



ORDR-4898531121-1009

Claim No: CFI-041-2021

**THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS**

**IN THE COURT OF FIRST INSTANCE**

BETWEEN:

- (1) **ABRAAJ INVESTMENT MANAGEMENT LIMITED (IN OFFICIAL LIQUIDATION)**
- (2) **ABRAAJ CAPITAL LIMITED (IN OFFICIAL LIQUIDATION)**

Claimants

and

- (1) **KPMG LOWER GULF LIMITED**
- (2) **KPMG (A FIRM)**
- (3) **KPMG LLP**

Defendants

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**ORDER WITH REASONS OF JUSTICE WAYNE MARTIN**

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**UPON** reading the Order with Reasons of Justice Sir Jeremy Cooke dated 19 May 2021

**AND UPON** reviewing the First Defendant's Application No. CFI-041-2021/4 dated 19 May 2021 contesting the jurisdiction of the DIFC Courts (the "**Application**")

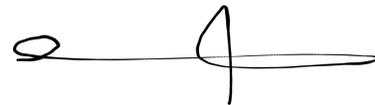
**AND UPON** reviewing the Claimants' evidence in answer to the Application dated 30 May 2021

**AND UPON** reviewing the First Defendant's evidence in reply dated 20 June 2021

**AND UPON** hearing Counsel for the Claimants and Counsel for the Defendants on 26 September 2021

**IT IS HEREBY ORDERED THAT:**

1. The Application is rejected.
2. Costs in the amount of USD 180,000 to be paid by the First Defendant to the Claimants.

A handwritten signature in black ink, consisting of a stylized 'A' followed by a horizontal line and a vertical stroke.

Issued by:  
**Amna Al Owais**  
Chief Registrar  
Date of issue: 3 November 2021  
Time: 8am

## SCHEDULE OF REASONS

### Summary

1. The First Defendant, KPMG Lower Gulf Limited (“**KPMG LG**”) has applied pursuant to Part 12 of the Rules of Court (“**RDC**”) for an order that the Court has no jurisdiction to entertain the claim of the First Claimant, Abraaj Investment Management Limited (“**AIML**”) against KPMG LG, or, in the alternative, for an order that the Court decline to exercise any jurisdiction it may have in relation to that claim. For the reasons which follow, that Application must be dismissed.

### The Parties

#### *The Claimants*

2. AIML and the Second Claimant, Abraaj Capital Limited (“**ACL**”) are both part of the Abraaj group of companies (the “**Abraaj Group**”). Both are in liquidation. AIML was incorporated in the Cayman Islands. ACL was incorporated in the DIFC. It is therefore a “DIFC Establishment” for the purposes of the Judicial Authority Law<sup>1</sup> (the “**JAL**”). ACL is a wholly owned subsidiary of AIML.
3. The Abraaj Group operated in many countries around the world through many related corporate entities. The Abraaj Group collapsed following allegations that senior individuals within the Abraaj Group had misappropriated funds.
4. The Abraaj Group’s operations in Dubai were principally conducted from an office in the Dubai International Financial Centre (“**DIFC**”). AIML also maintained an office in Dubai outside the geographical area of the DIFC. The extent of the activities carried on through that office is contentious. The Claimants assert that nothing of any significance took place in that office, although KPMG LG does not accept that assertion.
5. ACL provided services to AIML at the Abraaj Group’s office in the DIFC. The nature and extent of those services is the subject of evidence, to which I will refer in due course.

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<sup>1</sup> Dubai Law 12 of 2004 in respect of the *Judicial Authority Act*, Dubai International Financial Centre.

### *The Defendants*

6. The Third Defendant, KPMG LLP is a limited liability partnership registered in the DIFC. The Second Defendant is described as “KPMG (A firm)”. The First and Third Defendants deny that there is any such entity. The Claimants do not presently accept that assertion. Pending the resolution of that issue, it is unnecessary to say anything further with respect to the position of the Second Defendant. KPMG LG and KPMG LLP are both entities within the global KPMG network. KPMG LG is incorporated in the Cayman Islands. It has an office in Dubai, outside the geographical area of the DIFC. It has a commercial license issued by the Dubai Department of Economic Development. It has no authority to provide audit services within the DIFC. The extent to which it has nevertheless provided audit services or performed work in connection with the provision of audit services within the DIFC is one of the contentious issues in this Application. It will be necessary to refer to the evidence relating to that issue in detail in due course.
7. As noted, KPMG LLP is registered in the DIFC. It is common ground that KPMG LLP is a “DIFC Establishment” or a “Licensed DIFC Establishment” for the purposes of the JAL. KPMG LLP has an office in the DIFC and is authorised by the Dubai Financial Services Authority (“**DFSA**”) to provide audit services within the DIFC.
8. The nature and extent of the connections between KPMG LG and KPMG LLP is another contentious issue in this Application. The Defendants assert that the two entities operated completely independently of each other. They assert that KPMG LLP audited ACL but had no role whatever in the audit of AIML. The Claimants assert that officers of KPMG LLP did perform a role in relation to the audit of AIML and rely upon documents which suggest that KPMG LLP held itself out as performing a role in relation to that audit. They also assert that the distinction upon which the Defendants rely is illusory in substance, because ACL’s financial statements are consolidated within AIML’s audited financial statements, as ACL is a wholly owned subsidiary of AIML. The evidence relating to the extent of the connections between KPMG LG and KPMG LLP will be addressed in detail in due course.

### **The Proceedings**

9. These proceedings were commenced on 29 March 2021. It is necessary to consider the Particulars of Claim filed with the Claim Form in some detail. That is because the

Claimants assert that AIML's claims against KPMG LG are so interrelated and inextricably intertwined with ACL's claims against KPMG LLP as to confer exclusive jurisdiction upon this Court to hear and determine all such claims pursuant to Article 5(A)(1)(e) read with RDC r.20.7<sup>2</sup>. The Claimants also assert that if, contrary to their submission, there is an agreement which excludes the jurisdiction of this Court, the interconnection between ACL's claims against KPMG LLP, which are accepted to be within the exclusive jurisdiction of this Court, and AIML's claims against KPMG LG is so great that the Court should exercise its discretion to refuse to enforce such an agreement.<sup>3</sup> By contrast, the Defendants submit that there is no significant connection between AIML's claims against KPMG LG and ACL's claims against KPMG LLP, which they assert are entirely independent claims. Analysis of the Particulars of Claim is an appropriate first step in the assessment of these competing contentions.

### **The Particulars of Claim**

10. The Particulars of Claim commence with references to the parties to the proceedings. In that context it is asserted that the ultimate holding company of each of AIML and ACL is Abraaj Holdings, a company incorporated in the Cayman Islands. The Claimants assert that each of AIML, Abraaj Holdings and ACL maintained their headquarters in the DIFC from at least 2009 until entering liquidation in 2018<sup>4</sup>. The Claimants further assert that AIML carried on business as an investment advisor and fund manager, and that ACL performed certain administrative and management functions delegated to it by AIML. The Claimants further assert that fund management activities were directed by the Global Investment Committee of the Abraaj Group, which was based in the DIFC<sup>5</sup>.
11. The Claimants allege that ACL performed administrative and management functions pursuant to a series of services agreements with AIML, pursuant to which ACL agreed to meet the expenses of establishing and running the Abraaj Group's offices in Dubai and the region, subject to reimbursement by AIML, and in return for advisory fees to be paid by Abraaj Holdings to ACL<sup>6</sup>.

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<sup>2</sup> Sometimes referred to as the Nest jurisdiction, by reference to the decision in *Nest Investment Holdings Lebanon S.A.L & Others v Deloitte & Touche (ME) & Fardi* [2018] DIFC CA 011 (13 March 2019).

<sup>3</sup> *Al Khorafi & Others v Bank Sarasin-Alpen (ME) Ltd & Anor* [2011] DIFC CA 003 (5 January 2012).

<sup>4</sup> Particulars at [5].

<sup>5</sup> Particulars at [5].

<sup>6</sup> Particulars at [9].

12. The Claimants also assert that ACL employed the majority of the staff who worked in the DIFC office of the Abraaj Group, and also entered into the leases for the DIFC office.<sup>7</sup>
13. The Claimants assert that by two engagement letters, dated 9 January 2011 and 14 August 2017, Abraaj Holdings engaged KPMG LG to provide audit services to it and also to specified group entities, including AIML, for the period between 2010 and 2017<sup>8</sup> (the “**AIML Engagement Letters**”). The Claimants further assert that by a letter agreement dated 28 October 2015, ACL engaged KPMG LLP to provide audit services for the year ended 30 June 2015 and subsequent years unless otherwise agreed (the “**ACL Engagement Letter**”)<sup>9</sup>. The letter agreements are collectively described in the Particulars of Claim as the “**Engagement Letters**”, and I will use the same terminology.
14. The Claimants assert, and it is not controversial, that each of the Engagement Letters expressly required the retained Defendant to carry out its audit in accordance with the International Standards on Auditing (“**ISAs**”), although the ACL Engagement Letter was somewhat more specific in this respect than the AIML Engagement Letters.
15. The Claimants assert that in the circumstances particularised, KPMG LG owed AIML and KPMG LLP owed ACL duties to carry out the audits with reasonable care and skill in both contract and tort, relying in part on the provisions of DIFC Law in respect of all engagements, including the engagement of KPMG LG<sup>10</sup>. The Claimants further assert that each Defendant owed specific duties arising from the provisions of the ISAs which were, in effect, incorporated into each engagement<sup>11</sup>. In addition, the Claimants assert that KPMG LLP owed more specific obligations arising from the express obligation to comply with a particular ISA<sup>12</sup> by reason of an express provision in the ACL Engagement Letter.
16. The Claimants further assert that all Engagement Letters are governed by the laws of the DIFC<sup>13</sup>. This assertion is contested. For the reasons given below, I do not consider it necessary or appropriate to resolve the competing contentions of the parties with respect to the applicable governing law of the engagement agreements for the purposes of

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<sup>7</sup> Particulars at [9].

<sup>8</sup> Particulars at [10].

<sup>9</sup> Particulars at [10].

<sup>10</sup> Particulars at [13]-[14].

<sup>11</sup> Particulars at [15].

<sup>12</sup> ISA E3000.

<sup>13</sup> Particulars at [18].

resolving the issue with respect to the jurisdiction of this Court.

17. The Claimants assert that KPMG LG gave unqualified audit opinions with respect to the accuracy of the consolidated financial statements of AIML and its subsidiaries for the periods between 2013 and 2017, and that KPMG LLP gave similar opinions with respect to the financial statements of ACL in respect of the period between 2014 and 2017<sup>14</sup>. As ACL is a wholly owned subsidiary of AIML, its financial statements, which had been audited by KPMG LLP, were consolidated into the financial statements of AIML which were the subject of the audit opinions expressed by KPMG LG.
18. The Claimants assert that from at least October 2012 onwards the Abraaj Group experienced liquidity problems because its expenses far exceeded its income, and because a Mr. Naqvi caused hundreds of millions of dollars to be improperly paid to himself from at least that date<sup>15</sup>. The Claimants further assert that in order to disguise these problems, the executive management of the Abraaj Group engaged in dishonest and/or improper financial conduct which included the use of irregular and false accounting to hide the shortfalls and deficiencies<sup>16</sup>.
19. The Claimants further assert that the devices used to conceal these irregularities included “window dressing” transactions under which funds were appropriated by AIML from related entities in the Group in order to conceal the misappropriation of funds from AIML<sup>17</sup>. Non-exhaustive particulars of some of these transactions are given in the Particulars of Claim.
20. The Claimants further assert that ACL’s staff costs and the rent for the DIFC offices leased by ACL were systematically paid or accounted for by AIML and not by ACL. However, ACL’s financial statements showed only its net expenses, after deducting the amounts borne by AIML, whereas in fact they should have shown the total expenses, with the amount borne by AIML shown as income. According to the Claimants, this created an illusion that ACL was profitable and solvent, whereas in fact, at all material times, it was loss-making, and both cash-flow and balance sheet insolvent without the subsidy from AIML<sup>18</sup>. The Claimants further assert that AIML accounted for the End of

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<sup>14</sup> Particulars at [21].

<sup>15</sup> Particulars at [25].

<sup>16</sup> Particulars at [26].

<sup>17</sup> Particulars at [27].

<sup>18</sup> Particulars at [31].

Service Benefit obligation relating to ACL's employees, when those obligations should have been included in ACL's accounts<sup>19</sup>. Particulars are given of the amounts by which ACL's expenses and its cumulative accrued liability for End of Service Benefits were understated in each of the financial years ending on 30 June 2014-30 June 2017<sup>20</sup>.

21. The Claimants further assert that another effect of this manipulation of ACL's expenses was to "massage" ACL's capital adequacy requirements set by the Dubai Financial Services Authority, which was calculated by reference to ACL's adjusted expenses<sup>21</sup>.
22. The Claimants further assert that notwithstanding this manipulation, ACL was unable to satisfy its capital adequacy requirements without engaging in other window dressing transactions, including the receipt of funds from AIML in the days before each quarter end, and the return of those funds in the days afterwards. The effect of those transactions is that ACL would only have the required liquid assets for a few days around each quarter end. The Claimants assert that otherwise ACL had liquid assets that were less than 10% of its capital adequacy requirements<sup>22</sup>. Particulars of the payments in from AIML and the payments out by ACL are given<sup>23</sup>.
23. The Particulars of Claim include assertions with respect to the failure of the Abraaj Group and the liquidation of the various entities within the Abraaj Group. The Claimants also rely upon findings by the DFSA to the effect that AIML was carrying out financial services activities in the DIFC without the requisite lawful authority, and that AIML had actively and deliberately mislead investors. The Claimants further rely upon findings by the DFSA to the effect that ACL failed to maintain adequate capital resources and provided false, misleading or deceptive information in its returns as a result of the window dressing transactions referred to earlier in the Particulars of Claim. The Claimants also rely upon a finding to the effect that ACL was knowingly concerned in AIML's activities of conducting financial services in the DIFC without authorisation, and permitted ACL's resources to be used for this purpose<sup>24</sup>.
24. The Claimants assert breaches of contractual and tortious duty by all Defendants, and in

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<sup>19</sup> Particulars at [32].

<sup>20</sup> Particulars at [32].

<sup>21</sup> Particulars at [33].

<sup>22</sup> Particulars at [34].

<sup>23</sup> Particulars at [34].

<sup>24</sup> Particulars at [41].

the case of KPMG LLP breach of the specific duties said to be imposed upon that Defendant by reason of the terms of the ACL Engagement Letter<sup>25</sup>.

25. The particulars of those allegations include an assertion that:

The members of KPMG LLP's audit team working on ACLD and the members of KPMG LG's audit team working on the AIML Group overlapped substantially, and frequently worked from the same location (attending meetings at the Abraaj Group's DIFC offices as part of the audit process in respect of both AIML and ACLD)<sup>26</sup>.

26. The Claimants further assert that each of the Defendants failed to maintain independence and an appropriate attitude of professional skepticism<sup>27</sup>.

27. The Claimants make specific allegations of breaches of duty by KPMG LG and the performance of its duties to AIML<sup>28</sup>.

28. Particulars are also given of the specific breaches of duty alleged against KPMG LLP. Those breaches include the under-statement of ACL's expenses, failure to understand and report upon the transactions between ACL and AIML, failure to account for the end of Service Benefit obligations owed to its employees, and failure to identify ACL's false statements with respect to its capital adequacy requirements. As I have noted, all of these matters turn upon transactions and accounting entries as between AIML and ACL<sup>29</sup>.

29. The Claimants further specifically rely upon breaches of duty by KPMG LLP in relation to the cash payments made by AIML to ACL immediately before quarter end, and the return of that cash by ACL immediately after quarter end, for the purposes of inflating ACL's apparent capital adequacy.

30. The Claimants also assert that KPMG LLP should have identified the fact that executive managers within the Abraaj Group were using ACL to assist AIML in carrying out financial services activities in the DIFC without the required authorisation<sup>30</sup>. In this context, the

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<sup>25</sup> Particulars at [43].

<sup>26</sup> Particulars at [45.3].

<sup>27</sup> Particulars at [48].

<sup>28</sup> Particulars at [51], including breaches relating to the "window dressing transactions" specified earlier in the Particulars and the failure to identify the fact that AIML was carrying out financial services activities in the DIFC without the required authorisation. This is of course the activity in respect of which the Claimants assert that ACL has been found to be complicit.

<sup>29</sup> Particulars at [57].

<sup>30</sup> Particulars at [59].

Claimants assert that many of ACL's employees were carrying on fund management activities on behalf of AIML, whereas AIML itself had very few employees. It is further asserted that AIML was systematically bearing the cost of those staff, and also paying the rent for ACL's office space in order to undertake its activities in the DIFC<sup>31</sup>.

31. The Claimants assert that if the Defendants had complied with their duties, KPMG LG would have identified the irregularities relating to AIML, and KPMG LLP would have identified the irregularities relating to ACL<sup>32</sup>. It is asserted that this would have resulted in the irregularities being reported to the boards of AIML and ACL respectively, and to the board of Abraaj Holdings, because ACL's financial statements are consolidated into AIML's financial statements which are in turn consolidated into Abraaj Holdings' financial statements<sup>33</sup>. In this context it is also asserted that KPMG LLP would have reported the irregularities relating to ACL to KPMG LG as auditor of AIML<sup>34</sup>.
32. The Claimants assert that such irregularities should have been discovered and reported by all Defendants no later than 30 September 2013 in respect of the AIML consolidated financial statements for the 2013 financial year<sup>35</sup>. The Claimants further assert that the irregularities should have been discovered and reported by all Defendants no later than the close of the succeeding financial years up until financial year 2017<sup>36</sup>.
33. The Claimants allege that the Defendants' failures to comply with their duties resulted in the irregularities continuing until the collapse of the Abraaj Group in 2018, after incurring substantial financial losses<sup>37</sup>. The Claimants assert that the relevant counter-factual for the purposes of assessing the losses suffered by reason of the Defendants' failures is the assumption that the Abraaj Group would have continued to trade, and trade profitably, under a different management team, had the irregularities been reported shortly after they commenced occurring<sup>38</sup>. The Claimants assert, in the alternative, that their loss and damage should be measured by the additional shortfall on liquidation as a result of liquidation occurring later than would have been the case but for the Defendants' breach

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<sup>31</sup> Particulars at [59].

<sup>32</sup> Particulars at [61].

<sup>33</sup> Particulars at [61].

<sup>34</sup> Particulars at [61].

<sup>35</sup> Particulars at [63].

<sup>36</sup> Particulars at [63].

<sup>37</sup> Particulars at [65].

<sup>38</sup> Particulars at [68].

of duty<sup>39</sup>.

34. The Claimants have given provisional estimates of their loss, assessed by reference to these alternative counter-factuals, in terms which do not generally differentiate between AIML and ACL, with one apparent exception, being an amount of USD 10.5 million paid in dividends by ACL to AIML<sup>40</sup>. It can be inferred that the claim is advanced in this way on the basis that the detection and report of the alleged irregularities in either ACL or AIML would have led to one or other of the counter-factuals proposed.
35. In their Particulars of Claim the Claimants also acknowledge that AIML will give credit for dividends received from ACL since the date upon which the irregularities should have been discovered and reported, and for liabilities that it would not have incurred on ACL's account<sup>41</sup>.
36. The Particulars of Claim conclude with an assertion that KPMG LG is liable for damages in the amount of AIML's loss, and KPMG LLP is liable for damages in the amount of ACL's loss<sup>42</sup>. Given the composite manner and indivisible manner in which the loss and damage has been particularised, presumably it is contemplated that the loss suffered by the Abraaj Group as a whole will be identified and then allocated as between particular entities within that Group, including AIML and ACL. Given the interconnections between the group entities, this will obviously give rise to complex issues.
37. The Claimants also claim relief in the form of an indemnity in respect of any liability arising from claims against the Claimants by any other person as a result of the financial and accounting irregularities which occurred.

### **The Acknowledgements of Service**

38. Acknowledgements of Service were filed on behalf of both KPMG LG and KPMG LLP on 18 April 2021. In both Acknowledgements it was indicated that the relevant Defendant intended to contest jurisdiction. However, on 19 May 2021 KPMG LLP applied for leave to amend its Acknowledgement of Service so as to withdraw any contest as to jurisdiction and on 2 August 2021 an Amended Acknowledgement of Service was filed on behalf of

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<sup>39</sup> Particulars at [69].

<sup>40</sup> Particulars at [70].

<sup>41</sup> Particulars at [72].

<sup>42</sup> Particulars at [73].

KPMG LLP withdrawing the statement of intention to contest jurisdiction and indicating that the claim would be defended.

39. Accordingly, since at least 19 May 2021, KPMG LLP has accepted that the claims brought against it are within the jurisdiction of this Court, and, it may be inferred, the exclusive jurisdiction of this Court, given that each of ACL and KPMG LLP are DIFC Establishments or Licensed DIFC Establishments. That concession is consistent with the Application now under consideration, which only contests the jurisdiction of this Court to hear and determine the claims brought by AIML against KPMG LG. For reasons which will appear, the fact that the claims against KPMG LLP are undoubtedly within the exclusive jurisdiction of this Court is significant to the ambit of this Court's jurisdiction under 5(A)(1)(e) of the JAL, and to the exercise of any discretion with respect to any agreement to opt out of the jurisdiction of this Court insofar as KPMG LG and AIML are concerned.

#### **The Dubai Proceedings**

40. On 16 April 2021, KPMG LG commenced proceedings in the Dubai Court of First Instance against AIML seeking a declaration that the allegations made by AIML in these proceedings are false, and seeking compensation for the repetition of those allegations in the sum of AED 10,001,000.

#### **The Application to the JJC**

41. On 27 April 2021, KPMG LG lodged a petition with the Joint Judicial Tribunal of the Dubai Courts and the DIFC Courts (the "**JJC**"), seeking an order that the Dubai Courts are the competent courts to hear the claim that KPMG LG has discharged its obligations to AIML, and seeking an interim stay of the proceedings in both Courts pending the determination of the petition to the JJC (the "**JJC Petition**").

#### **The Application for a Stay Based on the JJC Petition**

42. On 27 April 2021, the day after the JJC Petition was filed, each of KPMG LG and KPMG LLP made informal requests to this Court asking for the proceedings to be stayed on the basis of the JJC Petition.
43. On 5 May 2021, the Registrar of this Court refused to stay these proceedings, noting that

there were no proceedings in the Dubai Courts or in the JJC involving KPMG LLP.

44. KPMG LG and KPMG LLP both applied for a *de novo* review of the Registrar's decision and reiterated their request for a stay of the proceedings. On 19 May 2021, that application was dismissed by Justice Sir Jeremy Cooke.
45. His Honour noted that no claim against KPMG LLP had been brought in the Dubai Courts, so that there was no basis for any conflict of jurisdiction in relation to the claims against that company. His Honour also noted that KPMG LG had indicated an intention to contest the jurisdiction of this Court, and that the Court had made no determination with respect to its jurisdiction to entertain the claims against KPMG LG. It followed that His Honour was bound to apply the decision in *Lakhan v Lamia*<sup>43</sup> and to conclude that there was no conflict in jurisdiction unless and until this Court had determined to exercise jurisdiction in relation to the claims against KPMG LG. In that context, His Honour expressed the view that it would be desirable for the issue with respect to the jurisdiction of this Court to entertain the claims against KPMG LG to be determined as soon as practicable.
46. The Application which is now before the Court relating to the Court's jurisdiction to hear and determine the claims by AIML against KPMG LG was filed on the same day as the decision of Justice Sir Jeremy Cooke was published<sup>44</sup>. As will be seen, the parties have filed significant quantities of evidence and comprehensive written submissions in relation to this Application, which was not ready for hearing until late September 2021.

## **The Evidence**

### *The Claimants' Evidence*

47. The Claimants rely upon:
  - (a) the witness statements of Ian Hammond and Mohamed Sharaz;
  - (b) decisions made by the DFSA; and
  - (c) various provisions of the ISAs which they assert are incorporated into the terms of engagement of the Defendants.

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<sup>43</sup> [2021] DIFC CA-001.

<sup>44</sup> 19 May 2021.

*The Witness Statement of Ian Hammond*

48. Mr. Hammond is a partner in the law firm representing the Claimants. Much of his statement is argumentative. This portion of the reasons is only concerned with the evidence, and I will only refer to those parts of Mr. Hammond's statement which have evidentiary value. As Mr. Hammond has no direct personal knowledge of the events in question, his statement only has evidentiary value to the extent that it identifies other sources of evidence, such as documentary evidence, or the sources of his information or belief.
49. Mr. Hammond relies upon the Decision Notice published by the DFSA in respect of AIML (the "**AIML Decision Notice**") for the assertion that AIML performed its investment and fund and management activities wholly or substantially from the DIFC, and board meetings and general investment committee meetings also took place in the DIFC<sup>45</sup>. Mr. Hammond relies upon the same source for the assertion that ACL employed the majority of the staff of the Abraaj Group, and performed certain administrative and fund management activities delegated to it by AIML. He also relies upon the AIML Decision Notice for the proposition that ACL was the vehicle which allowed AIML and the Abraaj Group to market itself to investors as being headquartered or based in Dubai<sup>46</sup>.
50. Mr. Hammond asserts that neither AIML nor ACL had or have any significant connection with Dubai outside the DIFC – the only connection being that AIML kept a branch office in Dubai for licensing purposes which was principally used for storage and was not a location from which AIML carried out any of its operations. Mr. Hammond does not identify the source of these assertions, other than the assertion relating to the AIML office in Dubai outside the DIFC, which is considered in more detail below.
51. Mr. Hammond refers to the evidence of Ms. Jaballah, (a lawyer for the Defendants) to the effect that clause 44 of the Engagement Letters is incorporated into all contracts by the KMPG Group entities based in the UAE, regardless of where they are based in the UAE, and notes that no documentary evidence has been produced to substantiate that proposition<sup>47</sup>.

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<sup>45</sup> Hammond at [18].

<sup>46</sup> Hammond at [18].

<sup>47</sup> Hammond at [21].

52. Mr. Hammond also notes Mr. Pera's assertion that he had been told that each of the 2011 and 2017 Engagement Letters were signed on KPMG LG's behalf at its office in Dubai. He notes that there is no documentary evidence to support that assertion, nor does Mr. Pera specify the source of his information<sup>48</sup>.
53. Mr. Hammond notes that the Engagement Letters were addressed to the offices of the Abraaj Group in the DIFC and were signed by individuals based in those offices<sup>49</sup>.
54. Mr. Hammond also disputes Mr. Pera's assertions that all the analysis and testing work required for the audit of AIML took place in the Dubai offices of KPMG LG, and the assertions that the reports were drafted, reviewed, signed and issued from those offices, and that the audit work could not have been conducted physically at AIML's DIFC offices because KPMG LG needed to access documents on its e-audit software, which could only be done from within Dubai (outside the DIFC)<sup>50</sup>. Mr. Hammond notes that no direct evidence is provided to support these assertions. He also notes that Mr. Pera makes no reference to the tasks which require an auditor to meet, discuss and interrogate management and company employees so as to enable a critical assessment of audit evidence – being tasks commonly conducted at the client's premises and at in-person meetings<sup>51</sup>.
55. Mr. Hammond exhibits to his statement a list of documents which are said to demonstrate that KPMG LG carried out significant amounts of audit work at the offices of the Abraaj Group in DIFC. Those documents are summarised in a Schedule to Mr. Hammond's statement. Those documents provide direct evidence of meetings taking place between the Abraaj Group officers in the DIFC involving officers of AIML (or at least officers performing services for AIML, noting the assertion that many of the staff in the DIFC Abraaj Group offices were in fact employed by ACL) and officers of KPMG LG engaged in the audit of AIML in each of the financial years 2013-2017 inclusive.
56. Mr. Hammond states that he was advised by the Joint Liquidators of AIML that members of their team were informed by Abraaj staff members that a locked room at the Abraaj Group's offices in the DIFC had been used by the KPMG audit team. Mr. Hammond was

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<sup>48</sup> Hammond at [24].

<sup>49</sup> Hammond at [25].

<sup>50</sup> Hammond at [29].

<sup>51</sup> Hammond at [31].

further advised by the Joint Liquidators that working papers which appear to be KPMG working papers relating to the audits spanning a number of years were found in that room, and that upon analysis, the working papers appear to relate to the audit of AIML.

57. Mr. Hammond notes that minutes of the board meetings of Abraaj Holdings suggest that board meetings dealing with the audit of the Abraaj Group companies were held at various locations around the world, including Istanbul and Singapore, but at least one such meeting was held at the offices of the Abraaj Group in the DIFC on 8 December 2016. The minutes of that meeting record that the “KPMG Team” presented to the board of Abraaj Holdings “the results for the year ending June 2015 to June 2016” and “expect to issue an unqualified audit report”. Mr. Hammond notes that KPMG LG’s independent auditor’s report for Abraaj Holdings consolidated financial statements for the year ended 30 June 2016 was signed and issued on the same day – namely 8 December 2016.<sup>52</sup>
58. Mr. Hammond also asserts that, contrary to Mr. Pera’s assertion, the KPMG personnel working on the ACL audit and those working on the AIML/Abraaj Holdings audit overlapped. He relies upon documents summarised in a schedule to his statement for that assertion, many of which are said to sustain the proposition that KPMG LG staff carried out tasks relating to the audit of ACL. Mr. Hammond relies upon those documents for an assertion, by way of example, that Mr. Navalkar, who was the audit partner for the Abraaj Holdings audit, and Mr. Siddiqui, and Priya Dugar, who were senior members of the KPMG LG audit team working on the Abraaj Holdings/AIML audit also worked on the ACL audit, and sent documents to Abraaj Group team members in relation to both entities. Mr. Hammond also relies upon a number of documents bearing the letterhead of KPMG LLP in which requests were made to various financial institutions for information in connection with the audit of AIML<sup>53</sup>.
59. Mr. Hammond states that he was advised by the Joint Liquidators that when their team first attended the office maintained by AIML in Dubai outside the DIFC, approximately two months after the Joint Liquidators were appointed, they found it to be in a state consistent with being used principally for storage and “not with any wider operations”<sup>54</sup>.
60. Mr. Hammond asserts that the majority of the meetings of the general investment

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<sup>52</sup> Hammond at [34].

<sup>53</sup> Hammond at [35].

<sup>54</sup> Hammond at [38].

committee, which included members of the senior management of AIML, were held in the Abraaj Group offices in the DIFC, although apart from the AIML Decision Notice, Mr. Hammond does not identify the evidentiary source of that assertion. Mr Hammond further asserts that Abraaj Holdings held board meetings at least twice a year in its offices in the DIFC, and that AIML held 17 board meetings in the DIFC offices of the Abraaj Group from November 2013 onwards. Mr. Hammond does not identify the source of these assertions, although it might perhaps be inferred that they are derived from minutes of these board meetings within the possession of the Joint Liquidators.

61. Mr. Hammond further asserts that all of AIML's senior management, with one exception, were employed by ACL, although the basis for that assertion is not identified<sup>55</sup>.

*Witness Statement of Mr. Sharaz*

62. Mr. Sharaz was employed by ACL and occupied the role of Finance Officer from 18 February 2008. In that capacity he was involved in the audits of AIML, ACL and Abraaj Holdings.
63. Mr. Sharaz recalls that over the 10 year period he worked for the Abraaj Group, KPMG staff were regularly present at the Group's offices in the DIFC and at different times during the year<sup>56</sup>. Mr. Sharaz is unable to say whether those staff members were from KPMG LG or KPMG LLP, as he knew them all as simply "KPMG"<sup>57</sup>.
64. Mr. Sharaz states that his role tended to involve collating and providing schedules of information in response to specific requests made by KPMG. Sometimes those requests came by email but "very often, those requests were made in person. KPMG staff members frequently came to my desk in the finance department to discuss information I had provided and verify that with me"<sup>58</sup>.
65. Mr. Sharaz states that whilst he dealt mostly with junior KPMG staff, on occasions he had interactions with more senior KPMG staff. While he did not deal directly with Mr. Navalkar, Mr. Sharaz does recall seeing him coming into the DIFC offices of the Abraaj Group on several occasions for what he believes were audit related discussions with

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<sup>55</sup> Hammond at [41].

<sup>56</sup> Sharaz at [8].

<sup>57</sup> Sharaz at [8]

<sup>58</sup> Sharaz at [8].

more senior staff of Abraaj Group<sup>59</sup>.

66. Mr. Sharaz recalls regularly seeing Mr. Siddiqui, Mr. Jayantilal and Priya Dugar at the DIFC offices of the Abraaj Group. Each of these people were senior managers or managers at KPMG<sup>60</sup>. According to Mr. Sharaz, Mr. Siddiqui spent a lot of time in the DIFC offices of the Abraaj Group and was a familiar face to large numbers of the staff of the Abraaj Group. Mr. Sharaz recalls watching cricket games with Mr. Siddiqui on the television in the staff pantry, and having dinners with Mr. Siddiqui at the DIFC offices when KPMG staff had to work late into the night at those offices, which was sometimes the case when KPMG were working on closing the audit<sup>61</sup>.
67. Mr. Sharaz recalls seeing KPMG staff at the DIFC offices of the Abraaj Group at different times throughout the year, and not just in the few months after financial year end<sup>62</sup>.
68. Mr. Sharaz states that KPMG were allocated a room close to the third floor pantry in the DIFC offices of the Abraaj Group. This room was the last room occupied by KPMG before the collapse of the Abraaj Group – over the previous 10 years different offices had been allocated to KPMG at different times<sup>63</sup>.
69. Mr. Sharaz states that the room was set up with desks, chairs and a telephone to enable people to work within it. He recalls going into the room on a few occasions when members of the KPMG team were working in the room. He is unable to say exactly what they were doing, other than working on the audit in the generic sense. He recalls that members of the KPMG team worked in the room for long periods, frequently large parts of the day and sometimes late into the evening<sup>64</sup>.
70. Mr. Sharaz denies the assertion that KPMG staff only attended the offices of Abraaj Group and DIFC to collect documents to take back to KPMG's Dubai office. Based on his direct observations, Mr. Sharaz believes that KPMG carried out a significant amount of work from the DIFC offices of the Abraaj Group which he believes related to the audits

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<sup>59</sup> Sharaz at [8].

<sup>60</sup> Sharaz at [8].

<sup>61</sup> Sharaz at [8].

<sup>62</sup> Sharaz at [8].

<sup>63</sup> Sharaz at [9].

<sup>64</sup> Sharaz at [10].

and related services<sup>65</sup>.

71. Mr. Sharaz has seen some of the papers that were found in the KPMG working room after the appointment of the Joint Liquidators. An index of the more than 1,400 documents which were found in the room is attached to the statement of Mr. Sharaz. The index shows that the paperwork relates to a number of entities within the Abraaj Group that were audited by KPMG, including AIML and ACL, covering a date range between 2014 to 2017<sup>66</sup>.
72. Based on his review of the documents, Mr. Sharaz has formed the view that the documents include a significant volume of KPMG's original audit working papers. Those papers include the handwritten comments or signatures of a number of different KPMG staff, some of whom were junior, and others of whom were more senior – for example Mr. Siddiqui and Mr. Navalkar<sup>67</sup>. Mr Sharaz refers to a number of specific examples of documents of this kind in his statement. In his view, the working papers which were found in the room reflect the sort of detailed audit work that he had assumed was being carried on in that room<sup>68</sup>.

### ***The First Defendant's Evidence***

73. The First Defendant relies upon witness statements provided by:
  - (a) Ms. Rita Jaballah;
  - (b) Mr. Emilio Pera; and
  - (c) Mr. Milind Navalkar.

### ***Witness Statement of Ms Jaballah***

74. Ms. Jaballah is a partner in the law firm which represents KPMG LG and KPMG LLP in these proceedings. Ms. Jaballah's statement is, like Mr. Hammond's statement, largely argumentative. I will refer only to those portions of the statement which have some

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<sup>65</sup> Sharaz at [11].

<sup>66</sup> Sharaz at [15].

<sup>67</sup> Sharaz at [16].

<sup>68</sup> Sharaz at [18].

evidentiary value.

75. Ms. Jaballah asserts that clause 44 is a standard term of all contracts entered into by KPMG Group entities established in various Emirates in the UAE, although she provides no source for that assertion, nor any evidence to substantiate it. Similarly, Ms Jaballah makes assertions with respect to the intention of the parties to the Engagement Letters without providing any source for those assertions or any evidentiary basis for them. I do not consider that assertions of that kind carry any weight.
76. Ms. Jaballah also refers to matters she was told by Mr. Pera and, as Mr. Pera has provided a statement, it is not necessary to refer to Ms. Jaballah's hearsay evidence in this respect.
77. In the result, there is little in Ms. Jaballah's statement of any evidentiary significance.

*Witness Statement of Mr. Pera*

78. Mr. Pera is a partner and head of audit at KPGM LG. He states that KPMG LG has a branch in Dubai and operates under a commercial license issued by the Dubai Department of Economic Development. KPMG LG's activities as auditor are regulated by Federal and Dubai regulatory authorities outside the DIFC<sup>69</sup>.
79. Mr. Pera asserts that KPMG LG and KPMG LLP are wholly separate and distinct entities, and that KPMG LLP is neither a subsidiary nor a branch of KPMG LG. Rather, KPMG LLP is a sub-licensee firm of KPMG International. KPMG LLP is able to operate under the KPMG brand pursuant to a licensing agreement with, *inter alia*, KPMG International.
80. Mr. Pera states that he was appointed the head of audit in May 2018. It is not clear from his statement where he was working prior to that appointment, although he states quite explicitly that he was not personally involved in the Abraaj audits<sup>70</sup>. However, he asserts on the basis of information provided by persons who are not identified that the audit reports in respect of the Engagement Letters dated 2011 and 2017 were drafted, reviewed, signed and issued from KPMG LG's offices in Dubai outside the DIFC<sup>71</sup>. Mr. Pera asserts, also on the basis of information from unidentified persons, that the

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<sup>69</sup> Pera at [1].

<sup>70</sup> Pera at [9].

<sup>71</sup> Pera at [9].

Engagement Letters were signed on behalf of KPMG LG at its offices in Dubai<sup>72</sup>.

81. Mr. Pera makes assertions with respect to the contemplation of the parties at the time the Engagement Letters were signed, but as he had no involvement in the execution of those letters, I do not consider those assertions to be of any weight or value.
82. Mr. Pera also asserts, on the basis of information and belief from persons who are not identified, that the auditing of accounts was carried out in KPMG LG's offices in Dubai, outside the DIFC. In this context, Mr. Pera describes the audit work of consisting of obtaining third party confirmations, analysis of information and explanations obtained, the preparation of audit working papers, the review of audit working papers, financial statements and audit reports and review of the valuation of portfolio companies<sup>73</sup>. I digress to note Mr. Hammond's observation that this description of audit activities does not include any reference to conversations or meetings with the staff of the entities being audited, which appears to be a significant omission.
83. Mr. Pera states that the information technology infrastructure used by KPMG LG for audit work is hosted by a server located in Dubai, outside the DIFC. Mr. Pera asserts, on the basis of information and belief from persons who are not identified, that KPMG LG would not have been able to access the relevant technology at the offices of the Abraaj Group. No explanation for that assertion is provided. Mr. Pera also asserts, without explanation or the identification of the source of any information or belief he may have in this respect, that the audit work was carried out in KPMG LG's offices outside the DIFC in order to avoid constraints in terms of working space<sup>74</sup>.
84. Mr. Pera states that KPMG LG's activities as an auditor are regulated by entities outside the DIFC. He notes that an auditor must not provide auditing services within the DIFC unless authorised to do so by the DFSA. KPMG LG does not have a license to perform auditing services within the DIFC<sup>75</sup>.

*Witness Statement of Mr. Navalkar*

85. Mr. Navalkar is a former partner in the audit department of KPMG LG. He ceased working

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<sup>72</sup> Pera at [9].

<sup>73</sup> Pera at [10].

<sup>74</sup> Pera at [11].

<sup>75</sup> Pera at [12].

in that capacity in September 2019. Mr. Navalkar was personally involved in the audits of AIML by KPMG LG for the years ended 30 June 2013 to 30 June 2017<sup>76</sup>.

86. Mr. Navalkar identifies the signatories on behalf of KPMG LG to the AIML Engagement Letters and observes that they worked in KPMG LG's offices in Dubai, outside the DIFC, which is where he believes the AIML Engagement Letters would have been signed.
87. Mr. Navalkar provides, as a schedule to his statement, a document setting out the persons who signed the audit reports for AIML for the financial years ending 30 June 2013-30 June 2017 and the place where he believes those reports were signed, being, in each case, outside the DIFC.
88. Mr. Navalkar states that the audits of AIML would start with a planning meeting at KPMG LG's offices in Dubai involving various members of the audit team for the Abraaj Holdings Group<sup>77</sup>.
89. The next stage of the audit process would involve the gathering of information. According to Mr. Navalkar, queries would "generally" be sent by email from individuals in KPMG LG's offices, and documents would be supplied by AIML electronically. However, he accepts that some documents and information were collected from the Abraaj Group offices within the DIFC<sup>78</sup>.
90. Mr. Navalkar states that the software used by KPMG for audit was incredibly slow when used remotely outside KPMG LG's premises, with the consequence that the analysis and drawing of audit conclusions took place at KPMG LG's offices in Dubai, outside the DIFC<sup>79</sup>.
91. Mr. Navalkar states that while there was a room in the offices of the Abraaj Group in the DIFC where KPMG LG employees were based when they were collecting information and collating material to take back to KPMG LG's offices, audit analysis did not take place in that room. However, that assertion is qualified by another assertion that the room was "certainly not the place where **significant** audit analysis was carried out or that the

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<sup>76</sup> Navalkar at [7].

<sup>77</sup> Navalkar at [10].

<sup>78</sup> Navalkar at [11].

<sup>79</sup> Navalkar at [12].

audit conclusions were drawn”.

92. Mr. Navalkar asserts that the real work of the audit took place after information had been gathered and uploaded onto the e-audit platform at KPMG LG’s offices in Dubai<sup>80</sup>. That analysis might reveal the need for further information, which would be requested by telephone or email or collected from the Abraaj Group offices in DIFC by an employee of KPMG LG<sup>81</sup>.
93. Mr. Navalkar also asserts that no work on AIML’s audit was done at KPMG LLP’s offices in the DIFC, although his statement provides no basis for that assertion<sup>82</sup>.
94. Mr. Navalkar asserts that AIML’s statements were not approved at the board meeting held at the Abraaj Group’s offices in the DIFC on 8 December 2016. Although the basis for that assertion is not enunciated, it appears that Mr. Navalkar may be drawing a distinction between the approval of the financial statements of Abraaj Holdings on the one hand, and the approval of the financial statements of AIML on the other (although of course the audited financial statements of AIML, as a subsidiary of Abraaj Holdings, would be consolidated into the financial statements of Abraaj Holdings).
95. Mr. Navalkar denies that there was any overlap between the personnel who carried out the audit of AIML and those who carried out the audit of ACL. However, he does not respond specifically to the documentary evidence upon which Mr. Hammond has relied for his contrary assertion.
96. I note that, as with Mr. Pera’s statement, Mr. Navalkar’s statement conspicuously omits any reference to the meetings and discussions between staff of the auditors and staff of the Abraaj Group which must have formed part of the audit process, and presumably a significant part of that process. That is a significant omission.
97. I also note the Claimants’ submission that the Defendants have not produced any documents, either through the witnesses who have provided statements or otherwise, to substantiate any of the assertions made with respect to the locations at which the various activities which comprised the audits of the relevant entities took place, other than the

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<sup>80</sup> Navalkar at [14].

<sup>81</sup> Navalkar at [14].

<sup>82</sup> Navalkar at [15].

documents relating to the places at which the AIML Engagement Letters and audit reports were signed by officers of KPMG LG. I accept the Claimants' submission that this is a significant omission, which supports an inference to the effect that the Defendants have not presently located any documents relating to the conduct of the audits which provide direct evidence to contradict the assertions made by the Claimants with respect to the performance of audit activities within the Abraaj Group offices in the DIFC.

### **Objections to Jurisdiction – General Principles**

98. There are no substantial differences between the parties in relation to the general principles applicable to the resolution of a challenge to the jurisdiction of this Court. When jurisdiction is put in issue, as it has been by the Application currently before the Court, the Claimants carry the burden of satisfying the Court that it has jurisdiction pursuant to one or other of the gateways to jurisdiction set out Article 5 of the JAL.<sup>83</sup> The Claimants can discharge this burden by establishing “a good arguable case” that the requirements of at least one of the gateways to jurisdiction are satisfied<sup>84</sup>.
99. The test of “good arguable case” derives from English law and has been explained in a number of recent English decisions in the following terms:

For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant had ‘the better of the argument’ on the facts going to jurisdiction. In *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192, para 7, this Court reformulated the effect of that test as follows:-

‘...’

- (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway;
- (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; but
- (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment

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<sup>83</sup> *Gavin v Gaynor* [2015] DIFC CFI-017 (3 April 2016).

<sup>84</sup> *Al Khorafi v Bank Sarasin* [2011] DIFC CA 003 (5 January 2012) (“**Al Khorafi**”).

can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it<sup>85</sup>.

100. These principles have been applied in this Court relatively recently by Justice Sir Jeremy Cooke in *Emirates NDB Bank PJSC & Ors v KBBO CPG Investment LLC & Ors*<sup>86</sup>.
101. Applying those principles to the circumstances of this case, it is clear that in whichever Court this case proceeds, much more evidence will be provided to the Court with respect to the performance of the audits in question than is presently before the Court. This is therefore one of those cases in which the caution against attempting to determine disputed issues of fact in the course of an interlocutory hearing is particularly apt. More specifically, in the context of this Application it is not appropriate for this Court to purport to make final determinations in relation to contested factual issues such as the place or places at which the AIML Engagement Letters were executed by the relevant signatories, or the place or places at which particular components of the relevant audits took place. Rather, the question which must be addressed is whether the Claimants have established a plausible evidential basis for the existence of facts which would enliven one or more of the gateways to this Court's jurisdiction.
102. On the other hand, in cases where the question upon which jurisdiction may depend turns solely upon a question of law, and the Court has all the necessary information in order to determine that question of law, ordinarily the Court should proceed to determine that question definitively<sup>87</sup>. The proper construction of the jurisdiction clauses in the Engagement Letters has a significant bearing upon the ambit of this Court's jurisdiction. Questions of contractual construction are seldom solely questions of law, although the relevance and significance of the matrix of factual circumstances known to both parties at the time the contract, or in this case, the contracts were executed will vary from case to case. In some cases, those matters may be of little significance. I will return to the question of whether this Court should purport to determine the issues of contractual construction relating to the jurisdiction clause substantively in the course of resolving this Application or simply apply the "good arguable case" test to that question in the context

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<sup>85</sup> *Goldman Sachs International v Novo Banco* [2018] 1 WLR 3683 at [9]; see also *Kaefer Aislamientos SA CV v AMS Drilling Mexico SA CV* [2019] EWCA CIV 10; [2019] 1 WLR 3514 per Green LJ at [75].

<sup>86</sup> CFI-045-2020 (18 August 2021).

<sup>87</sup> *Akhmedova v Akhmedov* (2018) DIFC – CA-003; *Credit Suisse v Goel & Ors* CFI-066-2020 (4 October 2020) at [7].

of the differing interpretations proffered by the parties.

### **The Jurisdictional Gateways**

103. Article 5 of the JAL provides:

- (1) The Court of First Instance shall have exclusive jurisdiction to hear and determine:
  - (a) civil or commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party;
  - (b) civil or commercial claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalised or performed within DIFC or will be performed or is supposed to be performed within DIFC pursuant to express or implied terms stipulated in the contract;
  - (c) civil or commercial claims and actions arising out of or relating to any incident or transaction which has been wholly or partly performed within DIFC and is related to DIFC activities;
  - (d) appeals against decisions or procedures made by the DIFC Bodies where DIFC Laws and DIFC Regulations permits such appeals;
  - (e) any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations.
- (2) The Court of First Instance may hear and determine any civil or commercial claims or actions where the parties agree in writing to file such claim or action with it whether before or after the dispute arises, provided that such agreement is made pursuant to specific, clear and express provisions.
- (3) The Court of First Instance may hear and determine any civil or commercial claims or actions falling within its jurisdiction if the parties agree in writing to submit to the jurisdiction of another Court over the claim or action but such Court dismisses such claim or action for lack of jurisdiction.

...

104. As noted, it is common ground that each of ACL and KPMG LLP are either a DIFC

Establishment or a Licensed DIFC Establishment within the meaning of those expressions within the JAL. It follows that, as has also been noted, it is common ground that this Court has exclusive jurisdiction to determine ACL's claims against KPMG LLP, pursuant to Article 5(A)(1)(a). This non-contentious proposition is relevant to the ambit of the Court's jurisdiction under paragraph (1)(e) and paragraphs (2) and (3) of Article 5(A).

### **Gateway (1)(b)**

105. The ambit of the gateway conferred by Article 5(A)(1)(b) was considered by the Court of Appeal in *Al Khorafi*<sup>88</sup> where the Court observed:

The purpose of Article 5(A)(1)(b) is to bring within the exclusive jurisdiction of the DIFC Courts claims arising out of or relating to a contract or to the negotiation of a contract where the connecting factor is that the contract or intended contract had been wholly or partly agreed upon or wholly or partly performed by conduct or an event which had taken place within the DIFC. The essence of the provision is that the court is given jurisdiction where there has been relevant activity with regard to the contract or related to it within the DIFC.<sup>89</sup>

106. The Claimants contend that the exclusive jurisdiction of the Court is enlivened under this gateway for three reasons:

- (a) the AIML audit engagements were at least partly concluded and/or finalised in the DIFC;
- (b) the services to be provided pursuant to the AIML audit engagements were partly performed in the DIFC; and
- (c) the services were supposed to be performed within DIFC pursuant to express or implied terms stipulated in the AIML audit engagements.

*Were the Audit Engagements Partly or Wholly Concluded or Finalised within the DIFC?*

107. The AIML Engagement Letters were addressed to the offices of the Abraaj Group in the

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<sup>88</sup> [2011] DIFC CA 003 (5 January 2012)

<sup>89</sup> At [60].

DIFC. Each Letter requested the Abraaj Group to:

Confirm your agreement to and acceptance of the terms of this letter and the attachments by signing and returning to us the enclosed copy ...

108. The AIML Engagement Letters were each signed by personnel who worked in the Abraaj Group's offices in the DIFC.
109. There is a plausible evidential basis for the proposition that each of the AIML Engagement Letters was signed on behalf of the Abraaj Group at the offices of that Group within DFIC, after which they were returned to KPMG LG's offices in Dubai. It follows that there is evidence to support the contention that the audit engagements relating to AIML were partly concluded or finalised within the DIFC.
110. KPMG LG submits that the AIML Engagement Letters sent by KPMG LG to the Abraaj Group were offers which could only be accepted by signing **and returning** the signed copy of the Letter to KPMG LG in Dubai. Accordingly, it is submitted that the contracts constituted by the Letters were not complete until acceptance had been communicated by delivery of the signed copy of the Letter to KPMG LG's offices in Dubai.
111. That submission can be accepted, but it provides no answer to the Claimants' submission that jurisdiction is enlivened if the relevant contract was **partly** concluded or finalised within DIFC. The Defendants' submission that a contract is either concluded or it is not would give no meaning whatsoever to the word "partly" in paragraph (1)(b) of Article 5 (A) of the JAL contrary to established principles of statutory construction.
112. The offer made by KPMG LG in the form of each of the AIML Engagement Letters expressly stipulated that the offer could be accepted by doing two things, namely:
  - (a) signing a copy of the letter enclosed with the offer; and
  - (b) returning the signed copy of the letter to KPMG LG.

The evidence suggests that the first step in that process likely occurred within DIFC, and if the evidence remains in that form, it will be entirely appropriate to conclude that the contracts which are the subject of AIML's claims against KPMG LG were each partly concluded or finalised within the DIFC.

113. This conclusion is consistent with prior authority in which it has been held that the execution of a contract by one party within the DIFC was sufficient to confer jurisdiction upon this Court pursuant to gateway (1)(b)<sup>90</sup>.

*Were the Audit Services Partly Performed within the DIFC?*

114. I have referred in detail to the evidence presently before the Court with respect to the place in which the various activities associated with each audit were performed. In assessing that evidence, it must be remembered that the hurdle which the Claimants must surmount is relatively low, and will be surmounted if there is a plausible evidential basis for the assertion that at least some of the services performed pursuant to the audit engagement were performed within DIFC.

115. There is a sound evidential basis for the proposition that staff of KPMG LG regularly attended the Abraaj Group offices in DIFC for the purposes of the audit of the various Abraaj Group entities. There is cogent evidence to the effect that a dedicated room was provided within the Abraaj Group's offices for the use of KPMG LG personnel. There is also evidence that meetings relating to the audits took place in the Abraaj Group offices, and that audit personnel made enquiries of Abraaj Group personnel who were working in those offices, and gathered information and documents within the Abraaj Group offices for the purposes of each audit. Further, in at least one instance, the financial statements of Abraaj Holdings which consolidated the audited financial statements of AIML and ACL were the subject of a presentation to the board of Abraaj Holdings by KPMG LG personnel in the DIFC offices of the Abraaj Group. The significant volume of work papers that were found in the room dedicated to KPMG's use include original audit work papers and provide a sound evidential basis for the proposition that audit work was conducted in the Abraaj Group offices. The first hand evidence of Mr. Sharaz with respect to the regular presence of KPMG staff in the office of Abraaj Group in DIFC is cogent, and substantiates the inferences properly drawn from the documents that have been produced in evidence.

116. By contrast, Mr. Pera gives no direct evidence of personal involvement in any of the relevant audits. Nor does Mr. Pera identify the sources of the information which he

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<sup>90</sup> *Allianz Risk Transfer AG Dubai Branch v Al Ain Ahlia Insurance Company PJSC* [2012] DIFC CFI 012 (30 April 2013); *National Bonds Corporation PJSC v Taaleem PJSC & Ors* [2011] DIFC CA 001.

asserts in general terms. Nor does Mr. Pera produce any documents to substantiate his assertions with respect to the manner in which the audits were conducted.

117. Mr. Navalkar does not deny that officers of KPMG LG attended the Abraaj Group offices within DIFC for the purposes of each of the audits. The thrust of his evidence appears to be to diminish the significance of the work undertaken by those personnel within the Abraaj Group offices in DIFC. However, the ambit of this Court's jurisdiction under the gateway provided by paragraph (1)(b) is not defined by a qualitative comparison of the significance or value of the contractual performance which occurred within the DIFC as compared to the significance or value of the contractual performance which occurred outside the DIFC. The gateway is satisfied if the contract was partly performed within the DIFC which, as I have already noted, sets a relatively low bar for this jurisdictional gateway.
118. For these reasons, the evidence presently before the Court establishes a sound evidentiary basis for the proposition that the audit services provided to AIML by KPMG LG were partly performed within DIFC, thereby conferring exclusive jurisdiction upon this Court with respect to claims arising from the performance of all the services under the engagements.

*Were the Audit Services Supposed to be Performed within the DIFC Pursuant to the Express or Implied Terms of the Engagements?*

119. The Claimants submit, and I accept, that the provisions of the AIML Engagement Letters with respect to the performance of the services to be provided thereunder are to be construed in the context in which all parties were aware that AIML's commercial activities were primarily conducted from the Abraaj Group offices in DIFC. Given the magnitude and complexity of AIML's commercial operations, it seems inherently implausible to attribute to the parties an intention that the audit services to be provided by KPMG LG could be provided entirely outside DIFC. An audit, by its very nature, requires the gathering of documents and information relevant to those documents, the investigation of facts, and, quite commonly, the interrogation of the officers of the audited entity by the auditors. As the accounts to be audited, the books and documents, the information and the relevant officers carrying out AIML's activities<sup>91</sup> were all located within the DIFC, it is

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<sup>91</sup> Which it seems may have been mostly officers employed by ACL.

difficult to see how the parties might be supposed to have contemplated that the audit services might have been entirely provided outside the DIFC.

120. Further, each Engagement Letter contains an express term which expressly contemplates the performance of at least some of the audit services in the offices of the Abraaj Group. Clause 13 of each Letter provides:

Where you require us or the nature of the services is such that it is likely to be more efficient for us to perform work at your premises or using your computer systems or telephone networks, you shall ensure that all arrangements are made for access, security procedures, virus checks, facilities, licenses or consents as may be required (without cost to us).

121. The evidence suggests that this provision was implemented throughout the audits, and KPMG was given an area within the Abraaj Group offices within the DIFC for its exclusive use.

122. Further, the Engagement Letters expressly require the audit services to be performed in accordance with the requirements of the ISAs. Various ISAs have been produced in evidence. It is unnecessary to go through them in detail. In general terms, as would be expected, under their terms auditors are required to identify and assess risks of material misstatement based on an understanding of the audited entity and its internal controls and are required to obtain appropriate audit evidence in order to ascertain whether a material misstatement exists. There are references within the ISAs to auditors being required to “meet, discuss and interrogate management and company employees so as to enable a critical assessment of audit evidence”. There are references elsewhere in the ISAs to “observation and inspection”, in order to support enquiries made of management. The Claimants submit, and I accept, that it is difficult to conclude that the parties to the audit engagements might have supposed that KPMG LG could satisfy the obligations imposed by the ISAs when auditing entities whose offices were located within the DIFC from entirely outside of the DIFC.

123. The Defendants’ rebuttal of these propositions is difficult to identify with clarity. It is perhaps implicit, although not explicit, in their submissions that they contend that this portion of the gateway is only available if the parties supposed that the contract would be entirely performed within the DIFC. However, there are no words within paragraph

(1)(b) to that effect, and any construction of the paragraph to that effect would be entirely inconsistent with the earlier words in the paragraph which explicitly provide that the Court has exclusive jurisdiction if a contract is partly performed within the DIFC.

124. It might also be inferred from the Defendants' submissions that they contend that the parties could not have supposed that the audit services would be performed within the DIFC because KPMG LG is not licensed to perform such services within the DIFC. However, there is no evidence to suggest that relevant personnel of the Abraaj Group were aware of KPMG's structures or licensing arrangements, and therefore no basis for attributing to those personnel any supposition or expectation to the effect that services to be performed by KPMG LG would be performed entirely outside the DIFC. Further, as a matter of fact, there is evidence which strongly suggests that those services were not performed entirely outside DIFC, as has been noted. Further still, even if there were some evidence of knowledge of KPMG's licensing arrangements on the part of Abraaj Group personnel, the Engagement Letters specifically define "KPMG persons" to include not only the KPMG contracting party (relevantly KPMG LG) but also "any other body or entity controlled by us or owned by us or associated with us" (which would include KPMG LLP). Accordingly, the express provisions of the contract contemplated that services could be provided by entities associated with KPMG LG, so that any impediment arising from KPMG LG's lack of a license to provide auditing services in the DIFC could be overcome by utilizing the services of KPMG LLP within the DIFC, for the purposes of discharging the contractual obligations of KPMG LG.

**Paragraph (1)(b) – Conclusion**

125. For these reasons the Claimants have established a good arguable case to the effect that:
- (a) each AIML audit engagement was partly concluded or finalised within the DIFC;
  - (b) each AIML audit engagement was partly performed within the DIFC; and
  - (c) each AIML audit engagement was supposed to be performed within DIFC pursuant to express or implied terms in the AIML Engagement Letters with the consequence that AIML's claims against KPMG LG under the relevant audit engagements fall within the exclusive jurisdiction of this Court.

### **Gateway (1)(c)**

126. Gateway (1)(c) confers exclusive jurisdiction upon this Court with respect to “civil or commercial claims ... arising out of or relating to any ... transaction which has been wholly or partly performed within DIFC and is related to DIFC activities”.
127. The claims in these proceedings are clearly civil or commercial in character. For the reasons already given in relation to gateway (1)(b) there is evidence to support the contention that the claims against KPMG LG arise out of or relate to a transaction which has been partly performed within the DIFC, being a transaction for the provision of audit services to the relevant audited entities, including AIML. That transaction is related to DIFC activities, because the audited entities, including AIML, primarily conducted their commercial activities within the DIFC.
128. The Defendants did not suggest any additional or alternative rebuttal to the Claimants’ reliance upon this gateway to those which had been advanced in relation to gateway (1)(b) and there is no apparent reason why the Court should not conclude that the requirements of this gateway are also satisfied.
129. For these reasons the Claimants have established a good arguable case to the effect that this Court has exclusive jurisdiction to hear and determine AIML’s claims against KPMG LG pursuant to gateway (1)(c).

### **Gateway (1)(e)**

130. Gateway (1)(e) confers exclusive jurisdiction upon this Court in respect of any claim or action in respect of which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations. The term “DIFC Regulations” is defined within the JAL in terms sufficiently wide to include the RDC. Those rules include RDC r,20.7, which provides:

The Court may order a person to be added as a new party if:

- (1) it is desirable to add the new parties so that the Court can resolve all the matters in dispute or the proceedings; or
- (2) there is an issue involving the new party and the existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the Court can resolve that issue.

131. The Claimants contend that this Rule confers jurisdiction upon this Court if:
- (a) there is an issue or issues as between AIML and KPMG LG which is or are connected to the matters in dispute in the proceedings between ACL and KPMG LLP; and
  - (b) it is desirable for AIML and KPMG LG to be party to these proceedings so that the Court can resolve the connected issue or issues.
132. The existence of jurisdiction identified through this process of reasoning was confirmed by the decision of the Court of Appeal in *Nest Investment Holdings Lebanon SAL & Ors v Deloitte & Touche (ME) & Fardj*<sup>92</sup>. The principle was enunciated in that case in which there was an application for the joinder of a party before the Court, and the written submissions of the Defendants in this case included an argument to the effect that such an application was an essential prerequisite to the existence of the jurisdiction. However, during the course of oral argument, that component of the Defendants' submissions was expressly abandoned by Senior Counsel for the Defendants<sup>93</sup>. So, it is accepted that the Court has jurisdiction in relation to claims against parties who would have been liable to have been joined pursuant to RDC r.20.7, notwithstanding that those parties may already have been joined to the proceedings.
133. The Defendants submit that the *Nest* jurisdiction does not apply to the circumstances of this case because ACL's claim against KPMG LLP is quite separate and distinct from, and unconnected to, AIML's claim against KPMG LG. For the reasons which follow I do not accept that proposition, which is contrary to the formulation of the claims and to the evidence before the Court.
134. ACL is a wholly owned subsidiary of AIML. It's audited financial statements are consolidated into the audited financial statements of AIML. There is evidence to the effect that personnel employed by KPMG LLP carried out work in respect of the AIML audit, although this is a contentious issue of fact.
135. There is evidence that AIML and ACL were inextricably intertwined in the conduct of the relevant commercial activities. Many of the staff performing services on behalf of AIML

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<sup>92</sup> [2018] DIFC CA 011 (13 March 2019).

<sup>93</sup> Transcript 70.

are said to have been employed by ACL, although the staff were apparently paid by AIML. The offices in which the commercial activities of AIML were conducted were leased by ACL, although the rental was apparently paid by AIML. The failure to properly account for the payments to staff and the rental in the accounts of ACL is one of the allegations made in the claim, and obviously involves both AIML and ACL. Similarly, the “window dressing transactions” of which complaint is made involve both ACL and AIML.

136. Further, by reason of the close and intertwined commercial connections between AIML and ACL, and the consequential close and intertwined connections between the audits of those two entities, the counter-factual scenarios advanced by the Claimants as the basis upon which their loss and damage is to be measured do not differentiate, with one small exception, between the loss and damage occasioned by of a breach of duty in connection with the AIML audit, as compared to the loss and damage occasioned by a breach of duty in connection with the ACL audit. The Claimants contend that if the serious irregularities had been discovered and reported in connection with either audit, then either:
  - (a) a new management group would have been installed thereby reducing the losses of the Abraaj Group as a whole; or
  - (b) the Abraaj Group would have gone into liquidation earlier which would also have diminished the losses suffered by the Abraaj Group as a whole.
137. Given this almost complete overlap in the claims of loss and damage, it is not merely desirable but essential, in the interests of justice, that the claims the subject of these proceedings be tried together and in the same Court. As noted, the allocation of the total losses said to have been suffered by the group as between the different entities in the group is likely to give rise to complex issues. As it is common ground that ACL’s claims against KPMG LLP can only be tried in the exclusive jurisdiction of this Court, this Court is the only Court which has jurisdiction to also try AIML’s claims against KPMG LG.
138. In summary, the claims by AIML against KPMG LG, and the claims by ACL against KPMG LLP will all fall to be evaluated in a context in which the commercial activities and personnel of AIML and ACL were closely entwined. Each of the claims will likely give rise to the same issues in at least the following respects:

- (a) What was the nature of the audit obligations imposed upon the auditors by the terms of their engagement and the ISA's and were those obligations discharged in the circumstances of the audit of the relevant Abraaj entities;
- (b) Were the audit opinions which were given in respect of the accounts of AIML, and which included by way of consolidation the accounts of ACL, given in breach of duty;
- (c) Did the various "window dressing" and related party transactions and accounting treatments as between AIML and ACL alleged by the Claimants occur, and if so, was it a breach of duty by each of the auditors engaged in the audit of each company to fail to identify and report those transactions and accounting treatments;
- (d) Were ACL's capital adequacy requirements understated by reason of the transactions and accounting treatments in which it engaged with AIML, and should those transactions and treatments have been identified and reported by the auditors of each company;
- (e) Was ACL knowingly concerned in the conduct of unlawful and unauthorised activity by AIML within the DIFC and if so, should the auditors of each company have identified and reported those facts;
- (f) Were employees of KPMG LG and KPMG LLP working together on the audits or did their activities overlap; and
- (g) Did breaches of duty in connection with the audits of each of AIML and ACL have the consequences asserted by the Claimants, and if so, what is the quantum of the loss and damage suffered by the various entities within the Abraaj Group, including AIML and ACL, by reason of those consequences.

139. In these circumstances, there can be no doubt that much of the evidence in the claims by AIML against KPMG LG will be relevant and admissible in the claims by ACL against KPMG LLP, and vice versa. It would be contrary to the interests of justice for that evidence to be given twice, in different courts. If the claims were to be heard in different courts, there would be a grave risk of inconsistent findings and judgments, which is also contrary to the interests of justice. The fact that the same loss and damage is claimed,

in substance, to have been the consequence of the breaches of duty in each claim, and must be allocated amongst the various entities within the Abraaj Group, creates a risk of either double or under recovery if the claims are tried in different courts, which is also contrary to the interest of justice.

140. As it is common ground that this Court has exclusive jurisdiction to hear and determine the claims by ACL against KPMG LLP, it follows that this is the only court in which those claims can be heard and determined together with the claims by AIML against KPMG LG. In these circumstances, it is a significant understatement to conclude that joining AIML and KPMG LG as parties to these proceedings is “desirable”, to use the language of RDC r.20.7.
141. For these reasons the Claimants have established a good arguable case that this Court has exclusive jurisdiction to hear and determine AIML’s claims against KPMG LG pursuant to gateway (1)(e).

#### **Summary – Article 5(A)(1)**

142. The Claimants have established a good arguable case to the effect that this Court has exclusive jurisdiction to hear and determine AIML’s claims against KPMG LG pursuant to each of paragraph (b), (c) and (e) of Article 5(A)(1) of the JAL.
143. In these circumstances it is obviously unnecessary for the Claimants to also rely upon the provisions of the AIML Engagement Letters relating to jurisdiction in order to invoke the jurisdiction conferred upon the Court by Article 5(A)(2) – namely, the “opt in” jurisdiction. Rather, in the circumstances of this case, it is the Defendants who rely upon the provisions in the AIML Engagement Letters relating to jurisdiction to assert that the parties have agreed to “opt out” of the jurisdiction otherwise conferred upon the Court by Article 5(A)(1), and who assert that the Court should give effect to that agreement and decline jurisdiction which it otherwise has.

#### **The Jurisdiction Agreements**

144. Each of the Engagement Letters contains a provision in the following terms:

44. Law and Jurisdiction. The Services Contract shall be subject to and governed by the laws of the United Arab Emirates and the laws of Dubai

International Financial Centre as applicable. All disputes arising from or under the Services Contract shall be subject to the exclusive jurisdiction of the United Arab Emirates Courts or the Courts in the Dubai International Financial Centre, as appropriate.

145. There are some provisions in the ACL Engagement Letter which are potentially relevant to jurisdiction which are not included in the AIML Engagement Letters. However, it is unnecessary to refer to those provisions as there is no issue with respect to the exclusive jurisdiction of this Court to hear and determine claims arising under the ACL Engagement Letter.

### **Applicable principles of contractual construction**

146. The parties have different positions in relation to the substantive law which governs the Engagement Letters. The Defendants contend that the AIML Engagement Letters are governed by the laws of the UAE, not including the laws of the DIFC, whereas the ACL Engagement Letter is governed by the laws of the DIFC and the laws of the UAE, where not inconsistent with the laws of the DIFC. On the other hand, the Claimants contend that all Engagement Letters are governed by the laws of the DIFC, augmented by the laws of the UAE when not inconsistent with the laws of the DIFC.
147. The parties also have differing positions whether the Court should determine the governing law of the AIML Engagement Letters for the purpose of deciding the issue as to jurisdiction. The Defendants contend that the Court should make that determination, and rely heavily upon the proposition that DIFC law does not apply to the AIML Engagement Letters in support of the contention that clause 44 is an agreement which excludes the jurisdiction which this Court would otherwise have in relation to claims arising from services performed pursuant to those engagements. The Claimants, on the other hand, contend that it is neither necessary nor appropriate for the Court to make a determination with respect to the law governing the relevant engagement agreements at this stage of the proceedings. I will return to this question below.
148. In my view it is unnecessary to determine the governing law of the AIML Engagement Letters in order to determine the legal principles governing the construction of Article 44 of those letters because, in the circumstances of this case, to the extent that there are differences in DIFC law and UAE law relating to principles of contractual construction,

they would make no material difference to the outcome of the issues which need to be resolved at this point in the proceedings.

149. In *Credit Suisse (Switzerland Ltd) v Goel & Ors*<sup>94</sup> I set out the principles of contractual construction which I understood to be common to both DIFC and UAE law in the following terms:

The task of the Court is to ascertain the joint intention of the parties. That intention is to be derived by construing the words which they have used to record their agreement objectively, as they would be understood by a reasonable person having knowledge of the circumstances known to the parties at the time they entered into the contracts.

150. For reasons which I will develop, it is significant to the issues now before the Court that both bodies of law:
- (a) focus upon the ascertainment of the **mutual** intention of the parties; and
  - (b) will only take into account the contextual circumstances known to **both** parties at the time they entered into their contract.

### **Opt-in and Opt-out Agreements**

151. Article 5(A)(2) of the JAL confers non-exclusive jurisdiction upon the Court to determine civil or commercial claims pursuant to any agreement between the parties to those claims “provided that such agreement is made pursuant to specific, clear and express provisions”. Agreements falling within this provision of the JAL are commonly described as “opt in agreements”.
152. In *Al Khorafi* the Court of Appeal construed Article 5(A)(3) of the JAL as implicitly authorising parties to exclude jurisdiction the Court would otherwise have. Agreements to that effect are commonly described as “opt out agreements”. The Court in *Al Khorafi* also held, by analogy to Article 5(A)(2), that any opt out agreement must meet the same requirements as an opt in agreement – namely, it must be made “pursuant to specific, clear and express provisions”.

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<sup>94</sup> [2020] CFI-066 (4 October 2020).

153. In *Al Khorafi* the Court also held that the Court retained a discretion to exercise jurisdiction notwithstanding an “opt out agreement” in limited circumstances, and the discretion was exercised in that case. The Defendants reserve their right to contend that *Al Khorafi* was wrongly decided in this respect, but accept that this Court, sitting at first instance, is bound to apply the decision of the Court of Appeal in this regard. I will therefore return later to the question of whether such a discretion should be exercised in the circumstances of this case, on the assumption that there is such a discretion.

**“Specific, clear and express provisions”**

154. In *Sunteck Lifestyles Ltd v Al Tamimi*<sup>95</sup>, Justice Sir Jeremy Cooke expressed the view that, provided an agreement could be construed as providing for the jurisdiction of the DIFC Court, it satisfied the requirement of being “specific, clear and express”. However, in a more recent decision the Court of Appeal has attributed greater significance to those provisions of Article 5(A)(2). In *Laabika & Anor v Ladu & Anor*<sup>96</sup>, the Court observed:

‘Specific’, ‘clear’, and ‘express’ each involves judgment of degree. What is sufficiently ‘specific’? What is sufficiently ‘clear’ and what level of detail is required to meet the requirements of ‘express’? Where a term is used that on its ordinary and unambiguous meaning applies to the DIFC Courts, the fact that it picks up the onshore Courts as well does not negate its application to the DIFC Courts. Nor does it negate that application as specific, clear and express. The jurisdiction conferred by Article 5(A)(2) is not exclusive and, consistently with that character, the parties can agree to have their disputes determined by DIFC Courts or any other Dubai Courts.

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155. The requirement that an opt out agreement must be specific, clear and express was affirmed by the Court of Appeal in *IGPL v Standard Chartered Bank*<sup>97</sup>. For reasons which I will develop, those requirements may be significant in a case such as this, where KPMG LG contends that Article 44 of the AIML Engagement Letters excludes the jurisdiction this Court would otherwise have, not because Article 44 says so in clear and express terms, but because of extrinsic circumstances which sustain the conclusion that the

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<sup>95</sup> [2017] DIFC CFI-048 at [24].

<sup>96</sup> [2021] DIFC CA-008.

<sup>97</sup> [2015] DIFC CA-004 (19 November 2015) [137].

exclusion of this Court's jurisdiction is "appropriate".

156. The Claimants submit that while they carry the burden of establishing that this Court has jurisdiction when jurisdiction is challenged, once they have discharged that burden by establishing the applicability of one or other of the gateways to jurisdiction created by Article 5(A), as in my view they have, the onus shifts to the Defendants to establish an opt out agreement which would exclude that jurisdiction, and that such an agreement should be enforced by this Court. The Defendants do not contest this proposition, which I accept, as it appears to be consistent with the authorities to which I have referred<sup>98</sup> and with general principle.
157. However, if the requirement that an opt out agreement be made "pursuant to specific, clear and express provisions" restricts the Court to a consideration of only the express terms of the agreement, it wouldn't appear that the allocation of a burden of proof has any significance. On the other hand, if, notwithstanding the requirement for an agreement made pursuant to specific, clear and express provisions, the Court can take into account extrinsic circumstances known to both parties at the time of contract for the purpose of construing the agreement said to be an opt out agreement, the burden of proving the relevant circumstances known to both parties at the time of contract would fall upon the party asserting the opt out agreement – in this case the First Defendant.

#### **Article 44 – Some General Observations**

158. Article 44 of the Engagement Letters deals with two distinct but related subjects – namely, the law governing the engagements, and the jurisdiction of the Courts available to resolve disputes arising from the engagements.
159. A different approach is taken in relation to each of these subjects. In relation to governing law, the clause provides that the laws of the UAE **and** the laws of DIFC are to apply "as applicable". By contrast, the jurisdiction of the Courts available to resolve disputes arising under the engagements is specifically stated to be "exclusive", and to be either the UAE Courts **or** the DIFC Courts "as appropriate". In other words, the governing law is expressed conjunctively "as applicable", whereas jurisdiction is expressed disjunctively, and is to reside exclusively in either the UAE Courts or the DIFC Courts, "as appropriate".

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<sup>98</sup> Al Khorafi, *JGPL*.

160. The proper construction of portion of the Article relating to governing law appears quite straightforward. The DIFC is of course part of the UAE, and the laws applicable in the DIFC include DIFC laws and UAE laws. On the other hand, activities performed entirely outside the DIFC, and which have no connection with the DIFC sufficient to engage the operation of DIFC laws will be governed entirely by the laws of the UAE, which will include the laws of the relevant Emirate in which the activities are performed. So, if the activities performed pursuant to the engagement have a sufficient connection with the DIFC to engage the operation of DIFC laws, then those laws will apply. On the other hand, if the engagement or the services provided pursuant to its terms don't have that degree of connection with the DIFC, those laws will not apply.
161. However, the proper construction of the provisions of the Article relating to curial jurisdiction are more problematic. While the Courts of the DIFC are, of course, Courts of the UAE, the Article draws a clear distinction between those Courts by the use of the disjunctive "or", and provides that one or other of the Courts described in this way will have jurisdiction that is exclusive of all other Courts. It follows that in the context of Article 44, UAE Courts must mean Courts other than the DIFC Courts.
162. The Article provides that the Courts which have exclusive jurisdiction are to be identified "as appropriate". However, the Article contains no provisions relating to the manner in which or by whom the appropriateness of one or other of the Courts to which it refers is to be identified or determined.
163. This significant omission creates an obvious and significant obstacle in the path of the Defendants' contention that Article 44 is an opt out agreement. In order to constitute such an agreement, the Article must exclude the jurisdiction of the DIFC Courts by provisions which are "specific, clear and express". It is difficult to see how an agreement which leaves the determination of the Courts which are to have exclusive jurisdiction to be ascertained by a criterion expressed in terms which are as vague and uncertain as "as appropriate", and which does not specify the manner or means by which the determination of "appropriateness" is to be made, could satisfy the requirements of an opt out agreement established by the authorities to which I have referred.
164. Of course, precisely the same obstacle would lie in the path of any contention by the Claimants to the effect that Article 44 constitutes an opt in agreement satisfying the

requirements of Article 5(A)(2). However, as has been noted, as the Claimants have established that this Court has jurisdiction pursuant to Article 5(A)(1), it is unnecessary for them to establish jurisdiction pursuant to Article 5(A)(2).

### **The Construction of Article 44 – the Parties’ Contentions**

#### *The Claimants’ Contentions*

165. The Claimants contend that Article 44 confers an option upon the parties to bring claims in either the DIFC Courts, or other Courts within the UAE. They contend that the only limitation upon that choice is that the choice must be “appropriate”. According to the Claimants, once a party has made that choice by commencing proceedings, provided the choice is “appropriate”, all parties are bound by that choice and the jurisdiction of the chosen Court is exclusive.

#### *The Defendants’ Contentions*

166. AIML contends that the decisive factor which determines both the governing law and the Courts which have exclusive jurisdiction is the identity of the KPMG entity providing the audit services<sup>99</sup>.

167. The process of reasoning upon which the Defendants rely includes the following steps:

- (a) KPMG LG conducts its operations outside the DIFC;
- (b) KPMG LG is regulated by authorities which operate outside the DIFC;
- (c) KPMG LG is not authorised to perform audit services within the DIFC;
- (d) The terms of the Engagement Letters contemplate or should be taken to contemplate that the audit services will be performed in accordance with the obligations imposed upon the relevant auditing entity which, in the case of KPMG LG are obligations imposed by entities outside the DIFC;
- (e) The parties should be taken to have intended that the law governing the audit engagement would be the law of the place in which the auditor is based, which in

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<sup>99</sup> Defendants’ skeleton at [43].

the case of KPMG LG, does not include the laws of the DIFC, as it is not based in the DIFC;

- (f) The parties should be taken to have known that the audit services would be performed by KPMG LG outside the DIFC, with the result that the laws of the DIFC would not apply to those services and the governing law of the engagement would not include DIFC law;
- (g) The terms of Article 44, which include reference to both UAE laws and courts, and DIFC laws and courts, are explained by the fact that is a provision in a standard form agreement used by all KPMG entities operating in the UAE, including entities which operate within and entities which do not operate within the DIFC, and the parties should be taken to have known and understood that; and
- (h) As the parties should be taken to have intended that the governing law of the audit engagement did not include DIFC law, they should also be taken to have intended that the Courts which would have exclusive jurisdiction to determine disputes under the engagement would correspond to that governing law, and would therefore not be the DIFC Courts.

168. Viewed more generally, the Defendants contentions rely heavily upon:

- (a) The fact that KPMG LG was subject to a regulatory regime outside the DIFC;
- (b) The fact that KPMG LG was not authorised to perform auditing services within the DIFC;
- (c) The expectations of the parties as to the place or places at which the audit services would be performed by KPMG LG;
- (d) The fact that Article 44 is a provision in a standard form agreement used by all KPMG entities in the UAE, including entities which do, and entities which do not operate in the DIFC; and
- (e) A conclusion drawn from the preceding matters, to the effect that the parties intended that the law governing the engagement of KPMG LG would not include

the law of the DIFC.

### **The Construction of Article 44**

169. As already noted, in order to resolve the issue of this Court's jurisdiction it is not necessary to determine whether Article 44 is an opt in agreement falling within Article 5(A)(2) of the JAL. This Court should go no further than is necessary to determine the extent of its jurisdiction at this point in the proceedings, with the result that it is neither necessary nor appropriate to determine whether the construction of Article 44 for which the Claimants contend is correct. Rather, the question which must be determined is whether the Defendants have established that Article 44 constitutes an opt out agreement which excludes the jurisdiction which this Court would otherwise have.
170. There are two reasons why the Defendants' contentions with respect to the proper construction of Article 44 must be rejected.
171. First, the process of reasoning which underpins the Defendants' contentions relies exclusively upon facts and matters which are extraneous to the provisions of the Article. In those circumstances it cannot be concluded that Article 44 comprises an agreement to exclude the jurisdiction of this Court "pursuant to specific, clear and express provisions".
172. Second, if, contrary to the view just expressed, it is possible for the Defendants to rely upon facts, matters and circumstances extraneous to Article 44 itself in order to establish the existence of an opt out agreement, those facts, matters and circumstances will only be relevant to the proper construction of the Article if they were known to both parties at the time the AIML Engagement Letters were executed. For the reasons already given, the onus of establishing that **both** parties had knowledge of the facts, matters and circumstances which underpin the process of reasoning which supports the First Defendant's contention that Article 44 is an opt out agreement rests upon the First Defendant. No attempt has been made to discharge that onus by adducing evidence as to the knowledge of any party in relation to those matters, including the knowledge of AIML. Rather, the argument has been propounded on the basis of an assumption that all parties should be taken to be aware of the facts, matters and circumstances upon which the argument depends.

173. That is not an assumption which can or should be made. For example, there is no reason to suppose, in the absence of evidence, that those who represented the Abraaj Group, for the purposes of ascertaining the relevant knowledge of the Abraaj parties to the AIML Engagement Letters, would have been aware of:
- (a) The regulatory regime to which KPMG LG was subject; or
  - (b) The fact that KPMG LG was not authorised to provide auditing services within the DIFC; or
  - (c) The fact that Article 44 is part of a standard form agreement used by all KPMG entities in the UAE, including those which do, and those which don't operate within the DIFC.

### **The Governing Law of the Agreement**

174. As already noted, the proposition that the AIML Engagement Letters are governed by UAE laws which do not include DIFC laws is a significant component of KPMG LG's argument that Article 44 of the agreements constituted by those AIML Engagement Letters is an opt out agreement.
175. The Claimants contend that it is neither necessary nor appropriate to definitively determine the governing law of the AIML Engagement Letters for the purposes of resolving the issue with respect to jurisdiction. They rely upon the following passage from the judgment of the Court of Appeal in *Sky News Arabia FZ-LLC v Kassab Media FZ*<sup>100</sup>:

We find that it is not necessary at this stage to address the issue of the applicable law of the Agreement. It is crucial to clarify that the issue of jurisdiction is separate from the issue of the applicable law of the Agreement. The Court first decides if it has jurisdiction under Article 5(A) of the Judicial Authority Law. After the issue of jurisdiction is decided, the Court with jurisdiction to hear the Claim can then go on to assess the applicable law of the Agreement as stated in the jurisdiction clause.

176. While there may be cases in which it is necessary to determine the governing law of the agreement in order to determine jurisdiction, for the reasons I have already given, this is

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<sup>100</sup> [2017] CA-010-2016 (12 July 2017) at [126].

not one of those cases.

177. The Defendants' approach to the determination of the applicable governing law pursuant to Article 44 turns critically upon the facts, matters and circumstances known to both parties at the time the Engagement Letters were executed. As noted, there is no evidence with respect to the extent of that knowledge before the Court, and therefore no basis upon which the validity of the Defendants' contentions can be determined at this stage of the proceedings.
178. On the view which I take of the proper construction and effect of the provisions of Article 44 with respect to governing law, the question will turn upon whether or not DIFC law has been engaged by either the circumstances in which the agreement was constituted by the Engagement Letters, or by the manner in which the agreements were performed. Determinations with respect to those matters will turn upon the evidence which will be adduced with respect to them in due course and should therefore await the receipt of the entirety of that evidence.

### **Discretion**

179. As noted, it is accepted that, for the purposes of the proceedings at first instance, this Court should act upon the view expressed by the Court of Appeal in *Al Khorafi* to the effect that the Court retains a discretion to refuse to enforce an opt out agreement if there is "strong reason" not to<sup>101</sup>.
180. I have set out my reasons for concluding that it would be contrary to the interests of justice for AIML's claims against KPMG LG to be determined in the Dubai Courts, while ACL's claims against KMPG LLP are determined in this Court, which is the only Court which has jurisdiction to determine those claims. For those reasons, had I determined that Article 44 was an opt out agreement, I would have concluded, without hesitation, that there was "strong reason" to exercise discretion not to enforce that agreement in the circumstances of this case.

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<sup>101</sup> *Al Khorafi* at [114]; *Donoghue v Armco* [2002] 1 Lloyds Rep 425.

## **Conclusion**

181. For these reasons, the Application must be dismissed.

## **Costs**

182. The parties are agreed that there is no reason why the usual rule that costs follow the event should not be applied to this application. It follows that the First Defendant will be ordered to pay the Claimants' costs of the application.

183. The Claimants filed a detailed statement of the costs which it claims in this regard, amounting to a total of USD 266,536.43. The First Defendant submits that those costs are excessive in the following respects:

- (a) The hourly rates are excessive – the application of more reasonable rates translates into a reduction of USD 34,000;
- (b) An unnecessarily large team (comprising 8 lawyers) was engaged to work on the application – the claim should be reduced by USD 40,108.50 in this regard;
- (c) Forensic accounting and investigatory support provided by Deloitte and included in the costs claimed was unnecessary – the claim should be reduced by USD 28,102.50 in this regard;
- (d) The claim for time spent working on documents is excessive and should be reduced by 20% - a reduction of USD 15,282;
- (e) The brief for Claimants' junior counsel was excessive, and should be reduced from USD 32,638.90 to USD 20,000; and
- (f) Costs are claimed in respect of time spent by lawyers who are not registered on this Court's register of Legal Practitioners, and the claim should be reduced by USD 40,000 on this account.

184. I accept that there is some force in the first three contentions set out above, but I do not accept the remaining contentions. In particular, I think there is force in the contention that the hourly rates claimed by the Claimants' lawyers are excessive, when compared to the hourly rates claimed by the lawyers acting for the First Defendant, and that it was

unnecessary to involve 8 lawyers in the response to the jurisdiction application. I am also unable to see the basis upon which forensic accounting or investigatory work was required in order to respond to the jurisdiction application, and think it more likely than not that the costs incurred in that respect were most likely incurred in work relating to the substantive merits of the claims.

185. However, I do not necessarily accept the First Defendant's assessment of the reductions which should be made in respect of the contentions which I consider should be accepted. Rather, I am inclined to take a more broad brush approach, and to reduce the amount claimed by the Claimants to USD 180,000.
186. Accordingly, there will be an order that the First Defendant pay the Claimants' costs of the Application in the amount of USD 180,000.