisis took place, which was further complicated by the realization that the 1960's concessions carried serious disadvantages. To assuage the tensions, a new agreement was concluded with Shaikh Shakhbut, one that granted him a greater piece of the jurisdictional pie than he had originally requested in 1959.

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[496]FO 371/149107, Letter from Middleton to Shaikh Shakhbut, dated 22 April 1960.

[497]FO 371/149107, Letter from Middleton to Shaikh Shakhbut, dated 22 April 1960.

[498]FO 371/149107, Letter from Middleton, dated 17 May 1960.

[499]FO 371/149108.

[500]FO 371/149108, Report on "Transfer of Jurisdiction in the Trucial States", dated 23 September 1960 (describing the Trucial States population: "*The total population of the Trucial States is something over 100,000, a very small proportion of whom will be affected by this transfer of jurisdiction. Although no census figures are available we estimate that there are perhaps a few hundred Saudi Arabians normally resident in the Trucial States together with a small number of persons (measured in scores or hundreds) from Jordan, the United Arab Republic, Iraq, Yemen, Muscat and Oman, the Somali Republic and the other Persian Gulf States (i.e. Kuwait, Bahrain and Qatar)*").

[501]FO 371/149108, Report on "Transfer of Jurisdiction in the Trucial States", dated 23 September 1960.

4.4.2 Second crisis with Shaikh Shakhbut: Failure of British to honor 1960 concessions

When the British failed to honor the terms of the 1960 agreement with Shaikh Shakhbut with respect to the Joint Court jurisdiction over mixed cases, the terms of the 1960 concessions were revisited and found to be inadequate. More specifically, while Joint Courts seemed like an excellent idea in 1960, by 1962 it was clear that these would create more problems than they would solve. In an interesting turn of events, while the Joint Courts idea had been proposed instead of an increase in the Ruler's jurisdiction, as a corrective measure for not implementing Joint Courts, the Ruler's jurisdiction was ultimately significantly expanded.

With the Ross case, relations between Shaikh Shakhbut and the British soured once again, as the Shaikh insisted that the case be tried in Joint Court (A). After the (re)discovery of the 1960 concessions, an alternative plan was developed that ultimately increased the Ruler's jurisdiction significantly (B).

A Ross case: Regina vs. Roderick Ian Ross

On 1 November 1962, a British citizen named Roderick Ian Ross was driving his car on Das Island in Abu Dhabi, when he struck Khalfan bin Harib Abdulla, an Arab employee of Abu Dhabi Marine Areas ("ADMA") Limited.[502]

Judge Harry Charles Neil Maxwell Oulton, the Assistant Judge for the British court in the Trucial States, who was in bed with the flu at the time, was urgently summoned.[503] Since the plane that would transport the Assistant Judge to Das Island was delayed, and given the urgency of the matter communicated to him by Colonel Hugh J. E. Boustead[504] and Shaikh Shakhbut, he suggested that a preliminary examination be conducted. When the realization came later that as a traffic case, summary proceedings should have been conducted, the entire proceedings were annulled in December 1962, resulting in the entire case having to be tried from scratch.[505]

On top of the delays above, there was further delay attributed to the Abu Dhabi police prosecutor, Colonel Bill Edge, the result being that "*advantage was somewhat regrettably, albeit legitimately, taken by the defense to send the accused and a number of the prosecution witnesses on overseas leave*". As a result, the case came to trial on 21 February 1963, on Das Island.[506]

The night before the trial, Shaikh Mubarak bin Mohammad – deputy in the Abu Dhabi Police Force, and Shaikh Shakhbut's son in-law – visited Edge (the prosecutor), and told him that Shaikh Shakhbut would only allow the trial to take place on the condition that

[502]FO 371/168659.

[503]FO 371/168659, Letter CT/5/63 from Judge Oulton to Political Resident, dated 21 February 1963, para. 2.

[504]Political Agent of Abu Dhabi from 1961 to 1965.

[505]FO 371/168659, Letter CT/5/63 from Judge Oulton to Political Resident, dated 21 February 1963, para. 3.

[506]FO 371/168659, Letter CT/5/63 from Judge Oulton to Political Resident, dated 21 February 1963, para. 4.

Mubarak and another representative be allowed to take part in the proceedings. On the day of the trial, in open court, Edge reported that Shaikh Shakhbut had ultimately taken the position that "*it could not make for justice, and would be quite wrong, for a British Judge, administering British law, to try a British prisoner, defended by a British advocate, here on Das Island*".[507] As a result, Edge declined to prosecute the case, leading Judge Oulton to acquit the accused.[508]

Judge Oulton declared in open court that he would lodge a complaint against Shaikh Shakhbut, and informed him of the same in person during a visit that same evening.[509] Judge Oulton reported that during the visit: "*I explained to him [Shaikh Shakhbut] that such an interference with the Courts was regarded by us as a very serious matter, particularly by an authority so powerful as himself. Indeed, the more powerful the authority in question, the more serious the matter became. Shakhbut protested that he had not interfered with the Court at all, and elaborated this theme with vigour. However, I asked him whether he would deny that he had said this: "tell the Judge that he must convict him." Fortunately, I had found out the exact words he had used, and it was significant that when confronted with them he made no reply at all for fully five seconds. I said, "there – You have not denied it." To this also he made no reply. There is, in fact, no sort of doubt that he did say this*".[510]

In his complaint addressed to the Political Resident, Judge Oulton required "*an assurance from the political representatives of the Crown that there will be no repetition of this sort of behaviour before I agree to come on circuit here again*".[511]

Simultaneously, Judge Oulton's complaint also reported the details of a conversation that had taken place over lunch the same day with Mr. Haines of ADMA, the employer of Ross. In response to Judge Oulton's expression of his surprise that the accused and key witnesses were allowed to leave the Trucial States after the original proceedings had been quashed, Mr. Haines assured him that "*the company had not intended in any way to stifle the prosecution or to help the accused to evade the course of justice, that the prosecution had taken no steps to bring a fresh complaint when the first one was quashed and they had accordingly sent these people on leave*".[512]

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[507]FO 371/168659, Letter CT/5/63 from Judge Oulton to Political Resident, dated 21 February 1963, para. 11.

[508]Edge was later unceremoniously dismissed by Shaikh Shakhbut (*See* FO 371/168659, Letter 1644 from Hugh Boustead to William Luce, dated 24 February 1963, para. 5: "But what worries me is that as soon as Bill Edge returned from Das Island, the Ruler sent for him and told him that he was a traitor and that he could get out and had better go and live in what he called the 'Consulate' (!) with his wife. That was on the 22nd about 11 pm, and Bill, of course, went back to his house". *See* Photograph of Shaikh Shakhbut and Bill Edge.

[509]FO 371/168659, Letter CT/5/63 from Judge Oulton to Political Resident, dated 21 February 1963, para. 1: "*I wish to lodge a formal complaint about the conduct of shaikh shakhbut in connection with the Das Island manslaughter case, Regina vs. Roderick Ian Ross, about which you know something already. I regret having to do this, but the extravagance of his conduct really gives me no choice*".

[510]FO 371/168659, Letter CT/5/63 from Judge Oulton to Political Resident, dated 21 February 1963, para. 16.

[511]FO 371/168659, Letter CT/5/63 from Judge Oulton to Political Resident, dated 21 February 1963.

[512]FO 371/168659, Letter CT/5/63 from Judge Oulton to Political Resident, dated 21 February 1963, para. 13.

Furthermore, Mr. Haines argued that since "*the police were not, as they would surely have been in England, waiting on the steps of the Law Courts to re-arrest the accused the moment his appeal was over" and that "he saw no reason why the Company should not have taken the steps it did when 48 hours went by after the conclusion of the appeal without any action by the Police*".[513]

After explaining why Edge was not present at the hearing,[514] Judge Oulton offered a gentle rebuke,[515] on the basis that while the actions of the company where legal, "*but in the circumstances, when one would have thought that it was important to ensure that they could not possibly be suspected of trying to obstruct the course of justice in favour of one of their own countrymen, one would have thought that they would have informed the prosecutor of what they were doing rather than present him later with a fait accompli*".[516] Judge Oulton reported that he did not receive a satisfactory response on this question from Mr. Haines, nor from ADMA's Chief Local Representative, Mr. Willy (although the latter did point out that he considered Edge reporting that Ross had been speeding to the Ruler to be disgraceful).[517]

Shaikh Shakhbut was not convinced by Judge Oulton's scolding. On 24 February 1963,

[513]FO 371/168659, Letter CT/5/63 from Judge Oulton to Political Resident, dated 21 February 1963, para. 13.

[514]FO 371/168659, Letter CT/5/63 from Judge Oulton to Political Resident, dated 21 February 1963, para. 13: "*I explained to him that col. Edge had been told that if he insisted on going to Bahrain to attend the Chief Court hearing, which he might do if he chose, he would have to pay his own air fare, the chief court being of the opinion that there was no need for anybody except Col. Boustead to appear. Secondly, it would not have been possible for Col. Edge to re-arrest the accused in Bahrain, because his Court had no jurisdiction outside the Trucial states; nor could he have invited H.B.M's Court for Bahrain to accept the case instead, because the offence was alleged to have been committed in the Trucial States, so that the Court for Bahrain had no jurisdiction either*".

[515]In contrast, Boustead was stern with the ADMA representatives (*See* FO 371/168659, Letter 1644 from Hugh Boustead to William Luce, dated 24 February 1963: "*3. I told them both [Willy and Haines of ADMA] that I thought it was a shocking thing to do under the circumstances and was so stupid as to be unbelievable, and asked them to get them all back immediately without delay, as, without a doubt, the shaikh, who was already asking what was happening, would be full of suspicions at the delay and would make things increasingly difficult for everybody. I told them they must have all witnesses present. 4. In spite of this, the chief and most effective witness resigned from the contracting company, by whom he was employed, merely because Haines cannot possibly have told the contracting company that they had got to hold this witness on tap. I was very much annoyed when I heard about it and told both Haines and Willy, in no measured terms, what I thought about it. This, of course, has all contributed towards the behaviour of Shakhbut in this case and we have the oil company to thank for this*").

[516]FO 371/168659, Letter CT/5/63 from Judge Oulton to Political Resident, dated 21 February 1963, para. 13.

[517]FO 371/168659, Letter CT/5/63 from Judge Oulton to Political Resident, dated 21 February 1963, para. 14: "*Later, in Col. Boustead's house, we raised the same subject with Mr. Willy, the Company's Chief Local Representative, and he gave the same sort of answers, expressing surprise, as Haines had done, at the failure of Col. Edge to attend the Chief Court proceedings and to re-arrest the accused in Bahrain. He eventually admitted, if only tacitly, that the Company had not been concerned to ensure that they were not suspected of trying to protect the accused as being a British national, and that they had been interested only in doing their utmost to back him up as one of their employees. Willy went on to say that what had prompted them to engage a lawyer was their having discovered that col. Edge had told the Ruler (and col. Boustead) that the accused had been guilty of speeding. This he considered disgraceful*".

the Shaikh wrote to the Abu Dhabi Political Agent, expressing his surprise that his representative was precluded from participating in the hearing "*although you [Boustead] know fairly well that when a case involving the subjects of the two parties takes place, a mixed court will be convened and it is our right to send to such a court the number of persons which we deem fit to represent us in the court to put our case exactly like the opposite side*",[518] and informing him that the case was therefore considered pending resolution.

In response to Shaikh Shakhbut, the Political Agent highlighted that he had insisted that the oil company ensure that the involved parties remained in Abu Dhabi for the hearing, that the Shaikh was mistaken in his understanding that a Joint Court must be convened for this dispute, and that the defendant was acquitted as a result of interference by the Shaikh's representative which led to Edge not prosecuting the case.[519] He also reiterated that "*Judge Oulton was extremely shocked at an interference in court procedure, which, as he explained to your Excellency, he had never encountered in all his years as a Judge*".[520]

Shaikh Shakhbut's response was swift, brief and stern. Addressing the relevant points made by Boustead, he wrote:

> "*We acknowledge receipt of your letter dated 24th February 1963, in which you said that the Political Resident has instructed that the case should be seen by the Court to which the accused belongs and not a mixed court. I wonder how it could not be a mixed court when we were the second party to it. If in your opinion it was so, who would the second party be? You also said that courts of this nature are generally open to the public and to any representative whom we may wish to appoint but they cannot make comments on the case or express their opinion in the court which law does not allow as normally they would be observers. What law do you describe? Law of this type is far from being called law as it cannot apply to human beings. You further said that the accused would automatically be acquitted and the case dropped. This would only mean that this is a force against us and there is nothing like it in the whole world. You finally said that the case was out of your hands since the month of December. We are wondering how it could have been while you are still representing your government in this country*".[521]

The crisis with Shaikh Shakhbut was further amplified on 10 March 1963, when an Adeni struck an Arab and was arrested under direction of the Ruler. Despite Adenis being subject to British jurisdiction, Shaikh Shakhbut refused to hand him over – the British believe that "*trying to use this case as a means of getting what he considers his rights in the Ross case*".[522]

[518]FO 371/168659, Letter from Shaikh Shakhbut to Colonel Boustead, dated 24 February 1963.
[519]FO 371/168659, Letter from Colonel Boustead to Shaikh Shakhbut, dated 24 February 1963.
[520]FO 371/168659, Letter from Colonel Boustead to Shaikh Shakhbut, dated 24 February 1963, para. 7.
[521]FO 371/168659, Letter from Shaikh Shakhbut to Colonel Boustead, dated 25 February 1963, para. 7.
[522]FO 371/168660, Confidential Note, undated and unsigned. Similarly in April 1963, when an Australian knocked over an Abu Dhabi with his car, Shaikh Shakhbut did not allow the Abu Dhabi police to file a complaint with the British Court, and instead wrote to the Political Agent in reference to the Ross case

On 11 March 1963, Shaikh Shakhbut wrote to Boustead about the Ross case, highlighting that "*[w]e now repeat our just and logical request to solve this case which has been pending for over 4 months, since failure and procrastination will not solve the problem*".[523] In turn, Boustead informed Shaikh Shakhbut that he was awaiting instructions.[524]

Shaikh Shakhbut's insistence was bewildering to the British officials who described the "*main importance of this affair is the further example it provides of Shaikh Shakhbut's misbehaviour in a matter affecting his relations with H.M.G*".[525] Once again, drastic measures were touched on in internal discussions.[526] The tone of internal communications changed drastically a few days later with the (re)discovery of the 1960's concessions.

B (Re)discovery of the 1960 concessions to Shaikh Shakhbut

On 23 March 1963, the Political Resident (William Luce) wrote to the Foreign Office (A. R. Walmsley) informing him that further investigations had revealed a series of commitments made to Shaikh Shakhbut in 1960, and that it is "abundantly clear" that Shaikh Shakhbut's actions in the Ross case are based on these commitments.[527] The Political Resident acknowledged that he had made a serious mistake.[528]

By 1962, the British Foreign Office had lost a number of key figures who had left the Gulf region, including the Trucial States Political Agent Mawdsley[529] and Judge Haines,[530] both of whom had previously been instrumental in the Persian Gulf and were intimately acquainted with the legal arrangements. That was likely how the 1960 Joint Court agreement with Shaikh Shakhbut slipped under the rug, especially since – as it was later discovered – it had never been approved by UK Ministeres.[531]

It was also discovered that after the political agreement was made with Shaikh Shakhbut, certain actions were meant to be taken in order for the political agreement to be reflected

(*See* FO 371/168659, Telegram No. 25, dated 26 April 1963).

[523]FO 371/168659, Letter from Shaikh Shakhbut to Colonel Boustead, dated 11 March 1963.

[524]FO 371/168659, Letter from Colonel Boustead to Shaikh Shakhbut, dated 12 March 1963. *See also* FO 371/168659, Letter from Colonel Boustead to William Luce, dated 13 March 1963 (highlighting that "the Ruler is still not willing to let the matter drop").

[525]FO 371/168659, Letter from William Luce to A. R. Walmsley, dated 23 February 1963.

[526]FO 371/168659, Minute, dated 18 March 1963.

[527]FO 371/168659, Letter 1377/63 from W. H. Luce (Political Resident) to A. R. Walmsley (Foreign Office), dated 23 March 1963.

[528]FO 371/168659, Letter 1377/63 from W. H. Luce (Political Resident) to A. R. Walmsley (Foreign Office), dated 23 March 1963, para. 4: "*You may already have noticed from your past knowledge of developments over the jurisdiction issue in Abu Dhabi and my letter under reference that I in fact made a serious mistake in concurring in the trial of the present Ross case before H.B.M.'s Court. It should clearly have been tried before a Joint Court since that is what had, politically, been agreed with the Ruler. I can only say that I am very sorry indeed about this mistake, but, by way of explanation though not of excuse, you will realise that there is now nobody here on the political or legal side who was in the Gulf when this political agreement with Shaikh Shakhbut was made*".

[529]FO 371/156703, Minute by John Whyatt, dated 5 March 1962.

[530]FO 371/156704, Letter from Walker, dated 1 June 1961 (noting that John Whyatt, replacing Judge Haines who retired, was currently undertaking his first tour of the Gulf).

[531]FO 371/168661, Note from Brenchley, dated 10 September 1963.

in applicable rules.[532] The actions were aimed at correcting fundamental issues with the functioning of the Joint Court. They included the question of the law to apply in the Joint Court, as well as setting out a method to break a potential deadlock between the two judges.

However, as the focus had shifted back on the main point of contention with Shaikh Shakhbut – the extension of his jurisdiction over nationals of Arab states following the concessions – none of the corrections that were necessary for the smooth functioning of the Abu Dhabi Joint Court were enacted.[533] As a result, the actions remained pending. Since no action was taken to implement them, the political agreement with Shaikh Shakhbut was not reflected in any Foreign Office document outside of the record of correspondence with the Abu Dhabi Shaikh,[534] which led to the error committed in the Ross case.[535]

This discovery gave rise to the urgent necessity to design a solution for the mistake made in the Ross case on the one hand, and to promptly address the exercise of jurisdiction over mixed cases in the Joint Court going forward (i.e., the application of the 1960 political concession) on the other hand.[536]

Despite initially showing great promise as a bridge connecting the two legal systems (B.1), the disappointing experiences with Joint Courts presented strong arguments for steering Shaikh Shakhbut away from them (B.2).

B.1 The promise of Joint Courts as a connecting point bridging different legal systems

The history of Joint Courts in the Gulf is a rocky one, marked by numerous false starts towards their establishment in practice, despite their early welcome as a vehicle that held

[532]FO 371/168659, Letter 1377/63 from W. H. Luce (Political Resident) to A. R. Walmsley (Foreign Office), dated 23 March 1963, para. 4.

[533]FO 371/168659, Minute from D. G. Crawford, dated 2 April 1963: "*Mr. Beaumont's letter [BA 1641/19 of June 1 1960] did, however, ask the Political Resident to secure Shakhbut's agreement to: (a) In the Joint Court, the judge of the Defendant's jurisidiction should have the casting vote and (b) persons under H.M. jurisdiction sentenced by the Joint Court should serve their sentence in the Trucial Oman Scout's prison and not that of the Ruler. 5. As far as can be seen from subsequent papers Shakhbut's agreement was never obtained to the above points. [...] Why we did not secure Shakhbut's agreement to satisfactory arrangements for the operation of the Joint Court in Abu Dhabi remains a mystery from the papers. One answer may be that, as reported in Dubai telegram No 10 Saving of 1960 (see BA 1201/20/60) Shaikh Zaid made counter-proposals contrary to those made in the Political Resident's letter of April 22 1960 for dealing with mixed cases in Abu Dhabi*".

[534]FO 371/168659, Letter 1377/63 from W. H. Luce (Political Resident) to A. R. Walmsley (Foreign Office), dated 23 March 1963, para. 4: "*From this correspondence it is clear, first, that the then Political Resident should have withdrawn, for Abu Dhabi, his standing Concurrence for mixed cases to be tried in H.B.M.'s Court, and secondly, that the Foreign Office were looking after the question of the law to be applied in a Joint Court and what was to be done if the judges of the Joint Court disagreed, with a view to including these points in the Amending Order which they were then drafting*".

[535]FO 371/168659, Letter 1377/63 from W. H. Luce (Political Resident) to A. R. Walmsley (Foreign Office), dated 23 March 1963, para. 4: "*When Judge Davis came to advise me on the present Ross case there was therefore nothing to show on his files that the Concurrence had been withdrawn (because it had not been) or that there was any reason to treat Abu Dhabi differently from the other Trucial States in this respect*".

[536]FO 371/168659, Letter 1377/63 from W. H. Luce (Political Resident) to A. R. Walmsley (Foreign Office), dated 23 March 1963, para. 7: "*In this unfortunate situation we now have two questions to tackle:*

the promise of direct interaction between two legal systems.[537]

The two parallel legal systems in the Trucial States had one important point of intersection: the Joint Courts.[538] In his 1949 report, Haines traced the history of Joint Courts, finding that they were a result of a 1909 reservation on British extraterritorial jurisdiction over mixed cases made by the Bahrain Ruler.[539] The first reference to Joint Courts was made in the 1913 Bahrain Order in Council, followed by the 1935 Qatar Order in Council.[540] Since the Trucial States Order in Council was based on the one adopted by Qatar, the Joint Court provision was included.[541] In other words, the Joint Court provision requested by the Bahrain Ruler was uniformly integrated into subsequent agreements with Rulers who did not explicitly make a request for it.[542]

Since Joint Courts had never functioned in Qatar and the Trucial States, the idea to discontinue them in the updated Order in Council was mooted in 1950.[543] However, they were ultimately saved by the Political Resident, Rupert Hay, who advocated for their maintenance in view of the expected future progress and population growth, that would – it was expected – eventually lead to them being put to use.[544]

In the 1950 redefinition of British legal policy in the Gulf, Joint Courts were identified as a useful educational tool that could be used to modernize the local legal system as it transitioned to exclusive jurisdiction. As a result, Joint Courts were envisaged for mixed

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first, how we deal with Shaikh Shakhbut on the present issue; and secondly, how we should conduct mixed cases in Abu Dhabi in future".

[537]FO 1016/121, Record of Meeting Held at the Foreign Office on 6th January 1950 Regarding Haines' Report, para. 8: "*It was suggested that we should use the Joint Courts gradually to educate the Sheikh and his judges into the administration of justice on more modern lines. It was thought that both the Sheikh and the Resident were too important and busy to concern themselves with sitting on Joint Courts and that they should both cease to do so. The Sheikh should be encouraged to train suitable persons in the administration of the law. This might be accompanied by visits abroad to study modern legal practice. In regard to the application of law it was thought that the Joint Court should apply modern law as well as local law and custom and that it is desirable that we should agree with the Sheikh what law is to be applied in these Joint Courts*".

[538]The Orders in Council provided for Joint Courts in Bahrain, Qatar and the Trucial States.

[539]FO 1016/121, Haines' Report on Judicial Arrangements in the Persian Gulf, Annexe VI, "Memorandum on Joint Courts", dated 19 December 1949.

[540]The result of a reservation made by the Bahrain Ruler in 1909 to British jurisdiction, on the condition that mixed cases (those involving subjects from different jurisdictions) would be settled jointly.

[541]FO 1016/121, Haines' Report on judicial arrangements, Annexe VI, "Memorandum on Joint Courts", dated 19 December 1949.

[542]The Haines report notes that he was asked to compare these Joint Courts to the Mixed Courts in Egypt (*see* FO 1016/121, Haines' Report on judicial arrangements, Annexe VI, "Memorandum on Joint Courts", dated 19 December 1949, para. 17: "*I have been asked to say whether the Joint Courts are established under the Order in Council or whether they are established under local law in the same way as the Mixed Courts were established in Egypt. There is no doubt that they are not analogous to the Egyptian Mixed Courts. I think that they are established under the Order in Council to give effect to the agreement with the shaikh that mixed cases should be decided jointly. The sheikh has accepted the institution and has left it to us to keep the records and to issue the necessary warrants, summons and orders*").

[543]FO 1016/121, Record of Meeting Held at the Foreign Office on 6th January 1950 Regarding Haines' Report.

[544]Letter 4/17/50 dated 3 March 1950 from Hay to Rogers.

cases in all the Gulf territories.[545]

However, throughout the 1950's, a number of Gulf states had never instituted Joint Courts, for various reasons. In the case of Qatar, Judge Haines had paid a visit in April 1954 to explore the possibility of establishing a Joint Court there, and concluded that the timing was not right given the Ruler's insistence on the *status quo* under which religious law occupied a supreme role compared to the secular Qatar Government Courts, that were only meant to deal with simple matters, while more complicated ones were transferred to the Shari'a Court.[546] Although some months later, the Ruler appeared prepared to consider establishing a Joint Court, it was decided to delay the subject until a concrete case of application manifested itself.[547]

As for Kuwait, Joint Courts faced strong resistance from the Political Agent (H. G. Jankins). In response to Judge Haines' Joint Court proposal, he wrote to the Political Resident:

> "*My first comment on this is that neither the Political Agent nor the Assistant Political Agent in Kuwait is qualified to give instruction in the law to anyone. The Political Agent's court is a long way from town and although it is public very few of the public attend it. We struggle along in our own court as best we can but I think it would be quite deplorable if we were called upon to parade our lack of legal training with a Kuwait judge on a bench in the middle of the town before the whole of Kuwait and passing visitors. If we insist on a high standard of local administration in the employment by the Ruler of properly qualified technical experts in finance, customs and so on we must, I think, insist on a comparable standard in the courts. To such a standard members of the Foreign Service are not, through lack of training and legal experience, competent to attain*".[548]

In contrast, Dubai's Joint Court was functioning starting from the 1950's, and had relatively more success as a functional point of interaction, exchange and education between the judiciaries of the dual legal system.[549]

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[545] *See* FO 371/168665, Despatch No. 172, dated 12 November 1963: "*In 1950 the Foreign Office recommended to the Political Resident (Despatches Nos. 76 and 77 of the 20th of November) the development of the Joint Court system in all the territories. It was intended that the system should be extended to every type of mixed case. The reason for this recommendation was that it was thought that the Joint Court System was not merely a means of securing justice in a mixed case but also a method by which the Ruler or his judicial officers might, by sitting with British judges, acquire a knowledge of the principles of justice and procedures which His Majesty's Government should wish them to apply*".

[546] FO 371/109929, Letter from Haines, dated 24 March 1954.

[547] FO 371/109929, Letter from Burrows, dated 26 June 1954.

[548] FO 1016/25, Letter No. 1/29/50, from H. G. Jakins (Political Agent in Kuwait) to Rupert Hay (Political Resident), dated 12 December 1950, para. 4. Jakins was also concerned that rising Arab nationalism would ultimately lead to calls for the abolishment of Joint Courts.

[549] FO 371/126986, Report from Judge Haines on working of Courts in Gulf, dated 8 April 1957: "*It is also a good thing that the Joint Court has been established and I was very pleased that the Political Agent has been able to persuade the Judges to follow wherever possible the procedure and laws under the Order in Council in Joint Court cases. I entirely agree with the Political Agent in his criticisms of the weakness of*

B.2 The underwhelming Joint Court experience

In his letter to the Foreign Office, the Political Resident emphasized that "*from a purely practical point of view the holding of Joint Courts in Abu Dhabi would be a most unsatisfactory procedure*",[550] pointing out that even after the issues that had been outstanding since 1960 were resolved, it would be extremely difficult for a judge of Shaikh Shakhbut's liking to familiarize himself with British law and procedure, and for Shaikh Shakhbut himself to refrain from interfering with the judge.[551]

In spite of his acute awareness of the serious problems that would very likely accompany the implementation of the 1960 political concessions, the Political Resident was steadfastly committed to rectifying his error and moving forward. Thus, he asserted "*we clearly cannot go back on our political agreement with Shaikh Shakhbut and we must therefore proceed with the establishment of the legal requirements for a Joint Court*".[552]

Luce's insistence on honoring the agreement was met with some resistance from within the Foreign Office. In response to his recommendation that the principle of *pacta sund servanda* means that Joint Courts must absolutely be implemented, Thomas Frank Brenchley (Head of the Arabian Department at the Foreign Office from 1963-1967) identified a number of difficulties. Brenchley argued that "*experience elsewhere has shown that Joint Courts are*

Joint Court procedure in not setting out the law to be applied. However, he has laid a good foundation in getting the local Judges to accept out procedure and law wherever possible". *See also* FO 371/126986, Letter from B. A. B. Burrows, dated 22 March 1957, para. 3: "*A special effort has been made throughout the year to associate the Ruler's representative and cousin, Shaikh Muhammed bin Hasher, and latterly the new Qadhi, with this Court's procedure and laws in the Joint Court cases. It is, of course, a serious criticism of the dual jurisdictional position that no official procedure or law has ever been evolved for Joint Court cases. This court has, however, endeavoured to follow, wherever possible, the procedure and laws obtaining under the Orders-in-Council, in Joint Court cases, in order to show the parties in mixed cases the value of our judicial system. Both Shaikh Mohammed and Shaikh Abdurrahman have concurred in this arrangement*". *See also* FO 371/168661, Note from T. F. Brenchley, dated 19 July 1963, para. 3. For a discussion on the failure of the Joint Court experience in Bahrain, *see* FO 371/156704, Letter from W. P. R. Mawdsley titled 'Memorandum on the Retrocession of Jurisdiction', dated 7 August 1961: "*The Joint Court in Dubai has done some useful work, but its defects in my experience exactly parallel those of the Bahrain Joint Court – and for the same reason*".

[550]FO 371/168659, Letter 1377/63 from W. H. Luce (Political Resident) to A. R. Walmsley (Foreign Office), dated 23 March 1963, para. 10.

[551]FO 371/168659, Letter 1377/63 from W. H. Luce (Political Resident) to A. R. Walmsley (Foreign Office), dated 23 March 1963, para. 10: "*Even if Shaikh Shakhbut were willing to stand by his agreement that the law to be applied in Joint Courts should be our law, and accepted a reasonable solution on what should be done if the Judges disagreed, there would be bound to be disagreements during the hearing of a case simply because anyone likely to be appointed by Abu Dhabi would be unlikely to understand or apply the procedure. There is moreover the obvious danger that Shakhbut would try to influence the proceedings and thus distort the course of justice*".

[552]FO 371/168659, Letter 1377/63 from W. H. Luce (Political Resident) to A. R. Walmsley (Foreign Office), dated 23 March 1963, para. 10: "*Even if Shaikh Shakhbut were willing to stand by his agreement that the law to be applied in Joint Courts should be our law, and accepted a reasonable solution on what should be done if the Judges disagreed, there would be bound to be disagreements during the hearing of a case simply because anyone likely to be appointed by Abu Dhabi would be unlikely to understand or apply the procedure. There is moreover the obvious danger that Shakhbut would try to influence the proceedings and thus distort the course of justice*".

generally unsatisfactory institutions",[553] that establishing them at this time would contradict the policy of retrocession in favor of the Ruler's exclusive jurisdiction, and that Abu Dhabi did not have a suitable judge to sit on the Joint Court.[554]

Brenchley's concerns about the difficulties pertaining to the applicable law, and the resolution of disagreements between Joint Court judges were shared by Judge Whyatt, who also identified the potential appeal of Joint Court judgments to the Privy Council to be problematic. Judge Whyatt highlighted that "*[t]he legal difficulties of implementing the 1960 Agreement for Joint Courts in Abu Dhabi are such as to enable the Secretary of State to say to the Ruler, with complete good faith, that it cannot be carried out as it stands*".[555] Whyatt concluded that "*[t]herefore the wise and proper course would be to postpone the 1960 Agreement until such time as the Ruler has a qualified legal adviser to advise and assist him in this difficult matter*".[556]

Therefore, there was a great degree of concurrence amongst Foreign Office officials that the Abu Dhabi Joint Court should not see the light of day. The question became how to convince Shaikh Shakhbut of the same – a challenging task on any day, but even more so in the context of the current strained nature of his relationship with the British. Given the chain of events that began in 1960 (starting with his threats to abdicate after his request for extended jurisdiction over nationals of India and Pakistan) to date (ending with a stern scolding and mischaracterization of his behavior as an attempt at subverting the course of justice when he was merely advocating for rights that had been consented by the British), it was difficult to imagine that Shaikh Shakhbut would be amenable to haggling over alternative arrangements.

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[553]FO 371/168661, Note from T. F. Brenchley, dated 19 July 1963, para. 3. For a discussion on the failure of the Joint Court experience in Bahrain, *see* FO 371/156704, Letter from W. P. R. Mawdsley titled 'Memorandum on the Retrocession of Jurisdiction', dated 7 August 1961: "*The Ruler himself has never liked the Joint Court, as I think he regards it as a more obvious derogation of sovereignty than Her Majesty's Court itself. When he sat on the Joint Court himself, it was a one-man show, and perhaps it should be said in fairness that he had not much choice in his position but to take complete command. Since those days the Joint Court has worked very amicably, but the burden placed on the European judge is considerable, and if the Joint Court were to be extended to cover more cases and more people, that burden would become worse. [...] The trouble is that the Arab judge on the Joint Court is neither learned nor really interested in legal matters. It is no use saying, as has sometimes been said, that we should "train the Bahrainis". The Ruling Family – especially the older ones – have no intention whatever of being "trained" by anyone – or of changing their ideas. The Joint Court is rather like a cart drawn by two cart horses, one horse pulling the card, the other walking alongside, being careful to keep traces tight but in fact pulling very hard. If the Arab partner were an independent and legally qualified man the picture would be different; but if such a person could be found why should he not try cases on his own?" [...] In Dubai and elsewhere in the Trucial States the climate may be more favourable, especially in Dubai, which in many ways seems to be the most progressive and liberal state in the Persian Gulf. The Joint Court in Dubai has done some useful work, but its defects in my experience exactly parallel those of the Bahrain Joint Court – and for the same reason. The "Joint Court idea" no doubt has its attractions but I venture to say that an ounce of experience is worth a ton of theory on this point*".

[554]FO 371/168661, Note from T. F. Brenchley, dated 19 July 1963.

[555]FO 371/168659, Note from Judge John Whyatt (who succeeded Judge Haines as Judge of the Chief Court for the Persian Gulf in July 1961) titled "Legal Difficulties confronting the implementation of the Agreement for a Joint Court to try civil and criminal Mixed Cases in Abu Dhabi", dated 23 August 1963.

[556]FO 371/168661, Note from Brenchley, dated 10 September 1963, para. 3.

A significant concession would have to be made, one that would succeed in "*persuading Shakhbut to veer from the Joint Court track*".[557] This was the complete retrocession of jurisdiction in limited subject-matters, after the necessary preconditions of implementing suitable legal codes and appointing trained judges were met. Brenchley suggested that "*[t]raffic offenses and civil Cases arising from traffic accidents might perhaps be among the first of these areas [of complete retrocession], particularly since traffic cases have been responsible for much of the friction between ourselves and the Ruler on jurisdictional matters*".[558]

The retrocession of British jurisdiction in traffic matters was presented to Shaikh Shakhbut in October 1963, who accepted it. The terms were that the retrocession would be experimental for 12 months, before being confirmed, and that Shaikh Shakhbut would adopt a modern traffic law and hire a professional judge to serve on the Abu Dhabi Court.[559] Writing urgently on the subject of British jurisdiction in the Gulf, William Luce highlighted the remarkable turn of events in Abu Dhabi, and emphasized that "*[c]ircumstances have thus conspired to bring about a situation where we are committed for the first time, apart from Kuwait, to a specific and rapid programme of retrocession of our jurisdiction, provided that our conditions are met, to the Ruler who is generally regarded as the least rational and reliable in the Gulf [i.e., Shaikh Shakhbut]. It will therefore be politically impossible to proceed at any slower pace in other States, certainly Bahrain, Qatar, Dubai and Sharjah*".[560]

4.5 Concluding remarks on Abu Dhabi's road to autonomy through Traffic Court

The details of the final outcome in the Ross case remain unclear. In light of Judge Oulton's verdict, it was deemed impossible for criminal proceedings to be instituted in a potential future Joint Court, although a civil lawsuit was theoretically possible.[561] Whether civil proceedings were commenced, and whether Judge Oulton's criminal judgment was appealed

[557]FO 371/168661, Note from Brenchley, dated 10 September 1963.

[558]FO 371/168661, Note from Brenchley, dated 10 September 1963.

[559]FO 371/168665, Despatch No. 172, dated 12 November 1963: "*It was further agreed that Sir John would try to obtain a suitable Jordanian judge by the end of the year and that he would also draft a traffic law for submission to and eventual promulgation by the Ruler; in addition it was agreed that the experimental period for the Traffic Court would be 12 months*".

[560]*See* FO 371/168665, Despatch No. 172, dated 12 November 1963, para. 7.

[561]FO 371/168659, Letter 1377/63 from W. H. Luce (Political Resident) to A. R. Walmsley (Foreign Office), dated 23 March 1963, para. 8: "*At the same time, the case has been tried correctly from the legal point of view, since my new Concurrence was legally valid, though not in conformity with the political agreement. Therefore, the accused having been acquitted, however unfortunate the circumstances, he should not be tried again on the same criminal charge; even if this were legally possible it would, I think, be wholly repugnant to our notions of justice to retry the case in a Joint Court. I can see no alternative therefore to informing Shaikh Shakhbut that I very much regret that in all good faith I concurred in the case being tried before H.B.M.'s Court, and that this was clearly in breach of the political agreement reached in 1960 with him; but that the accused has been legally tried and legally acquitted and therefore the case must be considered closed as a criminal case; nevertheless should the relatives of the deceased so wish, it would be possible for them to institute a civil case in a Joint Court claiming damages*".

are also uncertain. ADMA had directed a settlement proposal of €530 to the family of the deceased, which at the time had been rejected by Shaikh Shakhbut who was waiting a final determination on criminal proceedings.[562]

The retrocession of traffic disputes was Abu Dhabi's first step on the path away from the pluralist legal system that divided jurisdiction between the Ruler and Britain, towards the Ruler's exclusive territorial jurisdiction under a unitary legal system.

In the span of a few years, Abu Dhabi's legal system advanced from the least developed of all the Gulf states, to rival the rate of progress of Kuwait, which up to then was the model of a successful pathway towards retrocession and autonomy. Abu Dhabi's legal progress propelled its Ruler into the spotlight, with neighboring states asking to study the Abu Dhabi traffic law, which led to the Political Resident dubbing him "Shaikh Jones".[563]

The success of Abu Dhabi's legal reforms set a positive tone in the relationship between Shaikh Shakhbut and British Foreign Officials, a far cry from the two crises which played a fundamental role in shaping Abu Dhabi's path towards legal autonomy.

The starting point of the chain of events was Shaikh Shakhbut's modest request for wider jurisdiction over Arabs and Muslims. What was gained in the end was far more. Notably, what had been offered initially to distract the Ruler from his jurisdictional aspirations (Joint Courts) was the key that ultimately opened the door to retrocession. By the beginning of 1966, traffic jurisdiction had been permanently retroceded, and plans were elaborated to progressively retrocede Workman's compensation, contract and tort law, and even criminal cases, following the same method that was employed for traffic accidents.[564] Thus, the transition from dual to singular legal system in Abu Dhabi became a bilateral policy, and

[562]FO 371/168659, Letter 1377/63 from W. H. Luce (Political Resident) to A. R. Walmsley (Foreign Office), dated 23 March 1963, para. 9: "*A possible complication to the institution of civil proceedings is that the oil company who employ Ross has already offered compensation of Rs. 7665 (about €530). Shaikh Shakhbut has, however, declined this payment on the grounds that the case is still not settled. As therefore the payment has not been accepted there is presumably no legal reason why civil proceedings should not be instituted*".

[563]FO 371/185214, Annual Report for 1965 by Judge Whyatt titled "ANNUAL REPORT FOR 1965 MADE BY THE JUDGE OF THE CHIEF COURT FOR THE PERSIAN GULF TO THE SECRETARY OF STATE PURSUANT TO THE PROVISIONS OF THE PERSIAN GULF ORDERS IN COUNCIL", dated 6 May 1966: "*Recently the Deputy-Ruler asked the British Agency in Qater to ask the British Agency in Abu Dhabi to obtain a copy of the Abu Dhabi Traffic Law which formed the basis of retrocession in that Shaikhdom, to enable him to study this precedent. The desire to keep up with the Joneses is evidently not confined to suburbia. It would be ironic but pleasing to his friends and admirers if Shaikh Shakhbut became known as Shaikh Jones*".

[564]FO 371/185214, Note from Luce on progress of retrocession of jurisdiction (No. 5 1649), dated 29 January 1966, para. 7: "*In any case the time had come to review the operation of jurisdiction in traffic cases, which had already been retroceded for an experimental period; and it seemed opportune to associate this question with that of retrocession in other spheres. It has therefore been agreed by your Department that retrocession of jurisdiction in traffic cases should now be made permanent, and that proposals should be put to the Ruler and Judge Hijab that jurisdiction in regard to workmen's Compensation, the laws of contracts and civil wrongs, and to a limited degree in criminal cases, should, subject to the enactment of suitable laws and the continued employment of a professional judge, be retroceded, initially for an experimental period of one year. Sir John Whyatt will shortly visit Abu Dhabi and present these proposals. Should the Ruler and Judge Hijab firmly oppose the limitation to an experimental period I have your agreement to waive this condition, which, while desirable, should not be allowed to destroy the opportunity for more rapid transfer of jurisdiction*".

Abu Dhabi was the first of the Trucial States to achieve retrocession.[565]

In receiving an invitation back to the UAE, British common law appears to have come "full circle", while the local legal system slides back into legal pluralism. While at first blush, the 2004 development may appear to be a step back, the dualist legal system today is significantly different from the dualist legal system pre-1971. Notably, the Dubai International Financial Centre ("DIFC") Courts are staffed by professional common-law judges who are nationals of various common-law countries. This is in contrast to the court of the political agent that was prevalent in the Gulf region in the 1950's and 1960's. In addition, the DIFC Courts jurisdiction is not automatically conferred on nationals of certain states or on people of certain religions. Finally, while one major importance of the political agent court was its criminal jurisdiction, the DIFC Courts have no jurisdictional in criminal matters.

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[565]FO 371/185214, Annual Report for 1965 by Judge Whyatt titled "ANNUAL REPORT FOR 1965 MADE BY THE JUDGE OF THE CHIEF COURT FOR THE PERSIAN GULF TO THE SECRETARY OF STATE PURSUANT TO THE PROVISIONS OF THE PERSIAN GULF ORDERS IN COUNCIL", dated 6 May 1966: "*Without doubt the award for the best performance of the year goes to Shaikh Shakhbut. Alone, of all the Rulers in the Gulf, he has shown himself anxious to recover the segment of sovereignty which his ancestors coded to Britain in the last century when Britain was given the right to exercise jurisdiction in Abu Dhabi. Consequently in this State, unlike Bahrain, Qatar and the Northern Trucial States, the policy of retrocession has become a bilateral policy, both parties being agreed as to the object to be achieved and the*

N. J. Brown. *The rule of law in the Arab world: Courts in Egypt and the Gulf*. Cambridge University Press, Cambridge, 1997b.

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Chapter 5

Conclusions

Together, the three papers provide an account of the UAE's path away from, and subsequent return to legal pluralism. The core issue that plagued the institution of Joint Courts under the Trucial States Order in Council ("TSOC") appear to remain relevant today, at least to some extent. The challenge of using joint courts as an educational tool, and a tool to bridge differences across legal cultures, have not been entirely overcome, some fifteen years after the creation of the Dubai International Financial Centre ("DIFC") Courts. The major deficiency today, as it was then, is the lack of direct jurisprudential interaction between the two court systems. Such interaction, even if one sided (either the Dubai Courts commenting on DIFC Courts judgments or vice versa) would vastly enrich the experiment. Since it introduces the dangerous risk of contradictory judgments, the argument might be made that such a troubling outcome outweighs any potential benefit to be gained from direct interaction.

Glossary

CA Court of Appeal *pp.* 13, 21, 22, 25–30, 33, 37, 40, 64, 72, 73, 93–95, 99, 143, 146, 148–150, 154

CC Court of Cassation *pp.* 73, 93, 94, 99, 148, 149, 154

CCL Commercial Companies Law *pp.* 8–10

CFI Court of First Instance *pp.* 13–15, 18–27, 32–37, 41, 44, 53, 55, 57, 62–76, 84, 86, 92–95, 98–101, 143, 147–150, 153–156

DIAC Dubai International Arbitration Centre *pp.* 52, 55, 56, 60, 70, 73, 78, 93, 97, 99, 148, 152, 154

DIFC Dubai International Financial Centre *pp.* ii, 1, 2, 4–7, 11–31, 33, 37–41, 43, 44, 49–86, 90–101, 137, 141, 143–156

DXB Dubai Mainland Courts *pp.* 73, 93, 99, 148, 154

FCO Foreign and Commonwealth Office *pp.* 138, 157

FNC Federal National Council *pp.* 9, 38, 144, 145

FO Foreign Office *pp.* 138, 157, 158

GCC Gulf Cooperation Council *pp.* 7, 8

JAL Judicial Authority Law *pp.* 13, 14, 17, 20, 23–26, 51, 57, 58, 63, 64, 67–69, 71, 72, 74, 75

JT Joint Tribunal *pp.* 78, 79, 86, 94, 149

JV Joint Venture *pp.* 49, 52

LCIA London Court of International Arbitration *pp.* 43, 49, 50, 52–56, 77, 93, 95–97, 148, 150–152

LO Legal Origins *pp.* 4, 5

MOU Memorandum of Understanding *p.* 58

New CCL Federal Law (2) of 2015 on Commercial Companies *pp.* 10, 11

NYC New York Convention *pp.* 54, 74, 75, 77, 79

POJ Protocol of Jurisdiction *pp.* 14, 23, 40, 58, 59, 99, 146, 154

TSOC Trucial States Order in Council *pp.* 108, 141

TSOC 46 Trucial States Order in Council, 1946 *p.* 108

TSOC 50 Trucial States Order in Council, 1950 *pp.* 108, 109

UAE United Arab Emirates *pp.* 1, 2, 4, 6–13, 15–18, 22, 24, 26, 33, 37–41, 50–55, 58–60, 62, 63, 66–68, 70–75, 79, 83–87, 94, 97, 101, 103, 105, 137, 141, 143–147, 149, 152, 156

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