

**IN THE MATTER OF THE ARBITRATION UNDER THE RULES OF THE DIFC-
LCIA ARBITRATION CENTRE**

DIFC-LCIA ARBITRATION NO. DL18141

BETWEEN:

- (1) MEDIMPACT INTERNATIONAL LLC
- (2) MEDIMPACT INTERNATIONAL HK LIMITED

Claimants

- and -

- (1) DIMENSIONS HEALTHCARE LLC
- (2) MEDIMPACT ARABIA LIMITED

Respondents

PARTIAL FINAL AWARD ON LIABILITY

DATED 16 APRIL 2019

THE ARBITRAL TRIBUNAL:

CHRISTOPHER STYLE QC

CS

INDEX

A. INTRODUCTION 1

(1) The Parties 1

(2) The dispute between the Parties 4

(3) The Arbitration Agreement 6

(4) The Arbitral Tribunal 7

(5) The applicable law..... 8

B. PROCEDURAL HISTORY OF THE ARBITRATION9

C. FACTUAL BACKGROUND21

D. THE MERITS27

(1) The contentions of the Parties 27

(2) The issues for decision 33

(3) Questions of proof 35

(4) Factual and Legal Issues..... 38

(5) The Claims..... 65

(6) Causation..... 69

(7) Remedies.... 73

E. AWARD.....75

APPENDIX ONE.....Relevant provisions of the JVA

APPENDIX TWO.....Relevant provisions of the SLC

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A. **INTRODUCTION**

(1) **The Parties**

1. The First Claimant, MedImpact International LLC (the “**First Claimant**” or “**MIL**”), is a limited liability company established and existing under the laws of California, and is in the business of providing tailored Pharmacy Benefit Management (“**PBM**”) solutions, including informatics, to healthcare providers, insurers, employers and government entities.

2. The First Claimant’s registered address and contact details are:

MedImpact International LLC
10181 Scripps Gateway Court
San Diego
CA 92131
USA

Telephone: +1 858 790 6676

Emails: nancy.radtke@medimpact.com
dale.brown@medimpact.com

3. The Second Claimant, MedImpact International HK Limited (the “**Second Claimant**” or “**MIHKL**”), is incorporated in Hong Kong. The Second Claimant is an affiliate of the First Claimant, operating in the same business area as the First Claimant.

4. The Second Claimant’s registered address and contact details are:

MedImpact International HK Limited
Suite 3201
Jardine House
1 Connaught Place Central
Hong Kong SAR

And

Suite 1229
1 Peking Road
Tsimshatsui, Kowloon
Hong Kong

Telephone: +852 (3980) 9385

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Emails: nancy.radtke@medimpact.com
dale.brown@medimpact.com

5. The First and Second Claimants are represented in these proceedings by:

Mr Matthew Showler
Ms Dilpreet Dhanoa

Dentons & Co
Level 18, Boulevard Plaza 2
Burj Khalifa District
PO Box 1756
Dubai, United Arab Emirates

Telephone: +971 (0)4 402 0800

Email: matthew.showler@dentons.com
dilpreet.dhanoa@dentons.com

And

Mr Harris Bor

20 Essex Street
London WC2R 3AL
United Kingdom

Telephone: +44 (0)20 7842 1200

Email: Hbor@20essexst.com

6. The Claimants are together referred to below as “**MedImpact**”.
7. The First Respondent, Dimensions Healthcare LLC (the “**First Respondent**” or “**Dimensions**”), is a limited liability company providing healthcare and informatics solutions established and existing under the laws of the United Arab Emirates with registration number 1165141.
8. The First Respondent’s registered address and contact details are:

Dimensions Healthcare LLC
Al Wahda City Tower, Hazaa Bin Zayed
the First Street
P.O. Box 127432

Abu Dhabi
United Arab Emirates

9. The First Respondent is represented in these proceedings by:

Mr Andrew Mackenzie
Mr Will Seivewright
Ms Sally Kotb
Ms Noor Sabbah

Baker McKenzie Habib Al Mulla
Level 14, O14 Tower
Al Abraj Street, Business Bay
PO Box 2268, Dubai
United Arab Emirates

Telephone: +971 4 423 0068

Emails: andrew.mackenzie@bakermckenzie.com
sally.kotb@bakermckenzie.com
will.seivewright@bakermckenzie.com
nour.sabbah@bakermckenzie.com

And

Ms Isabel Jamal

8 New Square
Lincoln's Inn
London WC2A 3QP
United Kingdom

Telephone: +44 (0) 207 405 4321

Email: Isabel.jamal@8newsquare.co.uk

10. The First Respondent was also represented at the Evidentiary Hearing by Mr Stephen Houseman QC of Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3EG, United Kingdom.
11. The Second Respondent, MedImpact Arabia Limited (the "**Second Respondent**" or "**MIA**") in an exempted company incorporated and existing under the laws of the Cayman Islands.
12. The Second Respondent's address and the contact details for its representatives are:

MedImpact Arabia Limited
 c/o InterTrust Corporate Services (Cayman) Limited
 Elgin Avenue
 George Town
 Cayman Islands

Telephone: +1 (345) 914 3139

Emails: raquel.jackson@intertrustgroup.com
yoanna.gomezmiranda@intertrustgroup.com
dale.brown@medimpact.com
amit.sadana@iqvia.com

13. The Claimants and the Respondents are hereinafter referred to collectively as the “Parties” and individually as a “Party”.

(2) The dispute between the Parties

14. On 1 February 2012 the First Claimant and the First and Second Respondents entered into a Joint Venture Contract (the “JVA”)¹, which established a joint venture for the purpose of providing a PBM service comprising tailored healthcare information technology services and software in the member states of the Gulf Co-operation Council and other territories (the “Territory”). The Second Respondent is the joint venture vehicle in which the First Claimant and the First Respondent both hold a 50% interest.
15. On the same date the First Claimant entered into a Services and License Contract with the First and Second Respondents (the “SLC”)², which provided for the First Claimant and the First Respondent to supply services and licenses to the Second Respondent. On 21 January 2013 the parties to the SLC entered into an Amendment to Services and License Contract.³

¹ Documents in the agreed Hearing Bundles are referred to in this Award as [Bundle]/[Tab]/[Page]. Hence A2/11.

² A2/12.

³ A1/2/140.

16. By an Assignment and Assumption Agreement dated 1 January 2014 the First Claimant assigned its right, title and interest in the JVA and the SLC to the Second Claimant.⁴
17. This arbitration concerns claims by the Claimants against the First Respondent and by the First Respondent against the Claimants alleging breaches of the JVA and SLC.
18. The Claimants contend as follows in the Request:
 - (1) In breach of the JVA the First Respondent has sold information technology services and software in the Territory other than through the joint venture. It has engaged in the same business as the joint venture and has interfered with the business of the joint venture.
 - (2) In breach of the SLC the First Respondent has failed to manage customer relations and exclusively to promote the business of the joint venture in the Territory.
 - (3) The First Respondent has infringed the intellectual property of the Claimants and the joint venture by offering and selling products utilising the same in breach of the JVA and the SLC.
19. The First Respondent's Response denies the Claimants' allegations of breach of the JVA and the SLC and intellectual property infringement. It counterclaims as follows:
 - (1) The Claimants and their affiliates have used technology and proprietary information licensed by the First Respondent to the joint venture and developed by the joint venture to promote and support their business in other regions.
 - (2) In breach of the JVA the Claimants have failed to act in the best interests of the joint venture and have prioritised their own interests over the interests of the joint venture.

⁴ A1/2/146.

20. The Parties describe the Second Respondent as a “silent party” to this arbitration. As recorded in the Terms of Reference, the Second Respondent “agrees to abide by the directions of the Tribunal and any award, interim order or order made in the proceedings”.⁵

(3) The Arbitration Agreement

21. The Parties agreed in the Terms of Reference that the claims brought under the JVA and the SLC can be made in a single reference, heard together by the same Tribunal and be determined in the same award or awards.⁶
22. Article 20 of the JVA provides as follows:⁷

“20.1 Dispute Resolution

(a) The Parties will attempt in good faith to resolve any dispute arising out of or in relation to this Contract promptly.

(b) Any dispute between the Parties arising out of or relating to this Contract shall be in the first instance referred by any Party to its senior representatives.

(c) Any disputes that cannot be settled by the Parties through negotiation within thirty (30) days after it has been referred under Article 20.1(b) shall be settled by binding arbitration administered under the Arbitration Rules of the DIFC-LCIA Arbitration Centre (the “Rules”) in force from time to time and as may be amended by the rest of this Article. The place of arbitration shall be the Dubai International Financial Centre. There shall be only one (1) arbitrator appointed in accordance with the Rules. The language of arbitration, including the arbitrator’s award, shall be English. The expenses of the arbitration, including reasonable attorney’s fees, will be paid for by the Party against whom the award of the arbitrator is rendered.

(d) Save as expressly permitted herein, the Parties shall fulfil their respective obligations under this Contract insofar as is possible regardless of any outstanding dispute in relation to this Contract (without prejudice to the rights and obligations of any Party) and shall continue to be liable for their responsibilities and entitled to exercise their rights under this Contract.”

⁵ L/4/4.

⁶ L/4/5.

⁷ A2/11/22.

23. Clause 30 of the SLC provides as follows:⁸

“30 Governing law and dispute resolution

30.1 ...

30.2 The parties will attempt in good faith to resolve any dispute arising out of or in relation to this Contract promptly.

30.3 Any dispute between the parties arising out of or relating to this Contract, shall be in the first instance referred by any party to the individuals referred to in Clause 24.3.

30.4 Any disputes that cannot be settled by the parties through negotiation within thirty (30) days after it has been referred under Clause 30.3 shall be settled by binding arbitration administered under the Arbitration Rules of DIFC-LCIA Arbitration Centre (the Rules) in force from time to time and as may be amended by the rest of this Clause. The place of arbitration shall be the Dubai International Financial Centre. There shall be only one arbitrator appointed in accordance with the Rules. The language of arbitration, including the arbitrator's award, shall be in English. The expenses of the arbitration, including reasonable attorney's fees, will be paid for by the party against whom the award of the arbitrator is rendered.

30.5 Save as expressly permitted herein, the parties shall fulfil their respective obligations under this Contract insofar as is possible regardless of any outstanding dispute regarding the functionality or performance of the Services (without prejudice to the rights and obligations of any party).”

24. It follows that this arbitration is to be conducted in accordance with the Arbitration Rules of the DIFC-LCIA Arbitration Centre (the “**DIFC-LCIA**”) adopted to take effect for arbitrations commencing on or after 1 October 2016 (the “**DIFC-LCIA Rules**”).

(4) The Arbitral Tribunal

25. The Claimants began this arbitration by delivering to the Registrar of the DIFC-LCIA Arbitration Centre (the “**Registrar**”) their Request for Arbitration (the “**Request**”)

⁸ A2/12/21.

dated 23 January 2018.⁹ Pursuant to Article 1.4 of the DIFC-LCIA Rules, this arbitration therefore commenced on that date.

26. By letter dated 15 April 2018 the Registrar informed the Parties that, pursuant to Article 5 of the DIFC-LCIA Rules, the LCIA Court had appointed Mr Style as sole arbitrator. His contact details are as follows:

Mr Christopher Style QC

ONE ESSEX COURT
Temple
London EC4Y 9AR
United Kingdom

Tel : +44 207 583 2000
Fax : +44 207 583 0118
Email : cstyle@oeclaw.co.uk

(5) The applicable law

27. Article 21 of the JVA provides as follows:¹⁰

"21.1 Applicable Law

The formation, validity, interpretation, an implementation of this Contract shall be governed by the laws of England."

28. Clause 30.1 of the SLC provides as follows:¹¹

"The laws of England govern this Contract, its interpretation and any non-contractual obligations arising from or connected with it."

⁹ A1/1.

¹⁰ A2/11/23.

¹¹ A2/12/21.

B. PROCEDURAL HISTORY OF THIS ARBITRATION

29. As stated above, the Claimants delivered their Request to the Registrar on 23 January 2018.
30. In the Request the Claimants applied pursuant to Article 9A of the DIFC-LCIA Rules for the expedited formation of the Arbitral Tribunal. The First Respondent and the Claimants thereafter made submissions on the application. The Second Respondent did not respond. On 1 February 2018 the LCIA Court rejected the Claimants' application.
31. On 20 February 2018 the First Respondent submitted its Response under Article 2 of the DIFC-LCIA Rules.¹²
32. Thereafter there were exchanges between the Claimants and the First Respondent regarding the characteristics or qualifications which the sole arbitrator should possess. However this did not result in agreement between all the Parties. Accordingly, as stated above, on 15 April 2018 the Registrar notified the Parties that the LCIA Court had pursuant to Article 5 of the DIFC-LCIA Rules appointed Mr Style as the sole arbitrator in this arbitration.
33. On 18 April 2018 the Tribunal wrote to the Parties inviting them to agree the procedure and timetable for this arbitration. Thereafter the Parties conferred.
34. The Parties also conferred with a view to agreeing Terms of Reference. The text was agreed on 14 June 2018. On 22 July 2018 the Claimants circulated Terms of Reference which had been signed on behalf of all the Parties.¹³
35. A case management conference took place at the Capital Club in Dubai on 28 May 2018. The Claimants stated that they wished to apply for interim relief in order to preserve the business of the joint venture pending the outcome of this arbitration. They also alleged that the First Respondent had solicited clients of the joint venture in breach of restrictive covenants in the JVA. They had also infringed the intellectual

¹² A1/3.

¹³ L/4.

property of the Claimants. They sought directions for the inspection of the First Respondent's products in order to establish what products were being sold by the First Respondent. As foreshadowed in paragraph 70 of its Response, the First Respondent also sought interim relief. By letter to Dale Brown dated 23 July 2017, the First Respondent gave twelve months notice of termination of the JVA. In paragraph 5.29 of their Request, the Claimants contended that this notice was invalid because it had not been served on the Second Claimant. The First Respondent sought a declaration that the notice was valid and effective. The Parties agreed to confer with a view to agreeing arrangements for the hearing of these applications.

36. It was agreed that the Parties would make their various applications on 18 June 2018. However on 15 June 2018 the Claimants informed the First Respondent that they no longer disputed the validity of the notice of termination dated 23 July 2017. There was therefore no need for the First Respondent to pursue its application for a declaration. Thereafter the Claimants and the First Respondent agreed directions for the Claimants' applications for interim relief and inspection.
37. By Procedural Order No. 1 dated 20 June 2018 the Tribunal gave directions for the exchange of submissions on these applications culminating in a hearing in London on 25 and 26 July 2018.¹⁴
38. So far as interim relief was concerned, the Claimants sought directions pursuant to Article 25.1 of the DIFC-LCIA Rules which would preserve the assets and business of MIA pending a final award. These included provision for the transfer of the First Respondent's shares in MIA to the Claimants; orders restraining the First Respondent from applying to court to dissolve MIA or from taking steps to sell or charge its shares in MIA; and an order requiring the First Respondent to permit the Claimants to manage MIA in any way they thought fit. On 9 July 2018 the First Respondent filed evidence in which it undertook to comply with all its contractual obligations and to cooperate with the Claimants to ensure the continued operation of the joint venture vehicle. The Tribunal heard argument on the Claimants' application for interim protection at the hearing on 25 July 2018. During the hearing the First Respondent

¹⁴ L/1.

offered certain further undertakings. On this basis the Tribunal refused the directions sought.

39. The Claimants' application for inspection sought directions pursuant to Article 22.1(iv) of the DIFC-LCIA Rules for the disclosure of specified products and services offered or sold by the First Respondent and the inspection of the same by independent experts instructed on behalf of the Parties. The Claimants contended that early disclosure and inspection would provide visibility on the extent of the damages caused by the First Respondent's alleged breaches of the JVA and SLC. This would allow the Claimants fully to particularise their claims and thus narrow the issues between the Parties, assisting the Tribunal to determine their claims. In the course of argument on 25 July 2018 it emerged that the First Respondent did not object to some form of disclosure and inspection. The issue was how this fitted into the procedural timetable as a whole. Thereafter the Claimants and the First Respondents conferred and agreed to Procedural Order No. 2 dated 25 July 2018.¹⁵
40. At the hearing on 25 July 2018 both sides made submissions as to the procedure and timetable for the conduct of this arbitration. These culminated in Procedural Order No. 3 dated 26 July 2018, which provided for an Evidentiary Hearing in February 2019.¹⁶
41. In accordance with Procedural Order No. 3, as amended, the Claimants served their Statement of Claim on 9 August 2018,¹⁷ the First Respondent served its Statement of Defence and Counterclaim on 27 August 2018,¹⁸ the Claimants served their Reply and Defence to Counterclaim on 3 January 2019¹⁹ and the First Respondent served its Rejoinder on 17 January 2019.²⁰

¹⁵ L/2.

¹⁶ L/3.

¹⁷ A1/5.

¹⁸ A1/6.

¹⁹ A1/7.

²⁰ A1/8.

42. Issues arose between the Parties in relation to the process of inspection pursuant to Procedural Order No. 2. The Claimants complained that their expert was being denied the access to the First Respondent's products and services to which it was entitled. This resulted in further submissions by the Claimants and First Respondent. The Tribunal heard argument during a case management conference by telephone on 23 September 2018. Thereafter the Parties exchanged further submissions and the Tribunal gave the further directions set out in Procedural Order No. 4 dated 2 October 2018.²¹
43. At the hearing on 25 July 2018 the First Respondent had taken the position that, if it was to afford the Claimants early inspection of its products and services, the Claimants should do likewise in support of the First Respondent's counterclaim. Accordingly Procedural Order No. 3 provided for the First Respondent to apply for permission to conduct its inspection of the Claimants' products and services. The First Respondent's application was set out in its Statement of Defence and Counterclaim. The Claimants made submissions objecting to the application. The Tribunal also heard argument on this application at the hearing on 23 September 2018. Thereafter the Parties made further submissions on a form of order which reflected the outcome of the hearing and the Tribunal gave directions for inspection by independent experts of certain stated products used in the Claimants' PBM solutions by Procedural Order No. 5 dated 2 October 2018.²²
44. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Thereafter the Parties exchanged submissions. On 11 October 2018 by Procedural Order No. 6 the Tribunal refused the order sought.²³
45. In accordance with Procedural Order No. 3, as amended, on 11 October 2018 the Parties applied to the Tribunal for directions in relation to disputed requests for

²¹ L/5.

²² L/6.

²³ L/7.

documents. The Tribunal gave directions by Procedural Order No. 7 dated 17 October 2018.²⁴

46. On 18 June 2018 the First Respondent applied to the Tribunal for permission to claim the costs which it had incurred in dealing with the Claimants' abortive challenge to the validity of the First Respondent's notice of termination dated 23 July 2017. On 3 September 2018 the Tribunal directed that he would decide who should bear those costs. The Tribunal gave directions for submissions on the point, which were varied on 9 October 2018. In accordance with those directions the First Respondent submitted its claim for costs amounting to USD [REDACTED] on 16 October 2018. The Claimants made submissions in response on 23 October 2018 and the First Respondent replied on 30 October 2018. By Procedural Order No. 8 dated 7 November 2018 the Tribunal directed that the Claimants should pay the costs incurred by the First Respondent in responding to the Claimants' case on the validity of the notice of termination.²⁵ The Tribunal quantified those costs at USD [REDACTED]. However it declined to require payment at that stage or to direct that interest should run from that date.
47. On 25 November 2018 the First Respondent applied for an order bifurcating these proceedings. It contended that, because of various delays that had taken place in relation to document production and the processes of inspection provided for in Procedural Orders No. 2 and 5, there was not time to deal fully and fairly with both liability and quantum at the Evidentiary Hearing on 18 February 2018. The Claimants opposed the application. On 29 November 2018 the Tribunal denied the application. It considered that this was a case which should be decided as soon as possible. It was not persuaded that the Parties were unable properly to prepare their case on quantum in the time available. However the Tribunal made a number of amendments to the procedural timetable.
48. There were a number of further issues between the Parties concerning the inspections of their various products and services. In particular on 30 November 2018 the First

²⁴ L/8.

²⁵ L/9.

Respondent applied for an order requiring the Claimants to produce certain source code files. The Tribunal gave directions in response on 10 December 2018.

49. The Claimants rely on the following witness statements:

- (1) Dale Brown (“**Mr Brown**”) dated 18 June 2018,²⁶ 19 July 2018,²⁷ 3 and 13 January 2019²⁸. Mr Brown is a Senior Vice President of MIL and its nominated director of MIA, of which he is also General Manager.
- (2) James Gollaher (“**Mr Gollaher**”) dated 2 and 11 January²⁹ and 4 February 2019³⁰. Mr Gollaher is the Chief Financial Officer of MedImpact Healthcare Systems, Inc (“**MIHS**”).
- (3) Jarek Kloda (“**Mr Kloda**”) dated 3 January 2019. Mr Kloda is a senior software engineer at MIHS. His statement was amended on 2 February 2019.³¹
- (4) Shawn Ohri (“**Mr Ohri**”) dated 3 January 2019.³² Mr Ohri is the Vice President of Product and Technology at ScriptSave, a subsidiary of MIHS. Prior to joining ScriptSave he was employed by MIHS between 2005 and 2012. During 2011 and 2012 he was the Manager of Adjudication Process Management.
- (5) Aaron Duane Roberts (“**Mr Roberts**”) dated 3 January 2019.³³ Mr Roberts is Chairman of the Board of Directors of MedImpact HK Limited.

²⁶ D/1 (“**Brown One**”).

²⁷ D/2 (“**Brown Two**”).

²⁸ D/3 (“**Brown Three**”) and D/10 (“**Brown Four**”).

²⁹ D/5 (“**Gollaher One**”) and D/9 (“**Gollaher Two**”).

³⁰ D/13 (“**Gollaher Three**”).

³¹ D/6 (“**Kloda One**”).

³² D/7 (“**Ohri One**”).

³³ D/4 (“**Roberts One**”).

- (6) Dr Amar Mahmood (“**Dr Mahmood**”) dated 13 January³⁴ and 4 February 2019.³⁵ Dr Mahmood has been Medical Director and Deputy Regional Manager of MIL since October 2017, responsible for business development at MIA and MIL together with advancing their clinical programs.
- (7) Vasudeva Bobba (“**Mr Bobba**”) dated 12 January 2019.³⁶ Mr Bobba is Vice President of Application Development of MIHS. He has been employed within the group since 2002.
50. The First Respondent relies on the following witness statements:
- (1) Yousef Ghosheh (“**Mr Ghosheh**”) dated 9 July 2018³⁷ and 17 and 28 January 2019.³⁸ Mr Ghosheh has been employed by the First Respondent as Chief Operations Officer since 2011. He has also served as Deputy General Manager of the Second Respondent since February 2012.
- (2) Husam Bitar (“**Mr Bitar**”) dated 17 January and 19 February 2019.³⁹ Mr Bitar has been employed by the First Respondent as account manager since December 2013. He holds a BSc in Pharmacy and worked as a pharmacist for four years with Bin Sina, where he managed the revenue cycle of insurance claims, networked with the majority of insurance companies in the UAE and participated in implementing the regulatory PBM mandate in Abu Dhabi and Dubai.
- (3) Osama Malki (“**Mr Malki**”) dated 17 January 2019.⁴⁰ Mr Malki joined the First Respondent as a business and systems analyst in March 2011. Since March 2016 he has held the position of Manager, PMO. As such he oversees

³⁴ D/8 (“**Mahmood One**”).

³⁵ D/12 (“**Mahmood Two**”).

³⁶ D/11 (“**Bobba One**”).

³⁷ E/1 (“**Ghosheh One**”).

³⁸ E/2 (“**Ghosheh Two**”) and E/6 (“**Ghosheh Three**”).

³⁹ E/3 (“**Bitar One**”) and E/7 (“**Bitar Two**”).

⁴⁰ D/4 (“**Malki One**”).

business requirement gathering, project management and implementation as well as solution design and delivery.

51. The Claimants rely on the following expert reports:

- (1) Heather Bates (“**Ms Bates**”) dated 3 December 2018 (Claimants’ claims),⁴¹ 14 December 2018 (First Respondent’s counterclaims),⁴² 3 January 2019 (Claimants’ claims),⁴³ 3 January 2019 (First Respondent’s counterclaims),⁴⁴ 4 February 2019 (Quantum)⁴⁵ and 17 February 2019 (Claimants’ claims and First Respondent’s counterclaims).⁴⁶ Ms Bates is a Managing Director of Berkeley Research Group, a consulting firm with its headquarters in California. Ms Bates is based in the firm’s office in Washington DC. Her consulting work is focused on regulatory compliance, internal and government investigations, litigation and other complex problems in the healthcare industry.
- (2) Andrew Cottle (“**Mr Cottle**”) dated 13 January 2019⁴⁷ and 4 and 19 February 2019.⁴⁸ Mr Cottle is a partner in the forensic practice of BDO LLP based in London and Dubai. He has more than 20 years experience in expert witness, dispute advisory and investigations work across a wide range of cases and sectors.

52. The First Respondent relies on the following expert reports:

⁴¹ H1/1 (“**Bates One**”).

⁴² H2/24 (“**Bates Two**”).

⁴³ H3/45 (“**Bates Three**”).

⁴⁴ H3/52 (“**Bates Four**”).

⁴⁵ H3/79 (“**Bates Five**”).

⁴⁶ H3/81 (“**Bates Six**”).

⁴⁷ I1/1 (“**Cottle One**”).

⁴⁸ I2/73 (“**Cottle Two**”) and I2/88 (“**Cottle Three**”).

- (1) Wayne Gibson (“**Mr Gibson**”) dated 2 and 14 December 2018 (Claimants’ claims and First Respondent’s counterclaims respectively),⁴⁹ 17 and 28 January and 12 February 2019 (in all three cases, Claimants’ claims and First Respondent’s counterclaims).⁵⁰ Mr Gibson is a senior Managing Director in the Health Solutions Practice of FTI Consulting based in Washington, DC. He has over 20 years experience conducting forensic and investigative analysis and providing regulatory, compliance and management consulting to pharmacies, PBMs, drug distributors and manufacturers, physicians, hospitals and health systems.
- (2) Christopher Gerardi (“**Mr Gerardi**”) dated 28 January⁵¹ and 12 February 2019.⁵² Mr Gerardi is a Senior Managing Director at FTI Consulting, based in New York and Washington DC. He is the co-leader of FTI’s Dispute Advisory Services Practice and has more than 25 years experience providing economic, financial and accounting advisory services. He specialises in quantum and economic analyses in matters relating to intellectual property.
53. Ms Bates and Mr Gibson are referred to below as the “**Technical Experts**”. On 28 January 2019 they served joint reports, the first on the Claimants’ claims and the second on the First Respondent’s counterclaims.⁵³
54. Mr Cottle and Mr Gerardi are referred to below as the “**Quantum Experts**”.
55. On 20 December 2018 the Tribunal heard a case management conference by telephone and made various directions related to the Evidentiary Hearing. The Tribunal denied an application by the Claimants to move the location of the Evidentiary Hearing from Dubai to London. The Tribunal also heard a number of applications concerning inspection and disclosure. In particular the Claimants complained that in breach of Procedural Order No. 7 the First Respondent had still not

⁴⁹ H1/7 (“**Gibson One**”) and H2/28 (“**Gibson Two**”).

⁵⁰ H3/56 (“**Gibson Three**”) and H3/75 (“**Gibson Four**”) and “**Gibson Five**”.

⁵¹ I2/31 (“**Gerardi One**”).

⁵² “**Gerardi Two**”.

⁵³ H3/73 and H3/74.

provided the Claimants with access to the Second Respondent’s email servers; the Tribunal invited the First Respondent to clarify that day what if any practical or logistical issues required to be resolved in order to afford access to the Claimants.

56. On 14 January 2019 the Claimants made a further application to the Tribunal. They complained again that the First Respondent had still not provided access to the Second Respondent’s email servers and sought directions accordingly. The First Respondent made submissions in reply on 20 January 2019, to which the Claimants responded on 21 January 2019; and the Tribunal heard argument at a case management conference in London on 22 January 2019. The Tribunal made directions requiring access to be given by Procedural Order No. 9 dated 22 January 2019.⁵⁴

57. On 17 January 2019 the First Respondent served an affidavit of James Eldridge (“**Mr Eldridge**”). Mr Eldridge is an attorney-at-law admitted to the Cayman Bar and a partner of the Cayman firm of Maples and Calder. The affidavit set out his opinion on questions of Cayman law. On 5 February 2019 the Claimants applied to the Tribunal for a direction that this affidavit should be treated as a submission of law. The Tribunal responded on 6 February 2019 expressing the view that this was a submission. It was neither expert evidence nor evidence of fact.

58. On 5 February 2019 the Claimants again applied to the Tribunal for an order that the Evidentiary Hearing should take place in London. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵⁴ L/10.

59. In accordance with Procedural Order No. 3, as amended, the Parties exchanged Pre-Hearing Written Submissions on 11 February 2019.⁵⁵
60. On 11 February 2019 the First Respondent applied to the Tribunal for its approval pursuant to Article 18.3 of the DIFC-LCIA Rules to the addition to its legal representatives of Stephen Houseman QC of Essex Court Chambers. The Claimants objected on the ground that the First Respondent had failed to notify the change promptly. The Tribunal approved the addition on 12 February 2019.
61. The Evidentiary Hearing took place in DIFC, Dubai between 18 and 24 February 2019. The Parties made oral opening statements. The Tribunal then heard oral evidence from Messrs Brown, Roberts, Kloda, Gollaher, Bobba, Mahmood and Bates for the Claimants and Messrs Ghosheh, Bitar, Malki and Gibson for the First Respondent. Mr Ohri gave evidence by video link on 19 February 2019. Mr Dickson⁵⁶ and Mr Eldridge made submissions as to Cayman law by video link on 20 February 2019.
62. On 21 February 2019 the Parties agreed to bifurcate liability and quantum.⁵⁷ It was agreed that the Tribunal would give directions for the hearing of the issues on quantum after the publication of the present Award.
63. At the conclusion of the Evidentiary Hearing the Claimants made a number of applications. In particular they sought an undertaking by the First Respondent that it would not sell AIMS, ICM or any similar product pending the making of this Award. The First Respondent refused to give the undertaking. Having heard the Parties on the question the Tribunal declined to make an order in terms of the undertaking in advance of its Award on liability.⁵⁸

⁵⁵ A/2 (“Claimants’ PHWS”) and A2/10 (“First Respondent’s PHWS”).

⁵⁶ Mr Dickson is admitted to the Cayman Bar and a partner in the Cayman firm of Mourant Ozannes.

⁵⁷ References to the transcript of the Evidentiary Hearing appear below as “T/[Day]/[page]. Hence, T4/3-5. The parties further agreed that the present Award would cover questions of causation, although they differed as to the questions which arose; it will be necessary to return to this.

⁵⁸ T6/162.

64. On 26 February 2019, subject to the service of Written Closing Submissions, the Tribunal closed the proceedings on liability.
65. On 6 March 2019 counsel for the First Respondent informed the Claimants that the First Respondent withdrew its counterclaim.
66. In accordance with Procedural Order No. 3, as amended, on 8 March 2019 the Parties exchanged written Closing Submissions.⁵⁹
67. On 19 March 2019 the Tribunal addressed certain questions to the Parties. They replied with further submissions dated 24 and 27 March 2019. It will be necessary to return to these below.

⁵⁹ "Claimants' CS" and "First Respondent's CS".

C. FACTUAL BACKGROUND

68. The Claimants describe MIL's business as follows. MIL is in the business of providing tailored PBM solutions, including informatics, to healthcare providers, insurers, employers and government. MIL operates in various international markets. It has an affiliate in China and a strategic marketing relationship in South Africa. MIHKL operates in the same business area as MIL.
69. MIL's parent company, MIHS provides services to health plans, third party administrators ("TPAs"), self-funded employers and governments. As of 2014, it provided pharmacy services to more than 50 million people. Its main product is the PBM platform that allows patients and dispensing pharmacies to obtain insurance approvals for prescribed medicines. The PBM platform connects physicians, pharmacists and insurance payers to allow payers more efficiently to provide pharmacy benefits and care to patients. This has been developed by MIHS over the last thirty years. It is the largest privately owned PBM in the United States. A large number of employees are engaged in the day to day support of the system. The platform provides online real-time insurance coverage giving approvals or denials for prescribed medicines based on proprietary clinical algorithms, complicated plan design rules and member eligibility. This provides time and cost efficiency, plus enhanced operational efficacy, for the healthcare sector.
70. The First Respondent describes its business as follows. Dimensions has been trading since 2008. Its primary business both prior to the JVA and now is to offer a range of software solutions to assist private and public sectors in providing higher quality healthcare services by collecting and processing information that is used to decrease inefficiencies and reduce wasteful expenditures. Dimensions is a leading provider in the Middle East of healthcare software, information analytics and related services, and end-to-end technology solutions that help payers, providers, and regulators automate and optimize the way they interact with each other. Dimensions has broad capabilities across all types of claims and authorizations (not restricted to pharmacy) and works with thousands of healthcare providers and payers in the Middle East. At the time the Parties entered into the JVA, Dimensions had 21 employees in the UAE and 12 in Ramallah.

71. MIL's case is that in 2010 and 2011 it wished to expand into the Gulf region. There were, it says, no PBM providers in the region. It decided to partner with Dimensions, due to its presence and contacts in the UAE. In particular Dimensions had a network of pharmacies which used its eClaimLink portal. MIL saw potential synergy in providing its PBM platform for Dimensions' existing network.
72. MIL began to work with Dimensions under a non-disclosure agreement dated 21 March 2011 (the "NDA").⁶⁰ On 19 May 2011 they entered into a Letter of Agreement (the "LoA"),⁶¹ which recorded that they were "jointly proceeding to develop a proprietary Pharmacy Benefit Management ("PBM") service and to establish PBM contracts with payers in the United Arab Emirates ("UAE") and Jordan. It is the parties' collective goal to formalize this joint effort in a business partnership to be executed by the third week of June, 2011."
73. As stated above, the JVA⁶² and SLC⁶³ were entered into on 1 February 2012.
74. The principal provisions of the JVA and SLC are reproduced in Appendices One and Two.
75. The obligations of the Parties which are the subject of the claims in this arbitration include the following:
- (1) Article 4 defines the business of the joint venture (the "Business") as the provision of information technology consultative services and software to companies in the healthcare sector in the Territory. MIL and Dimensions agree that MIA shall be the sole person utilised by them to undertake the Business in the Territory.

⁶⁰ B/3.

⁶¹ C/16.

⁶² A2/11.

⁶³ A2/12.

- (2) Article 12 is a non-compete clause. MIL and Dimensions agree not to engage in any business in the Territory which is the same or substantially similar to the Business.
- (3) Article 10 deals with technology licensing. MIL and Dimensions agree that any intellectual property licensed to MIA is provided only for the use of MIA.
- (4) Article 11 is a confidentiality agreement. MIL and Dimensions agree not to use confidential information for any purpose other than the conduct of the Business.
- (5) Article 13 contains non-solicitation provisions. MIL and Dimensions agree not to interfere with the business of MIA for the purpose of engaging in any business in the Territory.

76. The SLC includes the following obligations:

- (1) Clauses 7-10 contain provisions which regulate access to and the use of information, preserve data security and restrict the use of confidential information.
- (2) Paragraph 6 of Schedule 1 and paragraph 8 of Schedule 2 require MIL and Dimensions exclusively in the Territory to promote MIA's PBM system with potential clients, payers, pharmacies and government agencies.
- (3) Paragraph 7 of Schedule 2 requires Dimensions to manage relationships with pharmacies and payers through disciplined project management.

77. MIL and Dimensions worked together to develop the business of MIA. This involved adapting MIL's systems to accommodate the regulatory and other requirements of the market and implementing a link between MIL's PBM and the systems operated by Dimensions. Dimensions' eClaimLink portal became PBM Link.

78. MIA's business was launched in 2011. Over time it attracted a number of new clients and its business grew steadily, generating revenue which increased year on year from USD [REDACTED] in 2012 to USD [REDACTED] in 2016.

79. Since 2016, however, MIA's revenues have been in decline. MedImpact attributes this to the activities of Dimensions of which it complains; these complaints are examined in detail below. Dimensions on the other hand points to competitors which entered the market leading to pricing pressure. These new entrants included GlobeMed and Winsoft. Dimensions also points to failings on the part of the MedImpact PBM and resultant client dissatisfaction.
80. MIL was aware at the time it entered into the joint venture that Dimensions had wider business interests than its participation in the PBM marketed by MIA. In addition to its eClaimLink, it marketed a number of other products in the healthcare sector.⁶⁴ MIL's case is that it had no objection to Dimensions continuing to sell its Health Information Technology services because these did not relate to PBM or claims adjudication and did not therefore compete with the areas of operation of MIA.⁶⁵
81. In February 2016 Dimensions was acquired by IMS Holdings, Inc ("IMS"). IMS merged with Quintiles Transnational Holdings, Inc in October 2016 to form Quintiles IMS Holdings, Inc, which changed its name to IQVIA Holdings, Inc ("IQVIA") in November 2017. IQVIA specialises in providing healthcare data to pharmaceutical companies.
82. On 23 July 2017 Dimensions wrote to Mr Brown giving 12 months written notice of termination of the JVA. It is now common ground that this was effective in accordance with Article 17.1 of the JVA. The JVA therefore terminated on 25 July 2018.⁶⁶ However the SLC remains in force and MIA has continued in business.
83. The Claimants' case is that they were surprised by Dimensions' decision to terminate the JVA. They did not know why Dimensions would want to walk away from a material revenue stream. Mr Brown describes the notice of termination as having come out of the blue. Mr Roberts describes how he asked Mr Brown to arrange a meeting with a decision maker at IQVIA in order better to understand their

⁶⁴ Procedural Order No. 2 required Dimensions to identify certain specific pre-JVA products with adjudication capability (L/2). It did so in its Statement of Defence and Counterclaim (A/6 at Appendix 1). It listed ePharmacyExpert, eClaimParser, eClaimReview, AssistaPharm, ePharmaSys, AssistaInsurance among others.

⁶⁵ Brown One, para 18, D/1.

⁶⁶ The Parties are agreed on the date: T6/171.

concerns.⁶⁷ This meeting took place on 11 September 2017. It was attended by Alistair Grenfell, IQVIA's President for the Middle East, and Mr Ghosheh. They explained that they wanted to move on from the joint venture because the Middle East was experiencing tighter competition, the market was too highly regulated and as a result margins were compressed. Mr Grenfell assured Mr Roberts that Dimensions was not becoming a competitor in the PBM market. The Claimants contend that what they were told by Mr Grenfell and Mr Ghosheh at this meeting was false and intentionally misleading.

84. Mr Brown describes a meeting he and Mr Ghosheh of Dimensions attended in September 2017 with Oman Insurance, which was one of MIA's most important clients.⁶⁸ He was surprised to be told by Ahmed Al Tabbakh, the Head of Medical and Life Claims, that they no longer needed MIA's PBM platform and would therefore cease to be a customer of MIA. He explained that it was using a product called the Adjudication Insurance Management System ("AIMS") to replace MIA's PBM platform. Mr Brown says he learned only in October 2017 that AIMS was a Dimensions product.
85. Dimensions advertised its products on its website. In February 2016 the following appeared.⁶⁹

"Adjudication Insurance Management System

Adjudication Insurance Management System (AIMS) is a platform for insurance companies and third party administrators (TPAs) that enables automated real-time adjudication for the vast majority of the healthcare authorizations and claims with advanced modules to administer its processing capabilities in relation to plans & products parameters such as benefits, groups members, networks and others aspects. AIMS offers as well e-authorization and e-claim management modules for those transactions that requires human intervention by the processors. AIMS has a transaction management & tracing module that enables users to real-time track transaction received and generated by AIMS. Moreover AIMS has a dynamic reporting, dashboard and analytical module with a user-friendly interface to create standard and ad-hoc reports and dashboards.

⁶⁷ Roberts One, para 9, D/4.

⁶⁸ Brown One, para 27, D/1. Oman Insurance accounted for 25% of MIA's revenues.

⁶⁹ C/63.

AIMS can be integrated with other products such as post office, providers' transaction managers, decision support systems and much more."

86. On 15 November 2017 counsel for MedImpact sent Dimensions a letter before action. This alleged that in breach of the JVA Dimensions had been marketing its AIMS platform and related capabilities to existing and prospective clients of MIA. MedImpact had as a result incurred losses estimated at USD 92 million. MedImpact invoked the dispute resolution mechanism in Article 20 of the JVA.
87. Counsel for Dimensions replied by letters dated 23 November, 7 and 21 December 2017. They denied liability. The PBM platform and AIMS were, they said, not the same product; they did not compete with one another; and they were not mutually exclusive.⁷⁰ They advanced claims against the Claimants based on their use of technology and proprietary information belonging to Dimensions and/or MIA in breach of the JVA and SLC. They also alleged that the Claimants had promoted the interests of their affiliates over the interests of MIA.
88. As stated above, the Claimants began this arbitration on 23 January 2018. The Claimants' case is in essence that the First Respondent has set out to steal MIA's business. The First Respondent for its part contends that the Claimants are motivated by a desire to punish it for having terminated the relationship and take as much as they possibly can of the regional business for themselves.

⁷⁰ They said that the PBM was a specialized, stand-alone platform which provided payers with a service for managing pharmaceutical benefits for their customers. AIMS, on the other hand, was an open-rule engine used more broadly for claims adjudication, including inpatient hospital claims, physician claims and dental claims.

D. THE MERITS**(1) The contentions of the Parties**

89. The Claimants' case in their Statement of Claim is in summary as follows:

- (1) Dimensions has breached Articles 4.1(b) and 12 of the JVA by engaging in the business of providing information technology consultative services and software to companies and undertaking activities in the healthcare sector in the Territory other than through MIA. Dimensions has marketed and sold such products and services to MIA's customers or former customers.
- (2) By carrying out business likely to interfere with MIA's customers or targeting the same to offer them products with overlapping features or in the same or similar business to the Business, Dimensions has also interfered with MIA's business in breach of Article 13.
- (3) Dimensions' failure to co-operate with MIL, including with respect to handling customer renewals and retaining customers such as Oman Insurance, and seeking to win new business, including the Waseel contract, constitutes a breach of Schedule 2, paragraph 7 of the SLC.
- (4) Dimensions' efforts to establish a competing business to that of MIA further constitute a breach of Schedule 2, paragraph 8 of the SLC.
- (5) Throughout the joint venture, Dimensions was provided with access to MIL's confidential information, trade secrets and know-how. By copying the features and functionality of MedImpact's and MIA's products, Dimensions has breached the following terms of the JVA and SLC:
 - (a) Article 10.1 of the JVA: by using licensed technology and intellectual property in ways other than agreed.
 - (b) Article 10.2 of the JVA: by failing to use its best efforts to protect MedImpact's or MIA's intellectual property.

- (c) Article 11.1(b) of the JVA: by disclosing MIA's/MedImpact's Confidential Information and utilizing it for purposes other than as necessary to perform under the JVA.
 - (d) Article 7.2 of the SLC: by using or reproducing Claims Data outside the MIA, and failing to maintain the confidentiality of the same.
 - (e) Article 8.1 of the SLC: by processing Claims Data other than on the instructions of MIA.
 - (f) Article 8.2 of the SLC: by failing to ensure that there has been no unauthorised or unlawful processing of Data.
 - (g) Article 9.2 of the SLC: by failing to hold MedImpact's or MIA's Confidential Information in strict confidence and by using and/or reverse engineering the Confidential Information outside the remit of the SLC.
 - (h) Article 10 of the SLC: by using the Data, The JV Assets and the MIL Software other than for the purpose of providing the Services.
- (6) Dimensions has misappropriated MedImpact's intellectual property rights existing under US, English and UAE law. The Claimants rely on the US Defend Trade Secrets Act; Article 4 of the US Trade Secrets Directive 2016/943; and Federal Law No. 31 of 2006 and Federal Law No. 17 of 2002 of the United Arab Emirates.
- (7) The acts complained of above constitute unfair prejudice as a matter of Cayman Law.

90. The Claimants sought the following relief:

“(a) an injunction preventing Dimensions from continuing to breach the JVA and SLC and/or infringing MIA's and MIL's IP, and continuing to take or target MIA's business or clients.

(b) damages with respect to losses suffered as a result of Dimensions breaches of the JVA and SLC and/or IP infringement and/or unfair prejudice, to be further particularised in due course with the assistance of expert evidence.

(c) an account of profits such that Dimensions be ordered to pay its share of all profits it has made or would make as a result of its breaches of the Agreements and/or IP infringement.

(d) Other tortious damages. MIL has spent over \$100 million developing its system and IP. The damages awarded will need to reflect this loss of investment.

(e) Interest on such amounts and for such period as the Tribunal sees fit.

(f) An order for buy out or appropriate declaration.

(g) Further or other relief.

(h) Legal costs and other expenses.⁷¹

91. MedImpact set out in Annex 2 to its Closing Submissions details of the trade secrets and confidential information which it contends were misused by Dimensions. It also set out the form of the injunction which it sought.
92. The First Respondent advanced a number of defences in its Defence and Counterclaim. In summary it contended as follows:
- (1) There was no breach of Articles 4 and 12 of the JVA. The sole purpose of the joint venture was to market and sell PBM in the Territory. AIMS is a platform for insurance companies and TPAs that enables automated real-time adjudication for authorizations and claims with advanced modules to administer its processing capabilities in relation to plans and products parameters such as benefits, groups members, networks and others aspects. As such it is not a product which competes with PBM.
 - (2) Further, Claimants argue that Dimensions was prohibited from marketing and selling new products; but AIMS was not new. It was developed, marketed and sold in a prior version before the formation of the joint venture.

⁷¹ A1/5/31.

- (3) Alternatively, the Claimants were fully aware of Dimensions' other business lines, including the AIMS solution, both before entering into the JVA and throughout its term. The parties proceeded throughout on a clear understanding that the JVA did not extend to Dimensions' development and sale of its other business lines, which are entirely different to the joint venture's PBM. The Claimants are therefore estopped by convention from contending that there has been any breach of the JVA.
- (4) Dimensions denies any misuse of confidential information, trade secrets or protectable knowhow. [REDACTED]
[REDACTED] PBM is not a product created and developed by MedImpact exclusively. It is a popular and homogeneous concept in the healthcare industry.
- (5) Dimensions denies that unfair prejudice is a cause of action under Cayman law. The jurisdiction relied upon by MedImpact is only enlivened on a showing that there is a basis for a winding-up order on just and equitable grounds. Such proceedings are not arbitrable under Cayman law.
93. The First Respondent also advanced a counterclaim. As stated above, the First Respondent withdrew this counterclaim after the Evidentiary Hearing. The Tribunal has to decide as to the disposition of the counterclaim.
94. In summary the case pleaded was as follows:

- (1) In violation of the JVA and the SLC:

"MedImpact and/or their Affiliates have intentionally used the following to promote and support their business operation outside the ambit of the JV inside the region of the JV and in other regions:

(a) technology and intellectual property that has been licensed by Dimensions to the JV; and / or

(b) technology that has been developed by the JV for the sole benefit of the JV. In that respect, MedImpact and/or their Affiliates have incorporated features, updates and capabilities developed for the JV's PBM platform for use in other MedImpact products including, but not limited to:

- (i) *The centralized 'Single Platform' PBM and/or any other PBM platform that MedImpact and/or their Affiliates market and license both within the Territory and also in jurisdictions outside of the Territory;*
- (ii) *The capability to adjudicate claims with drug-diagnosis edits and checks;*
- (iii) *The capability to integrate partner and third party systems through web-services;*
- (iv) *Web-based services/ eClaimLink;*
- (v) *Enhanced electronic prescribing capabilities;*
- (vi) *Edits and checks related to Controlled medications; and*
- (vii) *Drug-mapping processes and capabilities.*

*MedImpact has not only incorporated the above aspects of Dimensions' proprietary information and intellectual property into the PBM platform that it offers to customers outside the region, but it has also used this information and IP to create its own new platform (the MI-HK New System), which it has only very recently disclosed the existence of, but has been developing for a substantial amount of time.*⁷²

- (2) The Claimants have failed to act in the best interests of MIA, in breach of Article 4.2 of the JVA and clause 3.1 and paragraph 6 of Schedule 1 to the SLC.
- (3) The Claimants have infringed Dimensions' confidential information, intellectual property and knowhow in breach of UAE law; they have misappropriated Dimensions' trade secrets in breach of US law; and they have infringed Dimensions' copyright and intellectual property rights under Canadian law.

95. The First Respondent sought the following relief on its counterclaim:

“(a) Permanent injunctive relief to immediately stop MedImpact from continuing to infringe Dimensions' IP and/or misusing confidential information globally, including prohibiting MedImpact, whether acting by their shareholders, directors, officers, servants, agents, employees or representatives, from copying, producing, or reproducing Dimensions' IP and/or confidential information or any substantial part thereof in any material form whatsoever;

(b) Permanent injunctive relief to immediately order MedImpact to cease acting contrary to the interest of the JV;

⁷² Defence and Counterclaim at para 246: A1/6/50.

- (c) *Permanent injunctive relief to stop any and all further attempts to solicit the JV's clients and or business and to prevent MedImpact from continuing to breach the JVA and SLC;*
- (d) *Permanent injunctive relief to prohibit MedImpact, whether acting by their shareholders, directors, officers, servants, agents, employees or representatives, from copying, producing, or reproducing the Works or any substantial part of any of the Works in any material form whatsoever;*
- (e) *An Order:*
- (i) *requiring Medimpact to deliver up to Dimensions all wares, computer disks, compact disks, or other materials or things in MedImpact's power, custody, control or possession, which bear Dimensions' IP and/or confidential information or a substantial part thereof; and*
- (ii) *requiring MedImpact to permanently delete any copies of Dimensions' IP and/or confidential information, or any part thereof, which appear on any computer hard drive or any other optical or electro-magnetic storage device which is in the power, custody, control or possession of MedImpact.*
- (f) *declaratory relief dismissing MedImpact's claims in full;*
- (g) *declaratory relief confirming that MedImpact have intentionally used the technology and intellectual property that has been licensed by Dimensions to the JV and/or technology that has been developed by the JV for the sole benefit of the JV in breach of their obligations under Article X and XI of the JVA and under Clauses 9 and 10 of the SLC;*
- (h) *declaratory relief confirming that MedImpact has breached the JVA and SLC by failing to act in the best interests of the JV contrary to Article 4.2 of the JVA and Clause 3.1 of the SLC;*
- (i) *declaratory relief confirming that MedImpact has disclosed the JV's confidential information contrary to Articles 11 of the JVA and Clauses 7.2, 8.1, 8.2, 9 and 10.6 of the SLC;*
- (j) *an award of damages in the region of USD 284,000,000 based on the intentional misappropriation of Dimensions' and the JV's intellectual property by MedImpact and their affiliates, including MedImpact Healthcare Systems, Inc. in the United States, to be verified during the course of this arbitration;*
- (k) *an award ordering MedImpact to immediately cease infringing Dimensions IP;*
- (l) *pre and post award interest;*

(m) an award ordering payment by MedImpact of Dimensions' (both individually and as a member of the JV) full costs and expenses of the arbitration, including but not limited to legal and expert(s)' fees; and

(n) such other relief to which Dimensions may be entitled."⁷³

96. It follows that the Tribunal is now only concerned with the merits of the Claimants' claims and the First Respondent's defences to those claims. The submissions of the Parties on these issues have, as is often the case, evolved in the course of the proceedings. This is reflected in the discussion below.

(2) The issues for decision

97. The Tribunal proposes to address the issues as follows:

- (1) The factual and legal issues. This includes certain questions of construction and the First Respondent's case on estoppel. (the "**Factual and Legal Issues**")
- (2) In the light of its conclusions on the facts, the Tribunal will consider following claims advanced by the Claimants:
 - (i) Did Dimensions breach the JVA, Article 4.1 (by selling IT consultative services and software in the healthcare sector in the Territory outside MIA and failing to disclose opportunities), Article 12 (by engaging in the same or similar Business to MIA), and Article 13 (by interfering with MIA's business)? (the "**JVA Claim**")
 - (ii) Did Dimensions breach the SLC, Schedule 2, para 7 (by failing to manage customer relationships) and para 8 (by failing exclusively to promote MIA's PBM in the Territory)? (the "**SLC Claim**")
 - (iii) Did Dimensions infringe MIA's/MedImpact's intellectual property rights, including by offering and selling products utilising the same to

⁷³ A1/6/72.

MIA's customers, in breach of Articles 10.1 and 11.1 of the JVA and Articles 7-10 of the SLC? (the "**Contractual IP Claim**")⁷⁴

- (iv) Did Dimensions misappropriate MedImpact's intellectual property rights in breach of UAE, English, and US law? (the "**Statutory IP Claim**")
- (v) Did Dimensions cause MedImpact unfair prejudice as a shareholder in MIA as a matter of Cayman Law? (the "**Unfair Prejudice Claim**")

These are referred to as the "**Claims**".

- (3) Issues of causation. ("**Causation**")
- (4) What relief are the Parties entitled to? ("**Remedies**")

98. The Tribunal therefore addresses the issues below under the following headings:

- (1) Questions of proof
- (2) Factual and Legal Issues
- (3) The Claims
- (4) Causation
- (5) Remedies

99. The Parties have advanced a number of arguments in their statements and submissions in this arbitration. They have also referred to extensive evidence and authorities in support. In the interests of clarity and brevity, this Award does not refer to all of these arguments, all this evidence and all of these authorities. However they have all been taken into account in the course of preparing this Award.

⁷⁴ These provisions apply not only to intellectual property rights but also technology, confidential or proprietary information, trade secrets and Claims Data and Software, as these terms are defined in the JVA and the SLC. In what follows all these are referred to as "**Confidential Information**", although that term is defined in Article 11 of the JVA and Article 9 of the SLC.

(3) Questions of proofIntroduction

100. In the course of the Evidentiary Hearing the Parties agreed that in relation to the burden of proof the Tribunal should adopt the approach dictated by Article 27(1) of the UNCITRAL Rules (“Each party shall have the burden of proving the facts relied upon to support its claim or defence”). The Parties also agreed that the standard of proof was the simple balance of probabilities.⁷⁵

Adverse Inferences

101. In the course of these proceedings the Claimants have on a number of occasions invited the Tribunal to exercise its power under paragraph 7.8 of Procedural Order No. 3⁷⁶ to draw adverse inferences as a result of an alleged failure on the part of the First Respondent to comply with orders for the production of documents.
102. The Claimants list in their closing submissions the alleged breaches of disclosure orders which they rely upon.⁷⁷ They also rely on the alleged failure of the First Respondent to produce to Ms Bates the documents which were required to be produced pursuant to Procedural Order No. 2⁷⁸ and Procedural Order No. 4,⁷⁹ which as stated above was made after the Claimants had complained that Ms Bates was being denied the access to which she was entitled under Procedural Order No.2. In consequence the Claimants asks the Tribunal to infer:



⁷⁵ T1/34.

⁷⁶ L/3.

⁷⁷ Claimants’ CS at paras 2.6 to 2.10.

⁷⁸ L/2.

⁷⁹ L/5.

103. The First Respondent submits that no adverse inferences should be drawn.⁸⁰ It has provided a detailed justification of the search methodology which it employed in giving effect to Procedural Order No. 7.⁸¹

104. It will be apparent from the procedural history of this arbitration that it has been hard fought. Both sides have repeatedly cried foul. It is neither necessary nor practical for the Tribunal to decide with any precision on the rights and wrongs of the many disputes which it has been called upon to resolve in pursuance of its duty under Article 14.4 of the DIFC-LCIA Rules.

█ [REDACTED]

█ [REDACTED]

⁸⁰ First Respondent's PHWS at para 17: A/10/7.

⁸¹ First Respondent's CS, Annex 1.

⁸² L/3.

⁸³ See para 6 of the Claimants' Redfern Schedule at L/8/7. [REDACTED]

⁸⁴ Para 2.6 of Ghosheh Two: E/2/3.

[Redacted]

[Redacted]

[Redacted]

⁸⁵ See L/8/13, para 12 of the Claimants' Redfern Schedule.

⁸⁶ Even accepting Mr Ghosheh's evidence that Dimensions made many decisions in meetings or on calls and were not over-burdened by Bureaucratic procedures: para 2.6 of Ghosheh Two at E/2/3.

⁸⁷ L/2.

⁸⁸ Bates One at paras 25-36: H1/1/12.

⁸⁹ [Redacted]

⁹⁰ [Redacted] See Bates Six at H3/81.

⁹¹ Ghosheh Three, Brown Four, Mahmood Two, Gollaher Three, Bitar Two, Bates Five and Six, Gibson Four and Five, Cottle Two and Three and Gerardi Two.

[REDACTED]

[REDACTED]

[REDACTED]

107. That is not, however, to suggest that the Tribunal should at this stage make any specific findings of fact. The Tribunal therefore declines to draw the inference contended for by the Claimants. This is all nevertheless part of the background against which the Tribunal must make its findings of fact and decide on the issues of credibility which arise.

(4) Factual and Legal Issues

Introduction

108. Dimensions does not dispute that during the Term of the JVA it marketed and sold a number of products in the Territory other than through MIA. Some of these involved providing information technology consultative services and software to companies and other entities undertaking activities relating to the healthcare sector. As such they appear to fall within the definition of “Business” in Article 4.1(a) of the JVA.
109. As stated above, the JVA Claim concerns three obligations under the JVA:
- (1) In Article 4.1(b) the Parties agree that MIA shall be the sole person utilized by them to undertake the Business in the Territory. They also agree promptly to disclose to MIA any business opportunity in the Territory.
 - (2) In Article 12 they agree that during the Term they shall not, and shall cause their affiliates not, directly or indirectly to engage in any activity which is the same or substantially similar to the Business.
 - (3) In Article 13 they undertake not to take away or interfere with any business of MIA.

⁹² [REDACTED]

⁹³ First Respondent’s CS, page 1. See also T3/127-128 and T4/6.

110. All three require a determination of the nature of the Business. Dimensions' case is that its activities did not involve any breach of the JVA for two main reasons. First, on their true construction the provisions in question did not affect its entitlement to carry on business in the way it did. Alternatively, it contends that the Claimants are estopped from contending otherwise.

Construction

111. It is convenient to address two questions:
- (1) The duration of the provisions relied upon.
 - (2) The proper construction of Article 4.1(b) of the JVA.

Duration

112. The Parties have made submissions as to the duration of the provisions of the JVA which are relied upon by the Claimants. The issue arose because Articles 12 and 13 begin "During the Term", but Article 17.2 provides for those rights and obligations to continue notwithstanding termination of the JVA.
113. The Claimants submit that Articles 4.1(b) and 12 apply only during the term of the JVA. Their application is not extended by Article 17.2. Article 13 expressly applies for two years after the end of the term.⁹⁴ The First Respondent accepts that this is an available construction.⁹⁵
114. The Tribunal agrees. The effect of Article 17.2 is that there can only be a breach of Articles 4.1(b) and 12 if it occurred during the Term; but rights and obligations during the Term can be enforced after the expiry of the Term.

⁹⁴ Claimants' CS at para 3.20.

⁹⁵ First Respondent's CS at para 20.

Article 4.1(a)

115. The Claimants contend that the definition of the “Business” is clear and that the Tribunal should give effect to the ordinary and natural meaning of the words used by the Parties.⁹⁶ They also rely on the factual matrix. The essential purpose of the joint venture was to maximize business from MIL’s PBM. The Parties would not have wanted each other to engage in other new business in the Territory.
116. The First Respondent on the other hand argues that Article 4 only applied to restrict business relating specifically to PBM. That made sense, since MIA’s business was limited to PBM. It was also consistent with the LoA which had preceded the JVA. A literal construction, it says, would produce absurd and exorbitant results. Dimensions would effectively have had to close its entire business in the Territory and trade only through the joint venture.⁹⁷
117. The Tribunal rejects the First Respondent’s submission. The definition of the Business is clear. There is nothing in the factual matrix which dictates any different approach. To give effect to its literal meaning does not obviously conflict with commercial common sense in the circumstances. The Claimants were part of a large and long-established business. They were bringing to the joint venture a PBM which had been developed over many years at great expense. Dimensions in contrast was a small business which was just starting up. It offered its eClaim Link, which was to connect MIL’s PBM to its many local contacts. It is understandable that Dimensions might have been happy to concede the restrictions on its future business in return for the opportunity presented by the joint venture. It is also understandable that MIL might have been concerned to ensure that Dimensions devoted all its resources to promoting the joint venture.

Estoppel

118. Dimensions contends that there was a mutual understanding between MedImpact and Dimensions that the JVA only limited the ability of Dimensions to sell or offer to sell

⁹⁶ Claimants’ PHWS at para 3.2, citing Arnold v Britton [2015] UKSC 36 at para 17, Rainy Sky v Kookmin Bank [2011] UKSC 50 : A/10/13.

⁹⁷ First Respondent’s PHWS at paras 24-30: A/10/11.

products which were the same as or substantially similar to PBM so as to compete with MIA. This gave rise to an estoppel by convention, which prevents MedImpact from asserting otherwise.⁹⁸

119. Dimensions relies on the fact that MIA's business was limited to PBM. Mr Brown knew that Dimensions had other products in relation to information technology consultative services and software which it sold in the Territory. Far from complaining, he encouraged and promoted that business.
120. MedImpact on the other hand says that there was no agreed assumption as to the definition of Business in the JVA or what Dimensions was permitted to develop, offer or sell. There is, it argues, no evidence that by their conduct the Parties intended to alter what is provided for in the JVA.⁹⁹
121. MedImpact also contends that various provisions of the JVA operate to exclude any estoppel by convention. It relies on Articles 22.1, 22.3, and 23.10 of the JVA and Articles 19.1, 19.2 and 19.3 of the SLC.
122. The essential principles of law were not in dispute.¹⁰⁰ The starting point is that the parties must act on an assumed state of facts or law.
123. The relevant facts were largely uncontentious as well. It appeared to be common ground that Mr Brown and Mr Ghosheh never discussed the definition of "Business" in Article 4 or what Dimensions was and was not free to do in conducting its business in the Territory.¹⁰¹
124. Mr Brown and Mr Ghosheh also shared a similar understanding in this respect (although the Tribunal has held that they were both wrong). Mr Brown's evidence was that he had no objection to Dimensions continuing to sell its products "as none of them related to PBM or claims adjudication, but what we could not allow was any

⁹⁸ First Respondent's PHWS at para 34: A/10/14; CS at para 21.

⁹⁹ Claimants' PHWS at para 3.32: A/9/18; CS at 3.4.

¹⁰⁰ Para 7.21(a) and (b) of the Claimants' Reply and Defence to Counterclaim at A/7/25 and para 101 of Dimensions' Rejoinder at A/8/25.

¹⁰¹ T2/179; T4/40.

development of those products into products which MIA might (or already did) sell, which involved pharmacies, adjudication of medical pharmacy claims”.¹⁰² It was clear from Mr Brown’s evidence that this was a considered position, which he made on MedImpact’s behalf and for which he assumed responsibility. Mr Ghosheh considered that the definition of “Business” did not extend beyond the core business of the joint venture, which was to provide PBM services.¹⁰³ From Dimensions’ viewpoint, the only relevant restriction was that it should not sell PBM. His evidence was that it did not.¹⁰⁴ AIMS was completely separate from PBM.¹⁰⁵

125. It is clear that Mr Brown was at all times aware that Dimensions was selling products in the Territory which fell within the definition of “Business”, on the basis of the Tribunal’s findings. He lists the various products which he knew about in his witness statement.¹⁰⁶ The contemporary documents record Mr Brown listing and promoting services which qualify as “Business”.¹⁰⁷ In oral evidence he accepted that he was supportive and complimentary about the business that Dimensions was conducting outside the joint venture.¹⁰⁸ He also knew that Dimensions was developing new products.¹⁰⁹
126. There was one difference between Mr Ghosheh and Mr Brown, although that is not important for present purposes. Mr Brown was concerned to emphasize that he was not familiar with the details of Dimensions’ products. That was because this didn’t matter to him, so long as they were not relevant to the PBM product for health

¹⁰² Para 18 of Brown One at D/1/5. This passage goes on to add “or expand into other areas of the healthcare sector.” There is no evidence that this restriction was ever shared with Dimensions; the Tribunal considers that this was a late addition prompted by the present dispute. It does not appear anywhere else in Mr Brown’s witness statements: see Brown Two at para 25: D/2/7. It is also inconsistent with his oral evidence: T1/231.

¹⁰³ Para 2.7 of Ghosheh Two at E/2/3.

¹⁰⁴ T3/151-153.

¹⁰⁵ Para 7.1 of Ghosheh One: E/1/12.

¹⁰⁶ Para 18 of Brown One, D/1/5.

¹⁰⁷ See Mr Brown’s March 2012 presentation to Al Dhafra, which describes Dimensions as a leading provider of eClaim solutions, PBM Providers’ Interfaces, Health Information Systems, Medical Coding and Revenue Cycle, Drug Databases and Decision Support services: C/13/160; C/14/181; C/17/210.

¹⁰⁸ He mentioned the DHA platform, work with providers to enable them to communicate with regulatory platforms, integrated services to help payers and providers: T2/180.

¹⁰⁹ T1/231.

insurance payers.¹¹⁰ Mr Ghosheh on the other hand insists that Mr Brown knew much more than that. He spent half his time in the Territory working with Dimensions, which did not make a secret of its products. They were advertised on its website.¹¹¹ This difference is concerned chiefly with Mr Brown's explanation that, although AIMS had been on Dimensions' website since 2015,¹¹² he only learned of its existence in September 2017.¹¹³ He had not looked at the website.¹¹⁴ However it does not affect the Tribunal's view that the evidence amply establishes knowledge on the part of Mr Brown of business activities which fall within the scope of "Business" as defined.

127. The Tribunal considers first MedImpact's claim that the provisions of the JVA and the SLC which it relies upon give rise to a contractual estoppel. The Tribunal rejects that submission. These provisions are concerned with waiver, variation and entire agreement. The language is not apt to preclude an estoppel by convention.
128. The Tribunal concludes that on the evidence before it an estoppel by convention arose. Whatever the terms of Article 4, the "Business" of the joint venture for the purposes of the JVA and the SLC was PBM; and MedImpact is estopped from contending otherwise.
129. It is entirely clear that this was the assumption on which both MedImpact and Dimensions proceeded between 2011 and 2017. Both parties shared that assumption and by their conduct each made it clear to the other that the assumption was agreed. It is also clear that Dimensions relied upon that assumption in investing time and money in developing products which fell within the wording of Article 4. It would be unjust if MedImpact could after all these years seek to enforce the strict language of Article 4.

¹¹⁰ Brown Two at para 25: D/2/7.

¹¹¹ Ghosheh One, para 6.6: E/1/10; Ghosheh Two, para 2.9: E/2/3; T4/103.

¹¹² C/62, C/63.

¹¹³ Brown One at para 33: D/1/9; T1/213.

¹¹⁴ T1/210.

130. For these reasons the Tribunal finds that MedImpact is estopped from contending that the definition of the “Business” in Article 4.1(a) of the JVA encompasses more than acts of selling or offering to sell products which are the same or substantially similar to PBM, so as to compete with the MIA PBM.

The facts

131. The claims in question have to be considered against the following background, which is not in dispute:

- (1) In the course of the joint venture MIL shared with Dimensions every detail of its PBM:

“The reality is that we shared almost everything related to offering and providing PBM services with them as they had little or no insight as to how to do this and had zero PBM-related functionality at the start of our relationship. This included, for example: details of how to sell PBM services; how to price PBM services; how to contract for PBM services; how to implement PBM services; how to adjudicate claims; how to set up benefits and policies; details of our clinical rules; how to develop the editing platform for the UAE to customize MIL rules; the implementation schedule; the user access testing technology to test claims; how to manage clients effectively; how to report value created to clients; how to use customer service portals in real time to support patients and pharmacists; how to provide online reporting capabilities to clients; and how to set up customer call centers at health plans to support PBM services. This was at all times provided only for the benefit of the JV.”¹¹⁵

- (2) The Dimensions employees who worked for the joint venture were also engaged in relation to Dimensions’ independent business activities.¹¹⁶
- (3) They were therefore engaged in the process of developing the PBM for use by MIA in the UAE. This included mapping drugs in the UAE to the US codes already included in MedImpact’s POS system in the United States, using web services to enable MIA’s PBM to communicate with MedImpact’s POS and

¹¹⁵ Brown Three, para 18: D/3/5; Ohri One, para 20 and ff: D/7/8.

¹¹⁶ For example Mr Ghosheh, Mr Bitar and Mr Malki.

designing an ICD bucket switching concept, which became PBMSwitch, to translate UAE claims information.¹¹⁷

- (4) They also became aware of the clients to whom MIA pitched, the terms of any resulting agreement and the relevant pricing.

132. Dimensions was therefore in a position to compete with MIA; and it had access to information which was confidential to MedImpact and MIA (the Confidential Information).

133. The question whether Dimensions acted in breach of the various contractual provisions relied upon has to be considered in the light of the following, which is also not in dispute:

- (1) Dimensions developed AIMS during 2015.
- (2) In accordance with Procedural Order No.2, Dimensions' disclosed in its Statement of Defence and Counterclaim sales or offers for sale of IT consultative services and/or software to actual or prospective customers of MIA. This included sales or offers for sale of AIMS to twelve actual or prospective customers from 2015 to 2018.¹¹⁸
- (3) In the early years of the joint venture MIA's business prospered as it enjoyed first mover advantage in the PBM market in the Territory; but its profitability declined in 2017.

Year	US \$
2012	[REDACTED]

¹¹⁷ Ohri One at para 7 and ff: D/7/3.

¹¹⁸ Appendix Three at A/6. The twelve are [REDACTED] In fact the list was incomplete. Two products, ICM and APEX, were omitted in error: Ghosheh Three at para 3: E/6/5; A/13/457. In addition MedImpact has produced documents which identify sales or offers for sale to other customers: Claimants' PHWS at para 3.15: A/9/15. Mr Ghosheh accepted that some (at least) of Dimensions' pitches were not discussed with Mr Brown: T3/165.

2013	[REDACTED]
2014	[REDACTED]
2015	[REDACTED]
2016	[REDACTED]
2017	[REDACTED]

(4) [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED] MIA was reducing its prices in order to remain competitive, but planned to offset loss of margin by growing in the GCC region.¹¹⁹

(5) In addition MIA lost a number of its PBM clients. As said above, Oman Insurance terminated its agreement on 1 October 2017, after contracting with Dimensions for the supply of AIMS.¹²⁰ [REDACTED]
 [REDACTED]¹²¹

134. The essence of Dimensions' case is that this decline in MIA's fortunes was the product of an expiring monopoly.¹²²

[REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

¹¹⁹ G/10, C/31.

¹²⁰ B/14.

¹²¹ Brown Four at para 14: D/10/4.

¹²² T1/142.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

136. The claims turn in great part on the evidence of the Technical Experts. Both Technical Experts understood the duty they owed the Tribunal; however both were concerned to deploy the case advanced by one side or other.

137. The case advanced by MedImpact in its Reply was that Dimensions had two products which were in competition with MIA's PBM, AIMS and CDS. These were said to

¹²³ A/13/48.

¹²⁴ A/13/63.

¹²⁵ A/13/103.

¹²⁶ A/13/179,202.

¹²⁷ A/13/225, 242.

have been developed using the Confidential Information which MedImpact had shared with Dimensions for the purposes of the joint venture. This case is based on the findings of Ms Bates, which were summarized as follows in the Reply:¹²⁸

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹²⁸ A/7/2. References omitted.

138. Dimensions' defence was based on the evidence of Mr Gibson. This was summarized as follows in the Rejoinder:¹²⁹

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹²⁹ A/8/10. References omitted.



139. The Tribunal has to address two principal questions. The first is whether Dimensions marketed AIMS and CDS in competition with MIA's PBM. If so it will be likely to have been carrying on the "Business";¹³⁰ competing with MIA;¹³¹ interfering with the business of the joint venture;¹³² failing to manage customer relations;¹³³ and failing exclusively to promote MIA's PBM.¹³⁴ The second is whether in developing AIMS and CDS it was in breach of the restrictions which apply to the Confidential Information.¹³⁵

Competition

140. Ms Bates summarized her conclusion on AIMS and CDS as follows:¹³⁶



¹³⁰ Article 4 of the JVA: A/11/6.

¹³¹ Article 12 of the JVA: A/11/17.

¹³² Article 13 of the JVA: A/11/17.

¹³³ Schedule 2 para 7 of the SLC: A/12/23.

¹³⁴ Schedule 2 para 8 of the SLC: A/12/8.

¹³⁵ Articles 10 and 11 of the JVA: A/11/15; Articles 7 to 10 of the SLC: A/12/7.

¹³⁶ Para 119 of Bates One: H1/1/62.

[REDACTED]

141. In response Dimensions highlights the differences between AIMS and the MIA PBM. It is not limited to pharmacy management; and its technical functionality depends on the way in which the customer chooses to populate it:¹³⁷

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

142. Dimensions summarized its case in relation to CDS as follows:¹³⁸

[REDACTED]

¹³⁷ First Respondent's CS at page 11. References omitted.

¹³⁸ First Respondent's CS at page 12. References omitted.



143. MedImpact's case that as a matter of fact Dimensions marketed AIMS in competition with MIA's PBM is summarized as follows:¹³⁹

"3.21 Dimensions breaches of the JVA have not been innocent but undertaken with the express intention of winning clients from MIA, while seeking to hide its activity from MIL, as now evidenced by the documents from the MIA Server.

3.22 These documents and those obtained through disclosure, support Dale Brown's witness statement evidence which shows that:

(a) On or around 28 September 2017, Ahmed Al Tabbakh, the Head of Medical and Life Claims at Oman Insurance told Dale Brown at a meeting with him and Yousef Ghosheh that Oman Insurance was using a product called AIMS to replace MIA's PBM Platform...

(b) On 6 April 2016, Mr Ghosheh attempted to dissuade Dale Brown from discussing the competition with Oman Insurance and writes that "OIC may be looking for an in-house alternative which I am feeling is more of an option now than a competitor given recent discussions and knowing their existing capabilities"...

(c) On or about 15 October 2017, Omar Ghosheh and Yousef Ghosheh admitted to Mr Brown in conversation that AIMS, with its support services, were similar to MIA's PBM. Omar also admitted to Mr Brown that Dimensions had provided Oman Insurance with a similar PBM...

(e) Dimensions tested AIMS with its eHosting company in Dubai to ensure that the real-time adjudication process worked for Oman Insurance and for other clients...



¹³⁹ Claimants' PHWS at para 3.21: A/9/16. References omitted.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

144. Dimensions disputed the evidence on which this submission was based,¹⁴⁰ but the Tribunal preferred Mr Brown's evidence in support .

¹⁴⁰ Ghosheh One at para 8.13: E/1/16.

145. The exact characteristics of MIA's PBM on the one hand and Dimensions' AIMS and CDS products on the other were explored by the Technical Experts in their various reports, but it is unnecessary to address the rival contentions in any detail. Dimensions accepted that AIMS could provide functionality which was similar to MIA's PBM with the appropriate customizations. The Tribunal considers that it was as a result in breach of the relevant restrictions; the requirement for customizations is neither here nor there. Both sides also agreed that CDS made up part of the adjudication process; the Tribunal considers that it was also therefore in breach, rather than being simply complementary.

146. The Tribunal finds that AIMS and CDS were in fact marketed by Dimensions in competition with MIA's PBM. This follows from Mr Brown's account of his conversation with Oman Insurance and the other customers referred to above.¹⁴¹ It is also clear from the MIA Server Documents referred to above.¹⁴²

Confidential Information

147. Ms Bates relies on two considerations. First, she highlights the differences between Dimensions' pre- and post-joint venture products.¹⁴³



¹⁴¹ [Redacted]

B/14/13.

¹⁴² [Redacted]

A/13/225 and 243.

¹⁴³ Bates One, paras 108-110: H1/1/49.

[REDACTED]

[REDACTED]

148. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

149. Ms Bates concludes as follows:¹⁴⁶

[REDACTED]

¹⁴⁴ Bates One, para 127: H1/1/65; Bates Three, para 23: H2/45/19; T4/214.

¹⁴⁵ Bates One, paras 114-118: H1/1/54.

¹⁴⁶ Bates One: H1/1/63.

150. [REDACTED]
[REDACTED]

[REDACTED] [REDACTED]
[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

151. This is the basis of MedImpact’s case as to the trade secrets and confidential information which it alleges that Dimensions misused in Annex 2 of its Closing Submissions, which provides as follows:¹⁴⁸

¹⁴⁷ Bates One, paras 132-155: H1/1/66.

¹⁴⁸ These are referred to below as the “Trade Secrets”.

No.	Trade Secret	Description
1	Implementation Questionnaires	Documents that identify all of the information that must be collected from clients on the front end to build out the PBM services including all options and decisions that must be made by (or with) the client in order to structure the benefit design and coverage rules and ultimately drive the adjudication logic and process, as identified in MedImpact's implementation questionnaires.
2	Benefit Templates	Documents that outline and define features and options of the pharmacy benefit plan and provide granular details on the standard benefit designs, clinical and utilization management protocols on an element-by-element basis, including descriptions of each element and decisions for the client to make with regard to benefits, as identified in MedImpact's standard benefit templates.
3	File type formats	Detailed listing and structure of data elements/fields as identified in the file type formats/layouts for group, member, accumulator, drug and drug pricing.
4	MedAccess	The user interface modules within the MedAccess tool that provides specific processes and information in the PBM process.
5	POS system adjudication logic	Specific adjudication logic used to perform real-time drug claim adjudication including, how the system uses the information from 1-3 above to adjudicate claims and as identified through 4.

152. MedImpact advanced a further claim in its Closing Submissions in respect of intellectual property misappropriated from MIA.¹⁴⁹ Dimensions objects that this claim had not been pursued at the Evidentiary Hearing and it was now too late to raise it.¹⁵⁰ The Tribunal agrees.

¹⁴⁹ Claimants' CS at 5.20 and Annex 3.

¹⁵⁰ First Respondent's CS at para 83.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁵¹ Gibson One, paras 130-199: H1/7/38.

¹⁵² Gibson One, para 156, 157: H1/7/44.

¹⁵³ H3/73/9.

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

¹⁵⁴ [Redacted] H2/45/6.

¹⁵⁵ A/13/457; Ghosheh Three at para 3: E/6/5.

¹⁵⁶ Bates Three, para 9: H2/45/6.

¹⁵⁷ Bates Six at para 1.4: H3/81/2.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(e) [REDACTED]

157. This was the basis for MedImpact’s amendment to its claim on Day Three of the Evidentiary Hearing to encompass 26 Dimensions products. This later became the Prohibited Products listed in Annex 1 to MedImpact’s Closing Submissions.

158. [REDACTED]
 [REDACTED] There is little dispute between the Parties as to the capabilities of ICM. Dimensions states in its Closing Submissions that “from a technical perspective, ICM is a rule engine with similar (albeit not identical) capabilities as AIMS.”¹⁵⁹ Dimensions accepts that the differences in their capabilities are not relevant to this dispute. It goes on to argue that from a commercial perspective it is very different, since it is for providers not payers.¹⁶⁰ The Tribunal rejects this argument. If its capabilities are the same, it infringes the restrictions in question, even if it has not been marketed to payers in the past. It follows that the Tribunal concludes that ICM is in competition with MIA’s PBM, together with AIMS and CDS.

159. So far as HealthConnect is concerned, Ms Bates only inspected the Transaction Post Office component. On the material before the Tribunal, it is impossible to conclude

¹⁵⁸ Bates Six at para 3.4: H3/81/8.

¹⁵⁹ First Respondent’s CS at para 4.2.

¹⁶⁰ Ghosheh Three at para 3.2: E/6/5.

that HealthConnect, or the other products and services considered in Ms Bates' sixth report, were in competition with MIA's PBM. It could be bundled with AIMS, but that is not sufficient. In oral evidence Ms Bates' opinion became more firm, but there was insufficient evidential basis for any shift. Marketing materials are clearly inadequate.¹⁶¹

160. For these reasons the Tribunal rejects MedImpact's claims in respect of the so-called Prohibited Products in Annex 1 of its Closing Submissions, with the exception of AIMS, CDS and ICM.
161. Against this background the Tribunal considers whether in developing AIMS, CDS and ICM Dimensions was in breach of the restrictions which apply to the Confidential Information. The Tribunal concludes that in respect of AIMS and ICM it was.
162. The critical issue is the similarities between AIMS (or ICM) on the one hand and MIA's PBM on the other. The Tribunal is persuaded that this establishes that the one is in part a copy of the other.
163. There was evidence to this effect from the witnesses of fact. Mr Ohri in particular gave a detailed description of what he considers to be proprietary information and trade secrets.¹⁶² But the decisive evidence was that of Ms Bates. In her opening statement she said this:¹⁶³



¹⁶¹ Slide 18 of Mr Gibson's presentation; A/13/69; T5/36.

¹⁶² Ohri One, paras 20-41: D/7/8. See also Mr Brown at T1/238; Mr Ohri at T2/23.

¹⁶³ T4/214.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

me.

165. The Tribunal found that evidence compelling.

[REDACTED]

¹⁶⁴ T5/108.

¹⁶⁵ See also T5/59, 62, 72, 85.

¹⁶⁶ Gibson One at para 130: H1/7/38.

¹⁶⁷ T6/87.

167. However the Tribunal prefers the evidence of Ms Bates on this question. She had the greater relevant experience. Her evidence is also supported by that of Mr Ohri.¹⁶⁸ While Mr Gibson is no doubt correct that part of what became AIMS could have been created independently by Dimensions or obtained from public sources, there is no evidence that everything was. In fact it is unnecessary to decide exactly which of the constituent elements were and were not derived from the Confidential Information. Ms Bates has established that Dimensions did copy the Trade Secrets. That is sufficient.
168. If Dimensions had been able to produce documents evidencing the development of AIMS, these might have been conclusive one way or the other. However, as stated above, it did not produce the product and system specifications and systems design documentation which it had been ordered to produce.¹⁶⁹ Ms Bates considered that such documents were “uniformly available”.¹⁷⁰ Mr Ghosheh’s evidence was that AIMS was simply a more advanced form of the products that Dimensions had been selling to its customers before it entered into the joint venture.¹⁷¹ The evidence was however to contrary effect.
169. The MIA Server Documents tended to confirm that Dimensions copied certain Confidential Information when developing AIMS. For example, Mr Bitar circulated within Dimensions MedImpact’s benefits mapping file.¹⁷² He also circulated a list of proprietary exclusions relating to MIA’s contract with Oman Insurance. A meeting took place on 24 July 2017 (after Dimensions had signed up with Oman Insurance) where one of the agenda items was “Mapping Process between current PBM data and AIMS”.¹⁷³
170. Mr Bitar sought to explain this. During the Evidentiary Hearing he made a second witness statement in which he said that he prepared and circulated fields from AIMS

¹⁶⁸ Ohri One at paras 20-41; D/7/18; T2/52.

¹⁶⁹ Procedural Order No. 2 and No. 4 at L/2 and 5.

¹⁷⁰ T5/40.

¹⁷¹ Ghosheh One at para 7.4; E/1/12; Ghosheh Three at para 4.7; E/6/8; T4/74.

¹⁷² A/13/179.

¹⁷³ A/13/202.

mapped to fields or files in MIA's PBM because he thought that Oman Insurance might want to continue to use MIA's PBM alongside AIMS.¹⁷⁴ He was therefore bridging the gap so that the two could be integrated. He claimed that he was doing this on his own initiative.¹⁷⁵ The Tribunal found that evidence implausible.

171. Dimensions was critical of the reliance Ms Bates placed on the structure of AIMS, its logic and its functionality. It submits that the commercially sensitive information lies in the source code and underlying architecture. Ms Bates, it says, does not define the precise aspects of a piece of software which are said to be protectable.¹⁷⁶ The Tribunal disagrees. It finds that Ms Bates has defined the Trade Secrets with sufficient precision. She has demonstrated that Dimensions developed AIMS using the Trade Secrets and that they include Confidential Information for the purposes of the JVA and the SLC, including protectable intellectual property. This conclusion is of equal application to ICM.

172. This conclusion is significant. Had the evidence not gone this far it might have been possible to conclude that Dimensions acted in good faith in developing AIMS during 2015. It was not a copy of MIA's PBM, even if it had the same, or substantially similar functionality when the bare shell was fully customized. Especially having regard to the convention which MedImpact and Dimensions had adopted from 2011, Dimensions might genuinely have believed that it was acting within its rights in developing and marketing AIMS. The same goes for CDS and ICM. But the Tribunal's finding that AIMS was developed using the Confidential Information explodes this theory. Dimensions must have known perfectly well that this was a breach of the contractual arrangements for the joint venture.

173. In summary, the Tribunal finds that Dimensions set out to develop an independent business using the proprietary assets of MedImpact and MIA; and when it secured Oman Insurance it had the confidence to cut its ties with MedImpact. [REDACTED]

¹⁷⁴ E/7.

¹⁷⁵ T4/114.

¹⁷⁶ First Respondent's CS at paras 68-73.

174. It has been a theme of MedImpact's case that Dimensions has collaborated with its parent IQVIA on PBM projects both inside and outside the Territory; that IQVIA's business consists of selling data and that Dimensions has supplied IQVIA with the Confidential Information for this purpose; and that Mr Ghosheh's motivation in setting up a business which competed with MIA was to maximize his recovery under an earn out with IQVIA.¹⁷⁷ However this is denied by Dimensions.¹⁷⁸ MedImpact did not pursue this case and IQVIA is not of course a party to this arbitration. The Tribunal therefore expresses no view on the subject.

(5) The Claims

175. The Tribunal sets out its decision on the various claims in the light of the conclusions set out above.

176. The JVA Claim

- (1) Dimensions was in breach of Article 4.1(b) of the JVA in marketing AIMS, CDS and ICM in the Territory during the Term. In addition Dimension failed to disclose its marketing activity to MIA, although this included business opportunities relating to PBM in the Territory.
- (2) Dimensions was in breach of Article 12 of the JVA in marketing AIMS, CDS and ICM in the Territory during the Term. This was the same or substantially similar to MIA's PBM business.
- (3) As a result in breach of Article 13 of the JVA Dimensions took away, interfered with and attempted to interfere with MIA's PBM business.

177. The SLC Claim

- (1) In breach of paragraph 7 of Schedule 2 of the SLC, Dimensions failed to manage relationships with pharmacies and payers through disciplined project

¹⁷⁷ Reply at paras 7.4 to 7.11: A/7/22; Claimants' PHWS at paras 3.74-3.78: A/9/26; Claimants' CS at 5.23 to 5.26.

¹⁷⁸ Rejoinder at paras 90-92: A/8/24. Mr Ghosheh denied this in oral evidence: T4/61, 139.

management. The essence of this obligation was client relationship management with a view to promoting the business MIA's PBM business. In fact Dimensions went behind MIA's back and tried to take business away from MIA.

- (2) Paragraph 8 of Schedule 2 of the SLC required Dimensions exclusively in the Territory to promote MIA's PBM business with potential clients, payers, pharmacies and governmental agencies. In fact its competing business undermined MIA's business.

178. The Contractual IP Claim

- (1) The Tribunal has found that Dimensions misappropriated the Trade Secrets in the course of developing AIMS and ICM. It follows that it has used technology and intellectual property licensed to it in breach of Article 10.1 of the JVA.
- (2) The Trade Secrets constitute Confidential Information for the purposes of Article 11 of the JVA. In breach of Article 11.1(b)(iii) Dimensions used the Confidential Information for purposes other than the conduct of MIA's PBM business.
- (3) The SLC defines Claims Data to include claims for costs processed through MIA's PBM. MedImpact contends that Dimensions has "in all likelihood" sold Claims Data through IQVIA in breach of Article 7 of the SLC.¹⁷⁹ However it has not made good this claim, which fails. Mr Ghosheh explained in oral evidence why Dimensions used the IQVIA brand and denied any sale of data.¹⁸⁰
- (4) For the same reasons the claim for breach of Article 8 of the SLC fails. MedImpact has not shown that Dimensions processed Claims Data other than as Data Processor on behalf of the joint venture.

¹⁷⁹ Claimants' CS at para 5.32.

¹⁸⁰ T3/142; T4/61, 138.

- (5) The Trade Secrets constitute Confidential Information for the purposes of Article 9 of the SLC. In breach of Article 9.2 Dimensions used the Confidential Information for its own benefit.
- (6) It follows from what is said above that in breach of Article 10 of the SLC Dimensions used the Data, the JV Assets and the MIL Software for purposes other than providing the Services listed in Schedule 2.

179. The Statutory IP Claim

MedImpact does not suggest that there is any practical difference between the application of English, UAE and US law with respect to liability.¹⁸¹ The Statutory IP claim is advanced only with a view to recovering damages on an unjust enrichment basis. That is, a claim to recover the “avoided costs” or the savings realized by the violator due to misappropriation. MedImpact submits that Dimensions saved between USD 41.7 and USD 45.2 million in developing AIMS using the Trade Secrets which it had misappropriated.¹⁸² The Tribunal has however concluded that it would not in any event make an order for “avoided costs”. This would not meet the justice of the case since Dimensions is not left with an asset (AIMS, CDS or ICM) which it ought to pay for. In the circumstances it is unnecessary to consider the issues of UAE and US law debated between the Parties.

180. Unfair Prejudice

Article 18.1(e) of the JVA provides that on termination of the JVA MIA should be dissolved. The Parties are agreed that at some stage in future winding up proceedings would be commenced before the Cayman court. They would then, as it was put, switch to Cayman time. MedImpact intends to seek an order that it be permitted to buy Dimensions’ shares in MIA pursuant to Section 95(3)(d) of the Cayman Companies Law.¹⁸³ To that end MedImpact seeks the following declarations:¹⁸⁴

¹⁸¹ Claimants’ CS at paras 5.18, 6.1.

¹⁸² Claimants’ PHWS at paras 4.8 to 4.11: A/9/37; Bobba One: D/11; Brown Three at para 49: D/10/14.

¹⁸³ J/12/66.

“(a) Dimensions’ actions, which are the subject of the above declarations, have caused a breakdown of mutual confidence between the shareholders of MIA; and

(b) Dimensions has acted contrary to the MIL’s legitimate expectations that MIA will be managed lawfully, in good faith, and in accordance with the contracts which regulate the operation of the business; and

(c) If a court were minded to make an order for winding up or dissolution of MIA, it would be just and equitable for there to be an order, as an alternative to such order, that MIL be permitted to buy-out the shares of Dimensions in MIA.”

181. It was common ground that the Tribunal has jurisdiction to make these declarations.¹⁸⁵ Moreover both sides agreed that the Cayman courts apply English law on the issues which they present.¹⁸⁶

182. Dimensions submits that the Tribunal should not make any of the declarations sought, irrespective of whether it makes findings adverse to Dimensions on the substantive dispute within its jurisdiction. Dimensions contends that (a) and (b):¹⁸⁷

“involve evaluative contextual judgements based upon the entirety of the relevant parties’ dealings and all other commercial and circumstantial matters that would inform an insolvency court in reaching its final determination as to what was “just and equitable” in any given situation.”

It further contends that (c):

“purports to trespass illegitimately upon the Grand Court’s exclusive jurisdiction to determine what is “just and equitable” and what kind of relief to grant on a winding up petition by reference to all the circumstances of the case, not just the evidence relating to any “foundational” findings of unlawful conduct.”

¹⁸⁴ Claimants CS at para 8.4.

¹⁸⁵ Fulham Football Club v Richards [2011] EWCA Civ 855: J/13.

¹⁸⁶ T3/201.

¹⁸⁷ First Respondent’s CS at para 148.

183. The Tribunal accepts this submission. Its findings speak for themselves. These should be considered by the court entertaining the winding up proceedings in the context of any other issues which it considers to be relevant. It would be wrong in any way to pre-judge the outcome of that process.
184. In the exercise of its discretion the Tribunal therefore refuses the declarations in question.

(6) Causation

185. It remains to consider the consequences of the various breaches of the JVA and the SLC set out above.
186. The Tribunal has found that Dimensions went behind MedImpact's back in marketing AIMS (and CDS and ICM) in competition with MIA's PBM. It is self-evident that this inflicted damage on MIA's business. The Quantum Experts will in the following phase of this arbitration assist the Tribunal in assessing the damages which have resulted. At this stage the Tribunal addresses the issues of causation which arise from the evidence of fact adduced by the Parties and the submissions they have made.
187. It is common ground that in present circumstances MedImpact is entitled to claim damages on two bases:
- (1) Compensatory damages: that is, MedImpact is entitled to be put in the position it would have been in if Dimensions had performed its contractual obligations.
 - (2) An account of profits: MedImpact is entitled to recover the profits made by Dimensions which were caused by its breach of contract.¹⁸⁸
188. In summary, MedImpact contends that Dimensions' presence in the market caused other businesses to enter the market which as a result became more competitive. MedImpact has advanced its claim to compensatory damages on three bases:

¹⁸⁸ Subject to there being no double recovery: T1/172.

- (1) It contends that as a result of Dimensions' breach of contract MIA lost five customers: Oman Insurance, MetLife, AXA, Pentacare and Al Buhaira. It claims the profit MIA has lost as a result.¹⁸⁹
- (2) It contends that if Dimensions had not entered the market MIA would have obtained prices which were 25% higher.¹⁹⁰
- (3) It identifies a number of target clients and submits that, if Dimensions had not been competing with MIA, MIA would have provided services covering 25% of their needs.¹⁹¹

189. Mr Mahmood in particular considers MIA's actual clients and target clients and sets out both the actual position and what would have happened on his evidence but for Dimensions' breach of contract. Dimensions submits that the consequence is that MedImpact has eschewed any claim based on loss of a chance. Accordingly it is only entitled to recover compensatory damages if and to the extent that it discharges its burden of proof in relation to that specific client.¹⁹² The Tribunal rejects that submission. The Tribunal accepts that, as MedImpact submits,¹⁹³ the task of the Tribunal in the following phase of this arbitration is to assess the difference between the current value of its interest in MIA and what would have been its value if Dimensions had complied with its contractual obligations.

190. Against that background the Tribunal makes the following findings in relation to causation.

191. The Tribunal considers first MIA's five lost customers:

- (1) The Tribunal accepts that, but for Dimensions' breach of contract, MIA would have retained Oman Insurance. As stated above, this is the only one of the five

¹⁸⁹ Brown Four at para 27 and ff: D/10/9; Mahmood One at para 24 and ff: D/8/6; T3/67.

¹⁹⁰ Brown Four at para 20: D/10/6; Mahmood One at para 26 and ff: D/8/6.

¹⁹¹ Mahmood One at para 99 and ff: D/8/27.

¹⁹² First Respondent's CS at para 102.

¹⁹³ Claimants' CS at para 3.10.

which signed up for AIMS. There is evidence that as long ago as 2014 Oman had raised issues concerning the functionality of MIA's PBM¹⁹⁴ and in 2016 Oman was unhappy with MIA's pricing, but the Tribunal is not persuaded that MIA would have lost Oman but for Dimensions.¹⁹⁵

(2) Dimensions' case is that these losses are explained by the limitations of MIA's PBM. It was based on old technology, and US technology at that. It was incapable of coping with the developments offered by MIA's competitors which were tailored to the UAE market.¹⁹⁶

(3) The Tribunal accepts that MedImpact has failed to show that Dimensions' breach of contract was the effective cause of the loss of MetLife. [REDACTED]

[REDACTED]
[REDACTED]¹⁹⁷

(4) The Tribunal reaches the same conclusion in relation to AXA. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]¹⁹⁹

(5) The Tribunal also sees no good reason to conclude that Dimensions' breach of contract was the effective cause of the loss of either Pentacare or Al Buhaira.

192. Turning to the pricing, Mr Brown's evidence was that prices fell some 25% during the relevant period as a result of Dimensions' competitive presence. There is no contrary evidence of fact and Dimensions opted not to cross-examine Mr Brown on the subject. Mr Mahmood confirms that Dimensions had "an effect", partly because it was undercutting MIA. Dimensions, however, rejects MedImpact's argument. The

¹⁹⁴ It raised issues relating to approval limits: T2/64.

¹⁹⁵ G13, 14; T1/247; T2/60.

¹⁹⁶ Bitar One at para 10: E/3/3.

¹⁹⁷ Bitar One at para 17: E/3/4.

¹⁹⁸ G/18.

¹⁹⁹ G/89/4.

principal reason for the fall in the market was it says the presence of other suppliers who were aggressively seeking to win market share.

193. The Tribunal has no clear evidence of the state of the market. It is however clear that there had been a dramatic fall. A meeting of MIA's board on 4 May 2017²⁰⁰ was told that MIA had retained AXA with a [REDACTED] decrease in blended PMPM, MetLife with a [REDACTED] decrease and NGI with a [REDACTED] decrease; and we now know that those were not enough to keep the client. It is said that Winsoft were priced [REDACTED] less than MIA. It therefore seems clear that the overall fall was considerably more than 25%. Nevertheless the Tribunal considers that Mr Brown's 25% is overblown. The principal reason for the fall was that MIA no longer enjoyed the same dominant market position. The Tribunal finds that Dimensions is responsible for a 15% fall.
194. The claim in relation to lost business with target clients is based on Mr Mahmood's awareness that Dimensions had made approaches and entered into contracts with them.²⁰¹ He lists ten target entities. He says that, if MIA had been notified of the opportunity, it would have been able to win the business. Dimensions' response is that there is no evidence that MIA had in fact targeted these or that it had a realistic chance of making a sale.²⁰² It also points out that the entities concerned are healthcare providers or retail pharmacies, rather than health insurance payers, which represent MIA's natural customer base.
195. The Tribunal cannot accept Mr Mahmood's approach. There are a number of difficulties. First, some of the sales were of products which, as the Tribunal has found, Dimensions was entitled to sell. There was therefore no obligation to introduce the opportunity to MIA. Second, the assumption in most cases that MIA would have been able to generate revenue amounting to 25% of Dimensions' sales appears random. Third, it would be wrong to assume that MIA would have generated revenue from every opportunity that was referred to it.

²⁰⁰ C/31.

²⁰¹ Mahmood One at paras 99-183: D/8/27.

²⁰² First Respondent's CS at para 129.

196. In response to this head of claim the Tribunal awaits the opinion of the Quantum Experts. The Tribunal has no doubt that, Dimensions' failure to introduce to MIA the business opportunities it was required to introduce by Article 4.1(b) of the JVA, will have caused MIA some loss. However Mr Mahmood's evidence does not quantify that loss.

(7) Remedies

197. MedImpact claims declarations that Dimensions has acted in breach of the JVA and SLC.²⁰³ The Tribunal will grant declarations which reflect the conclusions set out above.

198. MedImpact seeks damages to be quantified in due course.²⁰⁴ The Tribunal will make an order to that effect.

199. MedImpact also seeks injunctive relief.²⁰⁵ The Tribunal will at this stage grant interim relief by way of Procedural Order. It will hear the Parties as to the form of any permanent injunction.

200. As stated above, Dimensions' counterclaim was the subject of lengthy written submissions, document production, evidence of fact and expert evidence and oral submissions at the Evidentiary Hearing. On 6 March Dimensions wrote to withdraw its counterclaim.²⁰⁶ In its Closing Submissions MedImpact sought an order dismissing

²⁰³ First Respondent's CS at para 8.2.

²⁰⁴ First Respondent's CS at para 8.3.

²⁰⁵ First Respondent's CS at para 8.5.

²⁰⁶ Counsel submitted as follows in their letter to the Claimants dated 6 March 2019: "On the basis of the Claimants' restricted disclosure and resistance to permit inspection of the relevant systems (including, but not limited to the so-called "*MI-HK solution*") and in the interests of saving further time and cost in the current proceedings, the First Respondent hereby withdraws its counterclaims.

Our client reserves its rights fully in this regard."

Dimensions' counterclaim.²⁰⁷ On 20 March 2019 the Tribunal invited submissions on both jurisdiction and discretion. On 24 March 2019 Dimensions responded as follows:

"(a) our client has withdrawn its counterclaim for the reasons set out in our letter of 6 March; and

(b) our client has reserved its rights should any further wrongdoing come to light at a later date, which causes recoverable loss or justifies any other relief.

In light of the above, the First Respondent defers to the Tribunal's discretion as to how to address the Claimants' request in respect of the First Respondent's counterclaims."

201. In response MedImpact drew attention to the fact that the withdrawal was not unconditional but came with a reservation of rights. It submitted that a dispute therefore remained as to whether Dimensions had any such rights. MedImpact contended that it did not.
202. The Tribunal considers that it retains jurisdiction over Dimensions' counterclaim notwithstanding its withdrawal. It notes that Dimensions is content for the Tribunal to exercise its discretion. In the circumstances the Tribunal will exercise its discretion to dismiss the counterclaim.

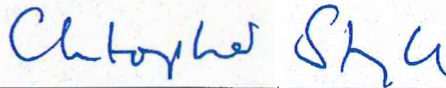
²⁰⁷ Claimants' CS at para 9.4.

E. AWARD

203. After consideration of all of the factual and legal submissions which have been presented to me and for the reasons set out in full above, I the Tribunal hereby award, declare and adjudge as follows:

- (1) I declare that Dimensions has acted in breach of Articles 4, 12 and 13 of the JVA and paragraphs 7 and 8 of Schedule 2 of the SLC by selling or offering for sale AIMS, CDS and ICM.
- (2) I further declare that Dimensions has acted in breach of Articles 10 and 11 of the JVA and Articles 9 and 10 of the SLC by using Confidential Information, including the Trade Secrets, as both terms are defined above, in the development of AIMS and ICM.
- (3) I order Dimensions to pay the Claimants damages to be assessed.
- (4) I dismiss the counterclaim by Dimensions.
- (5) I reserve jurisdiction in respect of all other requests and claims.

The seat of this arbitration is DIFC, Dubai. This award is made on 16 April 2019.



CHRISTOPHER STYLE QC
Sole Arbitrator

APPENDIX ONE

RELEVANT PROVISIONS OF THE JVA

ARTICLE 1 DEFINITIONS AND INTERPRETATION

“**Term**” means the term of this contract beginning on the Effective Date and ending upon the termination of this contract in accordance with its terms, including Article XVII.

...

“**Territory**” means the countries which are at the date of this Contract members of the Gulf Cooperation Council, Jordan, Lebanon and such other countries as the Shareholders may agree in writing from time to time.

...

ARTICLE IV THE PURPOSE AND SCOPE OF OPERATION

4.1 Purpose of the Company

(a) The principal purpose of the Shareholders in forming the Company is to engage in the business of providing information technology consultative services and software to companies and other entities undertaking activities related to the healthcare sector in the Territory (but only in relation to their activities in the Territory) (“the **Business**”)

(b) The Shareholders agree that the Company shall be the sole Person utilized by each Shareholder to undertake the Business in the Territory. Any Business opportunity in the Territory offered or made available to a Shareholder shall promptly be disclosed to the Company.

4.2 Business Conduct

The Company shall, and the Shareholders shall procure that the Company does, conduct the Business on a commercial basis in a proper lawful and efficient manner for its own benefit and shall transact all business with any Shareholder, any of a Shareholder’s Affiliates, or any Third Party on arm’s length terms.

...

ARTICLE X TECHNOLOGY LICENSING

10.1 Licensed technology

The Parties agree that any technology or intellectual property licensed to the Company by either Shareholder, including pursuant to the Services and License Contract, is provided only for the use of the Company and not for the use of the other Shareholder or any of its Affiliates or any other Person. Without prejudice to its obligations pursuant to the Services and License Contract, each Shareholder undertakes to the other Shareholder that neither it nor its Affiliates shall at any time during or after the Term use the licensed technology or intellectual property of the other Shareholder in any way, unless otherwise agreed by the licensing Shareholder in writing (including pursuant to the Services and License Contract).

10.2 Protection of Intellectual Property

The Company and the Shareholders will at all times use their Best Efforts to protect the intellectual property of the Parties.

....

ARTICLE XI CONFIDENTIALITY

11.1 Confidentiality

(a) From time to time prior to the commencement of and during the Term, a Shareholder may have disclosed or need to disclose to, or have received or need to receive from, the other Shareholder and/or the Company (as appropriate), confidential or proprietary information or trade secrets, including the following matters, documents, and information: (i) any provision of this Contract and the other Transaction Documents, or any negotiation or agreement related hereto and thereto, and (ii) business, financial, or other matters (including future plans and objectives) of the other Shareholder, the Company, or their Affiliates (the "**Confidential Information**").

(b) The Shareholder receiving such Confidential Information (the "**Receiving Party**") shall:

(i) maintain the confidentiality of the Confidential Information;

(ii) not disclose the Confidential Information to any Person, except to its employees, advisors,

agents, partners, members or financing sources who need to know such information to perform their responsibilities or with the written consent of the other Shareholder, provided, however, that such Persons shall agree in writing that they will comply with the requirements under this Article 11.1(b) as if they were a party to this Contract;

(iii) not utilize the Confidential Information for any purpose other than as necessary to conduct the Business pursuant to this Contract (including as contemplated by the Services and License Contract); and

(iv) promptly upon the request of the Shareholder which provided such Confidential Information or upon the termination of this Contract return all Confidential Information and destroy all materials prepared by the Receiving Party that contain Confidential Information and within thirty (30) days certify in writing that all Confidential Information has been so returned or destroyed.

(c) The provisions of paragraph (b) above shall not apply to information that:

(i) can be shown to be known by the Receiving Party's written records made prior to disclosure by the other Shareholder or the Company;

(ii) is or has become public knowledge other than through the Receiving Party's breach of this Contract;

(iii) was first obtained by the Receiving Party from a Third Party having no obligation of confidentiality with respect to such information;

(iv) can be shown to have been independently developed by the Receiving Party; provided that the Person or Persons developing the same had no access to Confidential Information provided by the Company or the other Shareholder; or

(v) is required to be disclosed or retained by the Receiving Party or any of its Affiliates under Applicable Laws, provided that, prior to any such disclosure, the Receiving Party shall forthwith provide the other Shareholder with a notice of such requirement, allow the non-disclosing Shareholder reasonable opportunity to secure confidential treatment of any such Confidential Information from the relevant Government Entity, and shall cooperate with the non-disclosing Shareholder in such effort.

(d) Each Shareholder shall advise its directors, management personnel, and other employees and those of its respective Affiliates receiving any Confidential Information of the existence of and the importance of complying with the obligations set forth in paragraph (b) above.

(e) With respect to Confidential Information, this Article XI and the obligations and benefits hereunder shall survive for five (5) years after the end of the Term. No formal public announcement or press release in connection with the execution or any subject matter of this Contract shall be made or issued by or on behalf of a Shareholder or its Affiliates without the prior written approval of the Shareholders. Without prejudice to the foregoing, the Company shall enter into a non-disclosure agreement in a form to the Shareholders' satisfaction with each of its directors, Senior Corporate Officers, advisors, consultants, Affiliates and any Affiliate's key employees, who will have access to such Confidential Information.

....

ARTICLE XII NON-COMPETITION

During the Term a Shareholder shall not, and shall cause its Affiliates (excluding the Company) not to directly or indirectly through any of its Affiliates or any Third Party, engage in any conduct of business or activity in the Territory which is the same or substantially similar to the Business.

....

ARTICLE XIII NON-SOLICITATION

13.1 Non-Solicitation by MIL

During the Term and for two (2) years after the end of the Term, MIL undertakes, and shall procure its Affiliates (excluding the Company) to undertake, that without Dimensions' prior written consent, it and its Affiliates (excluding the Company) will not in any way, directly or indirectly, for the purpose of conducting or engaging in any business in the Territory or any other country in which the Company shall then be carrying on business (a) take away or interfere or attempt to interfere with any custom, trade, business, or patronage of the Company, (b) interfere with or attempt to interfere with any officers, employees, representatives, or agents of the Company (other than such persons introduced to the Company by MIL), or (c) induce or attempt to induce any such officer, employee, representative, or agent (other than such persons introduced to the Company by MIL) to leave the employment of the Company or violate the terms of their contracts, or any employment arrangements, with the Company.

13.2 Non-Solicitation by Dimensions

During the Term and for two (2) years after the end of the Term, Dimensions undertakes, and shall procure its Affiliates (excluding the Company) to undertake, that without MIL's prior written consent, it and its Affiliates (excluding the Company) will not in any way, directly or indirectly, for the purpose of conducting or engaging in any business in the Territory or any other country in which the Company shall then be carrying on business (a) take away or interfere or attempt to interfere with any custom,

trade, business, or patronage of the Company, (b) interfere with or attempt to interfere with any officers, employees, representatives, or agents of the Company (other than such persons introduced to the Company by Dimensions), or (c) induce or attempt to induce any such officer, employee, representative, or agent (other than such persons introduced to the Company by Dimensions) to leave the employment of the Company or violate the terms of their contracts, or any employment arrangements, with the Company.

...

ARTICLE XVII EFFECTIVE DATE AND DURATION

17.1 This Contract and any amendment hereto shall become effective on the date thereof and, unless otherwise agreed in writing by the Parties...shall continue in full force and effect until the earlier of:

...

(iii) either Shareholder giving the other no less than 12 months written notice of termination.

17.2 The rights and obligations of each Shareholder shall continue and be enforceable by or against it only while it is a Shareholder save for:

(a) rights and obligations in respect of Article XI, Article XII, Article XIII, and Article 18.2 which shall continue to have effect notwithstanding a Shareholder ceasing to be a Shareholder or termination of this Contract; and

(b) rights and obligations in respect of antecedent breaches of this Contract or the Articles.

....

ARTICLE XXII MISCELLANEOUS PROVISIONS

22.1 Waiver

Failure or delay on the part of any of the Parties to exercise a right, power, or privilege under this Contract shall not operate as a waiver thereof; nor shall any single or partial exercise of such right, power, or privilege preclude any other future exercise thereof.

....

22.3 Binding Effect

This Contract is made for the benefit of the Parties and their respective lawful successors and permitted assignees and is legally binding on them. This Contract may be amended only by agreement in writing executed by the Parties. No course of dealing between or among any Persons having any interest in this Contract shall be deemed effective to amend, change, waive, discharge or terminate any part of this Contract or any right or obligation of any Person under or by reason of this Contract.

....

22.10 Entire Agreement

This Contract and the other Transaction Documents constitute the complete and only agreement among the Parties with respect to the subject matter hereof and replaces all previous oral or written agreements, contracts, understandings, and communications of the Parties in respect of the subject matter hereof. In the case of any discrepancy between this Contract and the AOA, the terms of this Contract shall take precedence and the Parties shall do and perform, and cause to be done and performed, all such further acts, and shall execute and deliver all such other agreements, certificates, instruments and documents, as necessary to give effect to the terms of this Contract, including amending the terms of the AOA to comply with the terms of this Contract so far as possible under any Applicable Law.

APPENDIX TWO

RELEVANT PROVISIONS OF THE SLC

1 DEFINITIONS AND INTERPRETATIONS

....

Claims means all submissions for the cost of pharmaceutical or medicinal products that are processed or otherwise sent to and processed in accordance with the terms of this Contract.

Claims Data means all Data supplied or in respect of which access is granted under this Contract, in relation to Claims.

...

Data means all information, text, drawings, diagrams, images or sounds, which are:

- (a) embodied in any electronic or tangible medium; and
- (b) supplied or in respect of which access is granted to (i) either Services Provider by the JV or (ii) the JV by either Service Provider pursuant to this Contract, in relation to the provision of Services; or
- (c) any output produced by any party in providing the Services.

...

Developed IPR means the Intellectual Property Rights set out in Schedule 10 that were created through the collaboration between the Service Providers.

...

Dimensions Software means the applications and systems with all associated and supporting documentation, including input and output formats, program listings, narrative descriptions, operating instructions, operating procedures, operating methodologies and the tangible media on which those programs and supporting documentation are recorded, software programs (including without limitation all macros, applets and scripts) and project management documentation and operating methodologies

acquired or developed by or on behalf of Dimensions (other than any the JV Software or the JV's Materials) used in the provision of the Dimension Services during the Term, as described or listed in Schedule 9, as varied pursuant to this Contract.

...

Intellectual Property Rights or **IPR** means all intellectual property rights at any time protected by statute or common law anywhere in the world, including:

(a) patents, petty patents, utility models, copyright , design, circuit layouts, trade marks, databases, and confidential information; and

(b) any registration, application or right to apply for legal protection of any of the rights referred to in paragraph (a).

...

JV Assets means all Data, all the JV's Materials and the JV Software and any Hardware, facilities, parts or Materials provided by the JV to the Service Providers in relation to the provision of the Services.

....

JV Software means the applications and systems software programs owned or used by the JV with all associated and supporting documentation, including input and output formats, program listings, narrative descriptions, operating instructions, operating procedures, operating methodologies, and the tangible media on which these programs and supporting documentation are recorded, as described or listed in Schedule 7, as varied pursuant to this Contract.”

...

3 PROVISION OF SERVICES

3.1 From the Effective Date MIL shall supply all MIL Services at all times to the Service Standards and in accordance with the Service Levels and Applicable Law.

3.2 From the Effective Date Dimensions shall supply all Dimensions Services at all time to the Service Standards and in accordance with the Service Levels and Applicable law.

...

7 AUDIT, ACCESS TO INFORMATION, REPORTS AND ACCOUNTS

7.2 Each Service Provider and the JV may use, reproduce, or adapt Claims Data solely for the purpose of providing the Services on the terms of this Contract and its agents, employees, and contractors shall maintain the confidentiality of this information to the extent required by Applicable Law.

7.3 Without limiting the generality of Clause 7.2, and subject to the restrictions set forth therein:

7.3.1 Claims Data or other Data or information provided to the Service Providers directly by the JV and Claim Data provided directly to the JV directly by the Service Providers shall be the property of the JV. Any Data (other than Claim Data) provided by the Service Providers to the JV shall remain the property of the relevant Service Provider.

....

9 CONFIDENTIALITY

9.1 The term "**Confidential Information**" means information of a confidential or proprietary nature relating to the subject matter described in this Contract which is taken from or disclosed by one party (the **Disclosing Party**) by or to the other party or parties (the **Receiving Party**). Confidential Information includes, but is not limited to, matters of a technical nature such as trade secrets, methods, compositions, data and know-how, designs, systems, processes, computer programs, files and documentation, similar items or research projects, and any information derived therefrom; matters of a business nature, such as the terms of this Contract (including, without limitation, any pricing terms and contract terms), marketing, sales, strategies, proposals, as well as any other information that is designated in writing by any party as confidential.

9.2 The Receiving Party agrees to hold the Disclosing Party's Confidential Information in strict confidence and to take reasonable precautions to protect such Confidential Information (including, without limitation, marking such information as confidential and proprietary and using all precautions Receiving Party employs with respect to its own Confidential Information). The Receiving Party further agrees not to disclose any Confidential Information to any third party, not to use, analyze, transcribe, transmit, decompile, disassemble or reverse engineer any Confidential Information unless required in the performance of the Receiving Party's duties under this Contract, not to use any Confidential Information for its own or any third party's benefit unless authorized by this Contract or by the disclosing Party in writing, and not to alter or remove any legend, marking or notice provided by the Disclosing Party on its Confidential Information regarding the confidential and proprietary nature of such information. The confidentiality obligations of this Clause 9.2 shall not apply to information which, as evidenced in writing:

- 9.2.1 is or becomes publicly known by Receiving Party through no breach of this Contract
- 9.2.2 is learned by the Receiving Party from a third party entitled to disclose it; or
- 9.2.3 is rightfully obtained by the Receiving Party prior to this Contract;

9.3 The confidential obligations contained in Clause 9.2 shall expire three (3) years after the termination of this Contract for any reason. Receiving Party may make disclosures required by Applicable Law or court order provided Receiving Party has given the Disclosing Party immediate written notice of the request so that the Disclosing Party can object or otherwise intervene and provided that the Receiving Party uses diligent, reasonable efforts to limit disclosure and to obtain confidential treatment or a protective order.

9.4 Receiving Party acknowledges that it shall not acquire any rights or title to any Confidential Information merely by virtue of its use or access to such Confidential Information hereunder. Neither the execution of this Contract nor the furnishing of any Confidential Information hereunder shall be construed as granting the Receiving Party, either expressly, by implication, or otherwise, any license under any invention or patent now or hereafter owned by or controlled by the Disclosing Party. None of the information that may be submitted or exchanged by the parties shall constitute any representation, warranty, assurance, guarantee, for inducement by a party to the other with respect to the infringement of patents, copyrights, trademarks, trade secrets, or any other rights of third persons.

9.5 Each party agrees that any disclosure or use of Confidential Information in violation of this Clause 9 would cause immediate and irreparable injury or loss that may not be adequately compensated by monetary damages. Therefore each party shall be entitled to injunctive relief and specific performance in addition to all other remedies available at Applicable Law or in equity for any breach or threatened breach of this Clause 9.

10 INTELLECTUAL PROPERTY RIGHTS AND SOFTWARE LICENSES

10.1 This Contract does not assign any IPR and no party may asset ownership of another party's IPR.

10.2 The JV hereby grants to the Service Providers a licence for the Term to use the Data and the JV Assets solely for the purpose of providing the Services on the terms of this Contract.

10.3 For the avoidance of doubt, the Service Providers acquire no right, title or interest in or to any Data or the JV Assets and the Service Providers may use the same only under the licence granted under Clause 10.2 and as otherwise expressly provided for in this Contract.

10.4 MIL grants to the JV a non-exclusive, royalty-free licence to use the MIL Software in accordance with the license terms and conditions attached hereto and incorporated into the Contract by this reference as Schedule 3. In the event of any conflict between this Contract and Schedule 3, this Contract shall take precedence to the event of any such conflict.

10.5 Dimensions grants to the JV a non-exclusive, royalty-free licence to use the Dimensions Software in accordance with the license terms and conditions attached hereto and incorporated into the Contract by this reference as Schedule 4. in the event of any conflict between this Contract and Schedule 4, this Contract shall take precedence to the extent of any such conflict.

10.6 JV acknowledges that each respective Service Provider owns, licenses or otherwise holds the rights to its own Software, and that the MIL Software is the exclusive and sole property of MIL and the Dimensions Software is the exclusive and sole property of Dimensions. JV further acknowledges that each Service Provider owns, licenses, or otherwise holds all rights to its programs, reports, formularies, and other services provided by it to JV under this Contract. JV disclaims any rights to the Software as described above (including access to any applicable source codes), any resultant reports, procedures or forms developed by the Service Providers, any development or modification of the Software as a result of any customization performed by any party, as well as any program, report, formulary or service provided hereunder, all of which shall be the property of the respective Service Provider and are protected by copyright which shall be owned by the respective Service Provider. In the event of any breach or threatened breach of this Cause 10.6, the respective Service Provider shall be entitled to injunctive relief, enjoining or restraining such breach or threatened breach. The parties acknowledge that the respective Service Provide will suffer irreparable injury if such conduct is not prohibited.

11 EXCLUSIVE LICENSE OF INTELLECTUAL PROPERTY RIGHTS IN THE DEVELOPED IPR

11.1 Since signing the letter of agreement on 19 May 2011, the Service Providers have been either independently or mutually developing the developed IPR with the intention that the Intellectual Property Rights in the Developed IPR would be exclusively licensed to the JV once established.

11.2 Dimensions owns and grants to the JV during the Term an exclusive, royalty-free, irrevocable licence to use the Developed IPR for the Business in accordance with the license terms and conditions attached hereto and incorporated into the Contract by this reference as Schedule 4. In the event of any conflict between this Contract and Schedule 1, this Contract shall take precedence to the extent of any such conflict.

11.3 The licence granted in Clause 11.2 shall include the right for the JV to grant sub-licences of the Developed IPR (or any part of it) to any end-customer on the same or more restrictive terms set out in this Contract.

....

19 REMEDIES AND WAIVERS

19.1 If a party breaches a term of this Contract, the rights of the other parties arising from that breach cannot be waived except:

- (a) with the express written consent of (i) the JV of the party in breach is one of the Service Providers or (ii) the Service Provider(s) affected by the breach if the party in breach is the JV; and
- (b) to the extent set out in that consent.

19.2 Waiver of one breach does not waive or imply waiver of any further or other breach.

19.3 This Clause applies if a party becomes entitled to exercise any right or remedy under the Contract or by law or regulation. No failure to exercise, no delay in exercise and no single or partial exercise of that right or remedy shall:

- (a) adversely affect that right or remedy;
- (b) waive it; or
- (c) prevent any further exercise of it or of any other right or remedy,

except to the extent the parties have expressly agreed otherwise in writing.

....

SCHEDULE 1- MIL SERVICES

MIL shall provide the following:

...

(6) Exclusively in the Territory promote the JV's Pharmacy Benefit Management System with potential clients, payers, pharmacies and government agencies;

...

SCHEDULE 2- DIMENSIONS SERVICES

Dimensions shall provide the following:

(1) license the PBMLink and eRXlink to manage payer contract plans sending and receiving prescription claims through web service calls to the JV's Pharmacy Benefit system whereby the solutions shall be provided to the following:

- (a) pharmacies;
- (b) physician and/or medical facilities; and
- (c) payers.

....

(7) manage relationships with pharmacies and payers through disciplined project management;

(8) exclusively in the Territory promote the JV's Pharmacy Benefit Management System with potential clients, payers, pharmacies and government agencies;

....

SCHEDULE 3- MIL LICENSE TERMS AND CONDITIONS

2. License Grant

MIL hereby grants to the JV a limited, non-exclusive, non-transferable, royalty-free license to use those Products listed in Attachment 1, for the purposes of supporting the JV's Business, solely in accordance with the terms of this Contract... the JV may use the Products strictly in connection with the JV's Business.

....

Attachment 1

The following MIL proprietary products and services are licensed for use by the JV under this Contract

MedAccess®

MedOptimiz®

Adjudication Platform

Clinical and Disease Edits.

**IN THE MATTER OF THE ARBITRATION UNDER THE RULES OF THE DIFC-
LCIA ARBITRATION CENTRE**

DIFC-LCIA ARBITRATION NO. DL18141

BETWEEN:

- (1) MEDIMPACT INTERNATIONAL LLC**
- (2) MEDIMPACT INTERNATIONAL HK LIMITED**

Claimants

- and -

- (1) DIMENSIONS HEALTHCARE LLC**
- (2) MEDIMPACT ARABIA LIMITED**

Respondents

FINAL AWARD

DATED 24 JULY 2019

THE ARBITRAL TRIBUNAL:

CHRISTOPHER STYLE QC

CS

INDEX

A. INTRODUCTION 1

B. PROCEDURAL BACKGROUND.....1

C. THE MERITS4

 (1) The issues for decision4

 (2) Damages5

 (3) Interest16

 (4) Injunctive relief..... 17

 (5) Costs 21

D. AWARD.....33

APPENDIX..... Final Injunction

CS

A. INTRODUCTION

1. This Award is supplemental to the Partial Final Award on Liability dated 16 April 2019 (the “**Partial Award**”),¹ the contents of which are incorporated into this Award.
2. This Award determines the remaining issues in this arbitration, namely the relief to which the Parties are entitled.

B. PROCEDURAL BACKGROUND

3. As stated in paragraph 62 of the Partial Award, the Parties agreed to bifurcate liability and quantum.
4. The Tribunal made its Partial Award on 16 April 2019. Paragraph 203 of the Partial Award provided as follows:

“After consideration of all of the factual and legal submissions which have been presented to me and for the reasons set out in full above, I the Tribunal hereby award, declare and adjudge as follows:

(1) I declare that Dimensions has acted in breach of Articles 4, 12 and 13 of the JVA and paragraphs 7 and 8 of Schedule 2 of the SLC by selling or offering for sale AIMS, CDS and ICM.

(2) I further declare that Dimensions has acted in breach of Articles 10 and 11 of the JVA and Articles 9 and 10 of the SLC by using Confidential Information, including the Trade Secrets, as both terms are defined above, in the development of AIMS and ICM.

(3) I order Dimensions to pay the Claimants damages to be assessed.

(4) I dismiss the counterclaim by Dimensions.

(5) I reserve jurisdiction in respect of all other requests and claims.”

¹ L/13.

5. On the same date the Tribunal also made Procedural Order No. 10,² which provided as follows:

- "5. *Dimensions shall and shall procure that any Affiliate (as defined in the JVA) shall immediately cease and desist from selling, offering for sale, using, disclosing or transferring, whether directly or indirectly, in whole or in part, AIMS, CDS and ICM and any products, howsoever named or branded, containing or using the same or substantially similar functionality.*
6. *Dimensions is prohibited, whether directly or indirectly, including through any Affiliate (as defined in the JVA) from selling, offering for sale, using, disclosing or transferring, in whole or in part, save as required for the time being for the continuing operation of MIA, the Trade Secrets and the Confidential Information.*
7. *The above prohibition shall include the front-end user interfaces, including the Transaction, Rule Engine, Administration, and Data Dictionary modules, all subparts under each module, file loads, benefit templates, data structures using said file loads, and back-end source code of these products (including all versions, iterations, and/or customizations to the code) and includes any modules, file loads, benefit templates and data structures by any other name in the First Respondent's systems.*
8. *Dimensions shall maintain confidentiality over the Trade Secrets and Confidential Information and immediately procure to the best of its ability that its Affiliates (as defined in the JVA) deliver up to the Claimants, all files or documents (in whatever form) containing any of the Trade Secrets or Confidential Information."*

9. Thereafter, at the Tribunal's request, the Parties conferred with a view to agreeing procedural directions.
10. On 29 April 2019 the Claimants applied to the Tribunal for permission to adduce expert evidence from Patrick Kilbourne of Berkeley Research Group LLC ("BRG") and further evidence of fact. On 30 April 2019 the Tribunal refused permission on the ground that the application was made too late.

² L/14.

11. On 30 April 2019, the Tribunal also gave directions for the hearing of the remaining issues in this arbitration on 14 and 15 May 2019 (the “**Quantum Hearing**”). In accordance with those directions:
- (1) On 30 April 2019, the Claimants served a fourth report by Mr Cottle.³
 - (2) On 9 May 2019, the First Respondent served a third report of Mr Gerardi.⁴
 - (3) On 12 May 2019, the Parties exchanged pre-hearing written submissions.⁵
12. The Claimants made a further application on 29 April 2019. It contended that the First Respondent had in certain respects failed to comply with the Partial Award and Procedural Order No. 10. It sought directions for immediate compliance. On the same date the First Respondent replied rejecting the Claimants’ contentions. It submitted that where possible it had complied with the Partial Award and Procedural Order No.10 immediately; in other respects it was in the course of complying. On 30 April 2019, the Tribunal directed that it would hear the Parties on this subject at the Quantum Hearing.
13. On 2 May 2019, the Claimants applied again for immediate directions concerning the application of Procedural Order No. 10 to existing contracts with the customers of the First Respondent, its Affiliates and the maintenance of confidentiality over the Trade Secrets and Confidential Information. The First Respondent made submissions in response on 6 May 2019. On 7 May 2019, the Tribunal replied that it was unrealistic to deal with this further application before the Quantum Hearing.
14. The Quantum Hearing took place at the IDRC in London on 14 and 15 May 2019, at which the Parties made oral submissions. They agreed that they did not wish to cross-examine Mr Cottle and Mr Gerardi. However the Tribunal put certain questions to

³ I/91 (“Cottle Four”).

⁴ I/97 (“Gerardi Three”).

⁵ The “Quantum Submissions”, P2/51 and 54.

each and counsel then asked some follow-up questions.⁶ At the conclusion of the Quantum Hearing, the Tribunal gave directions for submissions on costs.

15. In accordance with those directions, on 31 May 2019, the Claimants submitted their claim for costs. The First Respondent responded by submissions dated 12 June 2019. The Claimants made reply submissions on 17 June 2019.
16. After the Quantum Hearing the Parties sought to agree arrangements for the delivery up and destruction of files and documents containing Trade Secrets and Confidential Information. No agreement proved possible and on 12 July 2019 both sides made submissions as to the arrangements to be provided for in a Protocol.
17. On 16 July 2019 the Tribunal declared the record closed.

C. THE MERITS

(1) The issues for decision

18. The issues for decision are as follows:
 - (1) The quantum of damages recoverable by the Claimants.
 - (2) The Claimants' claim to interest.
 - (3) The form of injunctive relief.
 - (4) Arbitration Costs and Legal Costs.
19. The Parties have advanced a number of arguments in their statements and submissions in this arbitration. They have also referred to extensive evidence and authorities in support. In the interests of clarity and brevity, this Award does not refer to all of these arguments, all this evidence and all of these authorities. However, they have all been taken into account in the course of preparing this Award.

⁶ The transcript for the Quantum Hearing is referred to in what follows as T7 and T8.

(2) Damages

20. The reports prepared by the Quantum Experts before the Evidentiary Hearing considered a number of issues which fell away in the light of the conclusions reached in the Partial Award. The issues which remain for decision were addressed in Cottle Four and Gerardi Three.⁷
21. They considered liability in respect of two categories of claim. The first arises out of the Tribunal's findings in the Partial Award that Dimensions marketed AIMS, ICM and CDS in breach of various provisions of the JVA and the SLC. This is discussed in the Partial Award under the heading "Competition". Mr Cottle calls this the "JV Breaches Claim" and Mr Gerardi the "Competition Breach of Contract". The second arises out of the Tribunal's finding that the development and sale of AIMS and ICM involved a breach of various provisions of the JVA which restrict the use of Confidential Information and Trade Secrets. This is called the "Contractual IP Claim" in the Partial Award. Mr Cottle calls it the "IP Claim" and Mr Gerardi the "Intellectual Property Breach of Contract."
22. The Quantum Experts consider two measures of damages. The first is said to be gain-based or a disgorgement basis, that is, an account of the profits earned by Dimensions. The second is compensatory, that is the profits lost by MedImpact.

The Claimants' case

23. In its Quantum Submissions, MedImpact seeks damages in the amount calculated in Cottle Four in respect of the JV Breaches Claim.⁸ This calculation is, it says, of an extremely conservative nature.⁹

⁷ I/91 and 97.

⁸ MedImpact's Quantum Submissions at para 2.12, P2/51. Although the Claimants contend that lost profits should be calculated to 2024 rather than 2022.

⁹ MedImpact's Quantum Submissions at para 2.25, P2/51.

24. Mr Cottle assesses MedImpact’s claim to damages under three headings:¹⁰

- [REDACTED]
- [REDACTED]
- [REDACTED]

25. Mr Cottle calculates quantum as follows:¹¹

	Amount (AED)	Amount (USD)
JV Breaches Claim		
Dimensions’ Account of Profits: AIMS, ICM and CDS (100 % of revenues)	[REDACTED]	[REDACTED]
MedImpact’s Loss of Profits	[REDACTED]	[REDACTED]
Total under JV Breaches Claim	[REDACTED]	[REDACTED]
IP Claim		
Dimensions’ Account of Profits: AIMS and ICM (100% of revenues)	[REDACTED]	[REDACTED]

26. [REDACTED]

¹⁰ I3/91/7.

¹¹ Amounts in this Award are, where appropriate, rounded to the nearest whole unit of currency.

27. Mr Cottle's approach may be summarized as follows:

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

[Redacted]

[Redacted]

The First Respondent's case

28. Dimensions advances a number of contentions in its Quantum Submissions:

[Redacted]

[Redacted]

[Redacted]

[Redacted]

¹² Dimensions' Quantum Submissions at paras 5 to 14, P2/54.

¹³ Dimensions' Quantum Submissions at para 15, P2/54.

¹⁴ Dimensions' Quantum Submissions at para 16, P2/54.

¹⁵ Dimensions' Quantum Submissions at paras 17 and 18, P2/54.

Dimensions invites the Tribunal to adopt the approach taken by Mr Gerardi.¹⁶

[Redacted]

(2) [Redacted]

30. Mr Gerardi assesses damages arising from the Competition Breach as follows:

Quantum for Dimensions' Competition Breach of Contract

	In AED	In USD
Accounting of Dimensions' profits (2015 – 2023):		
-Based on direct margin	[Redacted]	[Redacted]
-Based on adjusted operating margin basis	[Redacted]	[Redacted]
MedImpact's lost profits (2015 – 2023)	[Redacted]	[Redacted]

31. [Redacted]

¹⁶ I3/97.

32. Mr Gerardi assesses damages as follows:

Quantum for Dimensions' Intellectual Property Breach of Contract

	In AED	In USD
Accounting of Dimensions' Profits (2015 – 2023):		
- Based on Direct Margin	[REDACTED]	[REDACTED]
- Based on Adjusted Operating Margin	[REDACTED]	[REDACTED]

33. [REDACTED]

34. Mr Gerardi's approach is as follows:

[REDACTED]

[REDACTED]

■

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

35. In the course of the Quantum Hearing, MedImpact’s case “evolved”. It contended that damages should be calculated based on the profits Dimensions earned on its sales of AIMS, ICM and CDS between 2015 and 2023.¹⁸ It accepted, for this purpose, the revenue figures produced by Mr Gerardi in respect of the competition breach of

¹⁷ T3/33.

¹⁸ T7/102.

contract.¹⁹ In addition it claimed its loss of profits in respect of retained clients.²⁰ Argument at the Quantum Hearing proceeded on that basis.²¹

36. The Quantum Experts express their calculations in both AED and USD. The Parties had no preference as to the currency in which the Tribunal should make its Award.²² Article 15.3(c) of the JVA provides that the bookkeeping base currency of MIA is USD.²³ The Tribunal therefore makes its award in damages in USD.

Discussion

37. Dimensions' challenge to Mr Cottle's hybrid approach was based on a decision of the English Court of Appeal in 2011.²⁴ This cited an earlier decision of the House of Lords²⁵ which contains this passage:

"The law frequently affords an injured person more than one remedy for the wrong he has suffered. Sometimes the two remedies are alternative and inconsistent. The classic example, indeed, is (1) an account of the profits made by a defendant in breach of his fiduciary obligations and (2) damages for the loss suffered by the plaintiff by reason of the same breach. The former is measured by the wrongdoer's gain, the latter by the injured party's loss... Faced with alternative and inconsistent remedies a plaintiff must choose, or elect, between them. He cannot have both."

¹⁹ I/2/98.

²⁰ Mr Cottle calculated the lost revenues at [REDACTED] Gerardi Three at para 36, I2/97/9.

²¹ Mr Cottle produced two amended calculations of MedImpact's claim on the second day of the Quantum Hearing. The second, [REDACTED]

²² T7/36 and 98.

²³ A/11/18.

²⁴ Ramzan v Brookwide Ltd [2011] 2 P&CR 22.

²⁵ Tang Man Sit v Capacious Investments Ltd [1996] AC 514.

38. On this basis, the Court of Appeal had held as follows:²⁶

“The principle is that damages must be awarded on a consistent basis. Once the claimant has elected to receive compensatory damages for a particular wrong, he may not also claim an account of profits or vice-versa. If however there are for instance separate wrongs, the claimant may be able to make a different election for each wrong.”

39. MedImpact did not challenge this authority.

40. It will be apparent from the preceding narrative that MedImpact’s case on quantum was in a state of flux to the end. In response to Dimensions’ submission that it was required to elect, Dimensions contended that its claim based on an account of the profits earned by Dimensions was in respect of the IP Claim. The JV Breaches Claim was a different legal wrong. It was, it said, therefore free to claim on the basis of the profits lost by MedImpact for retained clients in respect of the JV Breaches Claim. However it accepted that Mr Cottle’s “Summary of total loss” was prepared on the basis of Mr Gerardi’s revenue figures for the competition claim. It submitted that as a matter of justice that did not exclude the loss of profits claim in respect of retained clients, since there was no double-counting.²⁷ MedImpact submitted that, if its claim in lost profits also precluded a claim based on disgorgement, it would abandon the former in favour of the latter.²⁸

41. In support of its argument that the Tribunal should have regard to the justice of the position, MedImpact submitted that the Tribunal should reflect the approach of the Trade Secret Regulations.²⁹ Damages should “include any lost profits, which the trade secret holder has suffered, and any unfair profits made by the infringer.”³⁰ The Tribunal rejects that submission. There is no claim in this arbitration under those Regulations.

²⁶ Ramzan at para 63.

²⁷ T8/60.

²⁸ T8/67.

²⁹ T8/1.

³⁰ P/52/12.

42. The Tribunal also rejects the submission that the claim to an account of the profits earned by Dimensions can be said to be brought in respect of the IP Claim. Mr Cottle's calculations, which are based on Mr Gerardi's figures, relate to the competition claim.³¹ MedImpact must be held to its election to claim in respect of the competition claim on the basis of an account of the profits earned by Dimensions. It follows that MedImpact cannot also claim on the basis of lost profits in respect of retained clients (or for that matter new clients). The Tribunal sees no injustice in requiring a claimant to elect for either gain-based or compensatory damages. Here MedImpact has no doubt chosen the course which it believes will maximize its recovery. There is therefore no separate claim in respect of the IP Claim.

43. [REDACTED]

44. The differences between the two experts will be considered under the following headings:

- (1) the appropriate profit margin;
- (2) the discount factor; and
- (3) interest.

45. [REDACTED]

³¹ They include sales of CDS.

³² Cottle Two at para 2.21: 1/73/13.

[REDACTED]

46. The Tribunal heard oral evidence from both Mr Cottle and Mr Gerardi. The Tribunal accepts that both experts were doing their best to assist the Tribunal. The calculation of a profit margin inevitably involves a degree of judgment and it was clear that neither expert had available to him accounting records which enabled him to calculate with precision the incremental costs which were linked to turnover.³⁵ Mr Gerardi had however had the advantage of detailed discussions with management within Dimensions. Generally the Tribunal found that his assessment was better informed and prefers his calculation of direct margin to that of Mr Cottle.

47. The Tribunal also considers that it is in principle relevant to take account of the indirect costs which were attributable to the products in question, so as to arrive at an adjusted operating margin. [REDACTED]

[REDACTED]

48. [REDACTED]

³³ Gerardi One at para 102: I/31/22.

³⁴ Gurry on Breach of Confidence at para 20.15: P/54.

³⁵ Dimensions did not allocate costs to individual sales or contracts.

³⁶ This was accepted in principle by Mr Cottle, but overall he thought the scope for savings was limited. He had adopted a broad brush approach. In some respects he had probably over-egged it, in others under-egged: T7/129.

³⁷ T7/123. I/38.

³⁸ Gerardi Three at para 63: I2/97/15.

CS

[REDACTED]

49. So far as interest is concerned, Mr Cottle favoured the judgment rate of 9%. Mr Gerardi preferred a borrower's rate of EIBOR plus 2%. The Tribunal favours the latter. It seems inappropriate to take the higher rate before the date of the award.

50. The next question is whether interest should be simple or compound. The Tribunal favours the latter. It better reflects the proposition that Dimensions should not retain the benefit of its own breach of contract.

51. [REDACTED]

(3) Interest

52. The Parties agree that any award of damages would carry simple interest at 9% per annum from the date of this Award to the date of payment.⁴¹

³⁹ T7/147.

⁴⁰ Gerardi One at para 187: I1/31/43; Gerardi Two at para 49: I1/86/11.

⁴¹ T7/37 and 97.

CS

(4) Injunctive relief

53. MedImpact seeks, by way of Final Award, a final injunction to take the place of Procedural Order No. 10.

The submissions of the Parties

54. MedImpact produced a draft on 9 May 2019.⁴² It attached to its Quantum Submissions a further draft.⁴³ This orders Dimensions to cease and desist from any further breach of the restrictions on competition. It prohibits Dimensions from any misuse of the Trade Secrets and Confidential Information. It also prohibits Dimensions from maintaining any contract with its customers for the supply of AIMS and ICM and any other misuse of Trade Secrets and Confidential information. It includes ancillary relief requiring Dimensions to recover the Trade Secrets and Confidential Information from any recipients and deliver up the same to MedImpact.
55. MedImpact also sought permission to apply to the DIFC Court (or any other court of competent jurisdiction) to enforce the injunction and ensure compliance.
56. Dimensions did not challenge MedImpact's entitlement to injunctive relief but its Quantum Submissions advanced a number of objections to the form of the injunction sought by MedImpact:⁴⁴
- (1) The injunction should specify the term, which would vary according to the relevant provision of the JVA and SLC.
 - (2) The injunction relating to misuse of the Trade Secrets and Confidential Information should establish with clarity what Dimensions can and cannot do. Alternatively it should provide that it does not prevent Dimensions from using information which is in the public domain.

⁴² P2/50.

⁴³ P2/51.

⁴⁴ Dimensions' Quantum Submissions at paras 51-81. P2/54.

- (3) Dimensions objects to the order for delivery up, since this would require it to deliver to MedImpact sensitive information belonging to Dimensions and third parties. The best course would be for the materials to be destroyed upon oath.
- (4) Dimensions also objects to the order requiring it to stop maintaining its existing contracts with its customers. That is disproportionate and prejudicial to Dimensions and the third parties who have contracted to use AIMS and ICM. MedImpact should be confined to an award of the profits associated with such contracts.
57. In the course of the Quantum Hearing Dimensions produced its own rival draft of the injunction which it considered to be appropriate.

Discussion

58. In light of the findings in the Partial Award, it is clearly appropriate for the Tribunal to grant permanent relief. In the course of the Quantum Hearing the Parties made submissions on the issues summarized above. The Tribunal has arrived at the following conclusions.
59. The Tribunal considers that perpetual relief is appropriate in respect of AIMS and ICM, which involved misuse of MedImpact's Confidential Information and Trade Secrets. However the sale of CDS was in breach of Article 13 of the JVA and should be time-limited.
60. The Tribunal is persuaded that, in the interests of clarity, the injunction should state that Dimensions is not prevented from developing products using information which is not proprietary to MedImpact. Dimensions also seeks clarification that the injunction does not bite on the products other than AIMS, ICM and CDS which are listed in Annex 1 to the Claimants' CS,⁴⁵ having regard to the Tribunal's rejection of MedImpact's claims in the Partial Award.⁴⁶ The Tribunal considers this to be unnecessary, since the Partial Award speaks for itself; it is also undesirable that the question should be determined solely by the name attached to a product.

⁴⁵ P/2.

⁴⁶ Para 160 at L/13/61.

61. MedImpact complained that Dimensions' contracts with its customers relating to AIMS and ICM involved the misuse of its Confidential Information and Trade Secrets. They should therefore be terminated forthwith. It was, it said, inappropriate and potentially prejudicial for them to continue to have access to and the use of these products. The Tribunal is sympathetic to this approach, but there are a number of difficulties. First, it was not suggested that Dimensions had the right to terminate the contracts forthwith. Second, the customers concerned use the products for purposes of patient care. Immediate termination may be prejudicial to their business and to the interests of patients; in the case of the health authorities it might also be prejudicial to their discharge of their public responsibilities. Third, the Tribunal has very little information which enables it to assess these matters. Fourth, the customers are of course not party to this arbitration and not subject to the jurisdiction of the Tribunal. In the circumstances, the Tribunal considers that it must confine MedImpact to its remedy in damages.
62. In the course of argument, MedImpact indicated that it was considering taking steps to prevent any continued use of the offending products. The Tribunal accepts that this injunction should not ratify the contracts in question or otherwise affect whatever rights MedImpact may have in this respect in the jurisdiction and under the law in question.
63. MedImpact seeks an order for delivery up of the Trade Secrets and Confidential Information so that it can police compliance. However, the Tribunal accepted at the Quantum Hearing that the material in question would contain information which is proprietary to Dimensions and/or its customers. The Tribunal informed the Parties that it proposed instead to make an order for its destruction. Following the Quantum Hearing, the Tribunal informed the Parties of his provisional view that Dimensions should deliver up the offending material to FTI Consulting; FTI would allow BRG to inspect the material in question; and FTI would then destroy it, certifying compliance to MedImpact. The Tribunal asked the Parties to confer with a view to agreeing arrangements. As stated above, no agreement proved possible and on 12 July 2019, the Parties made submissions as to the form of a Protocol dealing with these arrangements. There were three principal issues between the Parties.

64. First, the Parties could not agree on the extent of the oversight role of BRG. MedImpact contends that they need to be involved in assessing the nature of FTI's search and reviewing the complete set of materials returned from that search, but Dimensions objects that this will add to the time and cost of the exercise. The Tribunal accepts the proposal by Dimensions that BRG should have a more limited role. Dimensions has a legitimate interest in keeping the enquiry within reasonable bounds and the Tribunal has no reason to doubt that FTI will discharge the responsibilities provided for in the Protocol.
65. The second issue is whether MedImpact's counsel should have access to FTI's Final Report. Dimensions objects that the exercise is a technical one and there is no need to involve counsel, who should not be allowed to disrupt the exercise. The Tribunal disagrees. The purpose of involving BRG is to ensure proper compliance with the Tribunal's orders. BRG must be free to report back to Dentons & Co ("Dentons") for this purpose and Dentons and BRG must be free to advise MedImpact on the conclusions they reach. Dimensions' interests are adequately protected by a provision that Dentons and BRG can use the Final Report solely for the purpose of advising MedImpact on Dimensions' compliance with Procedural Order No. 10 and this Final Award and not for any ulterior or collateral purpose.
66. The last issue is that, because the Tribunal will be functus, MedImpact wishes to have access to the DIFC Court to police compliance. The Tribunal considers that the language proposed by Dimensions is suitable for this purpose.
67. The Protocol which is annexed to the Final Injunction reflects these conclusions.
68. MedImpact's original draft of the injunction provided for liberty to apply to the DIFC Court. In argument, the Parties debated whether the injunction should provide that it may be varied by a court of competent jurisdiction.⁴⁷ The Tribunal considers that the provision to be included in the Protocol makes it unnecessary to provide any for any wider liberty to apply.

⁴⁷ T8/125, 126, 203, 222.

69. The Tribunal will make an order in terms of the Final Injunction set out in the Appendix to this Award which reflects the conclusions set out above. The Protocol referred to above forms the Annex to the Final Injunction.

(5) Costs

Introduction

70. [REDACTED]

71. It is convenient to set out the relevant contractual provisions.

72. As stated in paragraph 22 of the Partial Award,⁴⁸ clause 20.1(c) of the JVA provides as follows:⁴⁹

“The expenses of the arbitration, including reasonable attorney’s fees, will be paid for by the Party against whom the award of the arbitrator is rendered.”

73. Clause 30.4 of the SLC is in the same terms.⁵⁰

74. Paragraph 14.2 of the Terms of Reference provides as follows:⁵¹

“The fees and expenses of the Sole Arbitrator shall be determined by the DIFC-LCIA in accordance with the DIFC-LCIA Rules.”

⁴⁸ L/10/6.

⁴⁹ A2/11/23.

⁵⁰ A2/12/21.

⁵¹ L/4/13.

75. Article 28 of the DIFC-LCIA Rules, provides so far as relevant as follows:

“28.1 The costs of the arbitration other than the legal or other expenses incurred by the parties themselves (the “Arbitration Costs”) shall be determined by the LCIA Court in accordance with the Schedule of Costs. The parties shall be jointly and severally liable to the DIFC-LCIA Arbitration Centre and the Arbitral tribunal for such Arbitration Costs.

28.2 The Arbitral Tribunal shall specify by an award the amount of the Arbitration Costs determined by the LCIA Court. The Arbitral Tribunal shall decide the proportions in which the parties shall bear such Arbitration Costs (in the absence of a final settlement of the parties’ dispute regarding liability for such costs). If the Arbitral Tribunal has decided that all or any part of the Arbitration Costs shall be borne by a party other than a party which has already covered such costs by way of a payment to the DIFC-LCIA Arbitration Centre under Article 24, the latter party shall have the right to recover the appropriate amount of Arbitration Costs from the former party.

28.3 The Arbitral Tribunal shall also have the power to decide by an award that all or part of the legal or other expenses incurred by a party (the “Legal Costs”) be paid by another party. The Arbitral Tribunal shall decide the amount of such Legal Costs on such reasonable basis as it thinks appropriate. The Arbitral Tribunal shall not be required to apply the rates or procedures for assessing such costs practised by any state court or other legal authority.

28.4 The Arbitral Tribunal shall make its decisions on both Arbitration Costs and Legal Costs on the general principle that costs should reflect the parties’ relative success and failure in the award or arbitration or under different issues, except where it appears to the Arbitral Tribunal that in the circumstances the application of such a general principle would be inappropriate under the Arbitration Agreement or otherwise. The Arbitral Tribunal may also take into account the parties’ conduct in the arbitration, including any co-operation in facilitating the proceedings as to time and cost and any non-co-operation resulting in undue delay and unnecessary expense. Any decision on costs by the Arbitral Tribunal shall be made with reasons in the award containing such decision.

28.5 In the event that the parties have howsoever agreed before their dispute that one or more parties shall pay the whole or any part of the Arbitration Costs or Legal Costs whatever the result of any dispute, arbitration or award, such agreement (in order to be effective) shall be confirmed by the parties in writing after the Commencement Date.”

■ [REDACTED]

[REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

MedImpact's claim for Legal Costs

80. As stated above, MedImpact claims Legal Costs totalling [REDACTED] Its submissions set out a detailed breakdown of this amount, identifying the fee earners

involved, their charging rates and the work done, the time charged and the disbursements incurred on a quarter by quarter basis.

81. MedImpact's primary submission is that the Partial Award was rendered against Dimensions. Therefore Dimensions should in accordance with clause 20.1(c) of the JVA and clause 30.4 of the SLC pay all of MedImpact's costs and expenses in the arbitration.
82. Alternatively, MedImpact advances the following submissions as to the proper application of Article 28.4 of the DIFC-LCIA Rules. First it relies on the findings made by the Tribunal in the Partial Award which are adverse to Dimensions. It submits that the Tribunal should award costs on what is described in English court proceedings as the "indemnity basis". That is, any doubt as to whether costs were reasonably incurred or reasonable in amount should be resolved in MedImpact's favour.
83. It makes specific submissions as to the conduct of Dimensions by reference to each quarter (described as a "Part"):
 - (1) In Part 2, Dimensions acted unreasonably in resisting the expedited formation of the Tribunal and MedImpact's various applications for interim relief.
 - (2) In Part 4, Dimensions resisted disclosure and inspection and then resorted to various tactics to delay the process.
 - (3) Dimensions also pursued a fanciful counterclaim to divert attention from its own wrongdoing.
 - (4) In Part 5, Dimensions' approach to document production was a fishing expedition, which required the collation, on a third-party e-discovery platform, of 1.7 million documents. Dimensions' own document production was small and incomplete.
 - (5) Dimensions also engaged in delaying tactics with an unsuccessful application to bifurcate liability and quantum.

- (6) In Part 6, Dimensions sought to prevent and delay access to the MIA Server Documents. Eventually over 400,000 documents were produced only two weeks before the Evidentiary Hearing.

84. MedImpact submits that its costs are proportionate:

- (1) Having regard to the need to defend the very substantial counterclaim.
- (2) In response to the conduct of Dimensions, which is referred to above.
- (3) Only 46% of the costs incurred by MedImpact are in respect of the profit costs of Dentons. The hourly rates of the fee earners involved compare favourably to those charged by Baker McKenzie Habib Al Mulla. The number of fee earners is large, but justified by the need to deploy teams in both the UAE and the USA and the fact that workstreams like document production, witness statements and quantum were most economically managed in the UK.
- (4) The charges of the experts, Mr Bor and MedImpact's in-house counsel were reasonable.

Dimensions' submissions in response

85. Dimensions contends that MedImpact's costs are wholly disproportionate and unreasonable. It relies on a breakdown of its own costs. These total [REDACTED]. The total is broken down by time and issue.
86. Dimensions rejects MedImpact's submission that it is contractually entitled to the whole of the costs of the arbitration, pursuant to clause 20.1(c) of the JVA and clause 30.4 of the SLC.
87. Dimensions argues that, applying Article 28.4 of the DIFC-LCIA Rules, the Tribunal should award MedImpact no more than 30-35% of its total claim:
- (1) [REDACTED] injunctive relief and an account of profits. In the event, it will recover a small fraction of

the damages it claimed. A claimant which exaggerates its claim should not necessarily be regarded as having succeeded.

(2) MedImpact was unsuccessful on a number of issues. Dimensions highlights (a) the issue concerning the definition of the “Business” and its successful plea of estoppel; (b) the statutory claims, which added nothing except for the unrealistic possibility of claiming damages on an unjust enrichment basis; and (c) the unfair prejudice claim under Cayman law.

(3) MedImpact made a number of applications which were rejected: (a) it applied to DIFC-LCIA for the expedited formation of the Tribunal; (b) it sought interim measures, although Dimensions had volunteered equivalent undertakings; and (c) it sought directions for document production and inspection prior to service of its Statement of Case.

(4) [REDACTED]

(5) MedImpact’s changing case on quantum resulted in an unnecessary increase in costs.

(6) Dimensions resists MedImpact’s claim to indemnity costs on the basis that it has not acted unreasonably. It accepts that it should pay MedImpact’s costs of its counterclaim, but its withdrawal was a pragmatic decision reflecting its difficulty in proving loss and did not involve any recognition that it lacked merit.

88. Dimensions contends that MedImpact’s costs are unreasonable and disproportionate:

(1) [REDACTED]

- (2) [REDACTED]
[REDACTED]
[REDACTED]
- (3) MedImpact's experts charged USD [REDACTED] for Dimensions.
- (4) It objects to the claim in respect of MedImpact's in-house lawyer. She was in effect the client.
- (5) There is, it says, no basis for the claim for USD 120,000 for estimated future costs to ensure compliance with the injunction.

89. Dimensions concludes that MedImpact should not be awarded more than USD 1,500,000.

MedImpact's reply

90. MedImpact joins issue with Dimensions and contends as follows:
- (1) Clause 20.1(c) of the JVA and clause 30.4 of the SLC are clear and binding on the parties. MedImpact is undeniably the successful party. Article 28.5 of the DIFC-LCIA Rules has no application.
- (2) This is not a case in which justifies an issue-by-issue approach. But in any event it disputes Dimensions' claim to have succeeded on the issues in question. First, Dimensions' case on the term "Business" was not accepted. Second, the Statutory IP Claim overlapped with the contractual claim. In any event Ms Bennett spent most of her time on Dimensions' counterclaim. Third, the unfair prejudice claim served an important purpose in securing findings on which MedImpact will rely in proceedings in the Cayman Islands.
- (3) Furthermore, apart from the termination point, MedImpact effectively succeeded on all its interim applications.

- (4) [REDACTED]
[REDACTED]
[REDACTED]
- (5) Dimensions mischaracterises MedImpact’s case on quantum. The process of estimating loss and damage is often an iterative process.
- (6) The findings in the Partial Award justify an award of indemnity costs.
- (7) MedImpact’s costs are reasonable. This was a complex and high value claim. Dimensions’ counterclaim was for [REDACTED]. The difference between its costs and those of Dimensions is easily explained because Dimensions had no credible defence and counterclaim; [REDACTED]
[REDACTED]. Moreover this case is not defined by the damages claims. MedImpact’s successful claim to an injunction alone justifies the efforts it made.

Discussion

91. The Tribunal must first decide on its approach to the quantification of MedImpact’s recoverable Legal Costs. There are three preliminary points.
92. First, as stated above, Dimensions relies on the fact that MedImpact initially advanced an exaggerated quantification of its claim.⁵² While true, this does not alter the fact that MedImpact’s claim has succeeded and Dimensions’ defence⁵³ has failed. The Tribunal’s approach to costs is unaffected. In any event, as MedImpact says, this case was never all about damages. At least as important to MedImpact was the need to deny Dimensions the continued use of its proprietary technology and to protect its business interests in the region. MedImpact has been successful in that respect.
93. Second, the Tribunal rejects MedImpact’s submission that it has a contractual entitlement to all of its costs and expenses pursuant to clause 20.1(c) of the JVA and

⁵² As will be apparent, this is a classic example of the pot calling the kettle black.

⁵³ And counterclaim.

clause 30.4 of the SLC. These provisions do no more than require the Tribunal to adopt a “loser pays” approach and to introduce the concept of reasonableness. They do not operate to exclude the usual process for the assessment of recoverable costs. As Dimensions points out, that would have absurd consequences.⁵⁴

94. Third, the Tribunal also rejects MedImpact’s submission that it should quantify costs on the so-called indemnity basis. That is a domestic concept which does not, of course, apply in this arbitration, as Article 28.4 of the DIFC-LCIA Rules makes clear. The Tribunal accepts that it has made findings against Dimensions of a serious nature. It acted in deliberate breach of the JVA and the SLC and its conduct of this arbitration has been in breach of the DIFC-LCIA Rules and the directions of the Tribunal. On the other hand, as stated above, the JVA and the SLC provide for the recovery of “reasonable” attorney’s fees; and the Tribunal is of the view that the conduct of Dimensions does not justify MedImpact recovering costs which were unreasonably incurred.
95. Turning to the substance, the DIFC-LCIA Rules allow the Tribunal to decide on such reasonable basis as it thinks appropriate. The Tribunal considers that MedImpact should recover all costs which were reasonably incurred.
96. The Legal Costs were always going to be substantial. This case justified a substantial investment. MedImpact was the victim of serious wrongdoing on the part of Dimensions and faced an existential threat to its business in the region. Furthermore MedImpact faced a number of challenges. The factual and legal issues were complex. There were numerous, hotly contested applications. Document production was extensive and time-consuming. The Technical Experts were required to inspect and analyse complex systems. The case also necessitated the deployment of a multi-jurisdictional team, to cover activities in the UAE, the United Kingdom and the United States.
97. On the other hand, the question of what costs were reasonable is to be answered objectively and the test of reasonableness requires a party’s legal spend to be

⁵⁴ Dimensions also invokes Article 28.5 of the DIFC-LCIA Rules, but these clauses do not provide for a party to pay costs “whatever the result”.

proportionate. The Tribunal has found that MedImpact's claim for damages was modest compared to its original amount. The Tribunal was not called upon to make findings on Dimensions' counterclaim, but it proceeds on the assumption that, although large in amount, it was lacking in merit. It may have made business sense in the circumstances for MedImpact to leave no stone unturned in defence of its position, but it does not follow that the costs involved were reasonable costs which Dimensions should be required to pay. The Tribunal considers that the question is what costs were reasonably attributable to the wrongdoing of Dimensions. These may be, and are here, different from the costs which are attributable to MedImpact's choice about how best to advance its interests.⁵⁵

98. As Article 28.4 of the DIFC-LCIA Rules requires, the Tribunal will have regard to the conduct of the Parties in deciding on the costs which were and were not reasonably incurred.
99. In a number of respects, the conduct of Dimensions made MedImpact's task more time consuming and therefore expensive. The factors in play include the pursuit of an unmeritorious counterclaim, the steps Dimensions took to conceal its activities [REDACTED] [REDACTED] In some respects, Dimensions adopted a scatter-gun approach.⁵⁶ Dimensions highlights the fact that MedImpact's counsel charged 44% more time than its counsel. This is to some extent explained by its own conduct. It is understandable that MedImpact considered that it should meet fire with fire.
100. On the other hand, the Tribunal accepts Dimensions' submission that MedImpact's conduct of these proceedings was in certain respects unreasonable and disproportionate:
- (1) There was significant over-engineering.⁵⁷ There were numerous procedural disputes and the approach to the merits was disproportionate. For its part

⁵⁵ Dimensions cites Kazakhstan Kagazy v Zhunus [2015] EWHC 404 at 13.

⁵⁶ These are discussed in detail in the Partial Award.

⁵⁷ On both sides, but this is not to excuse any overshoot on MedImpact's part.

MedImpact adduced thirteen statements from seven witnesses of fact. As is apparent from the Partial Award, the Tribunal did not find all of this evidence helpful or persuasive. It also adduced ten reports from Ms Bates and Mr Cottle. The Tribunal would expect Ms Bates to have spent more time than Mr Gibson. She had to make the case in difficult circumstances. [REDACTED]

(2) The Tribunal considers that MedImpact acted unreasonably in pursuing a number of issues on the merits.⁵⁸ Its opposition to Dimensions' estoppel case concerning the "Business" was unreasonable having regard to its conduct over so many years. The Statutory IP Claims under US and UAE law added nothing, but the requirement to deploy (in particular) US law capability was significant in costs terms.⁵⁹ It was also a mistake to seek unfair prejudice relief under Cayman law. That was always a matter which should have been left to the Cayman courts. The bulk of the time spent by Mourant Ozannes was unnecessary.

101. Dimensions contends that MedImpact should pay the costs of Dimensions in respect of these specific issues, by way of a deduction from the costs that MedImpact would otherwise recover. The Tribunal rejects this submission. Dimensions must bear the risk of this level of response by MedImpact. The appropriate course is a reduction in the amount that MedImpact should recover from Dimensions.

102. [REDACTED]

⁵⁸ The Tribunal does not consider the various procedural applications relied upon by Dimensions to be unreasonable.

⁵⁹ Dimensions responded with counterclaims under US and UAE law, but it is doubtful whether they would have done so, but for MedImpact's reliance on those laws. That is not to suggest that US lawyers could have been dispensed with altogether. They were required in order to manage the inspection by Dimensions of MedImpact's PBM in San Diego.

[REDACTED]

103. In addition, Dimensions makes two specific challenges to MedImpact’s claim:

- (1) MedImpact claims USD 120,000 for ensuring compliance with the collection and destruction of offending material. The Tribunal sees no basis for this claim. It assumes that Dimensions will comply with its obligations.
- (2) Dimensions objects to the claim for the time spent by MedImpact’s in-house counsel. The Tribunal considers her time to be recoverable in principle. The Tribunal sees no reason to doubt that she was deploying her legal skills in the conduct of the case. There is no reason to suppose that she was acting as the client.

104. Against this background the Tribunal has to assess the costs which were reasonably incurred. This is not a matter of scientific analysis. Ultimately the Tribunal has to make a judgment based on its experience of the way the proceedings unfolded.⁶² [REDACTED]

[REDACTED]

⁶⁰ Dimensions relied on Painting v University of Oxford [2005] EWCA Civ 161 at 27.

⁶¹ [REDACTED]

⁶² Although Dimensions’ Schedule of Costs provides a helpful analysis of the percentage of its costs which are attributable to specific heads of claim.

105. This is subject to one adjustment. Pursuant to Procedural Order No. 8 dated 7 November 2018 the Tribunal directed that MedImpact should pay [REDACTED]. MedImpact's claim to costs is therefore reduced by that amount, resulting in an award of USD [REDACTED].
106. As stated above, MedImpact claims interest on its costs from the date of this Award at such rate as the Tribunal thinks fit. The Tribunal has power to award such interest pursuant to Article 26.4 of the DIFC-LCIA Rules and considers that it meets the justice of the case to award interest on Legal Costs and Arbitration Costs at the same rate and on the same basis as its award of interest on damages.

D. AWARD

107. After consideration of all of the factual and legal submissions which have been presented to me and for the reasons set out in full above, I, the Tribunal, hereby award, declare and adjudge as follows:
- (1) I order that the Final Injunction in the Appendix has effect.
 - (2) I order the First Respondent to pay the Claimants [REDACTED] by way of damages.
 - (3) I order the First Respondent to pay the Claimants [REDACTED] by way of Legal Costs and [REDACTED] by way of Arbitration Costs.
 - (4) I order the First Respondent to pay the Claimants simple interest on the total amount due under this Award at 9% per annum from the date of this Award until payment.
 - (5) I dismiss all other requests and claims.

**The seat of this arbitration is Dubai International Financial Centre, Dubai,
United Arab Emirates. This award is made on 24 July 2019.**



CHRISTOPHER STYLE QC

Sole Arbitrator

APPENDIXFINAL INJUNCTIONDefinitions

- 1 In this injunction, Confidential Information is defined as the technology and intellectual property rights, confidential or proprietary information and trade secrets referred to in Articles 10.1 and 11.1 of the JVA and Articles 9 and 10 of the SLC.
- 2 In this injunction, Trade Secrets is defined as:

No	Trade Secret	Description
1	Implementation Questionnaires	Documents that identify all of the information that must be collected from clients on the front end to build out the PBM services including all options and decisions that must be made by (or with) the client in order to structure the benefit design and coverage rules and ultimately drive the adjudication logic and process, as identified in MedImpact's implementation questionnaires.
2	Benefit Templates	Documents that outline and define features and options of the pharmacy benefit plan and provide granular details on the standard benefit designs, clinical and utilization management protocols on an element-by-element basis, including descriptions of each element and decisions for the client to make with regard to benefits, as identified in MedImpact's standard benefits template.
3	File type formats	Detailed listing and structure of data elements/fields as identified in the file type formats/layouts for group, member, accumulator, drug and drug pricing.
4	MedAccess	The user interface modules within the MedAccess tool that provides specific processes and information in the PBM.
5	POS system adjudication logic	Specific adjudication logic used to perform real-time drug claim adjudication, including how the system uses the information from 1-3 above to adjudicate claims and as identified throughout 4.

Orders

- 3 Dimensions shall immediately inform IQVIA, Inc., IQVIA Holdings Inc. and IQVIA AG, and all subsidiaries of Dimensions of the orders contained in this injunction.
- 4 Dimensions shall, and shall procure that any Affiliate (as defined in the JVA), immediately cease and desist from selling, offering for sale, using, disclosing or transferring, whether directly or indirectly, in whole or in part, AIMS and ICM and any products, howsoever named or branded, containing or using the same or substantially similar functionality.
- 5 Dimensions shall, and shall procure that any Affiliate (as defined in the JVA), immediately cease and desist from selling, offering for sale, using, disclosing or transferring, whether directly or indirectly, in whole or in part, CDS and any products, howsoever named or branded, containing or using the same or substantially similar functionality until whichever is the later of a) the termination date of the SLC or b) 25 July 2020,
- 6 Subject to paragraphs 8 and 9 and 10 below, Dimensions is prohibited, whether directly or indirectly, including through any Affiliate (as defined in the JVA) from selling, offering for sale, using, disclosing or transferring, in whole or in part, the Trade Secrets and the Confidential Information.
- 7 The above prohibition shall include the front-end user interfaces, including the Transaction, Rule Engine, Administration, and Data Dictionary modules, all subparts under each module, file loads, benefit templates, data structures using said file loads, and back-end source code of these products (including all versions, iterations, and/or customizations to the code) and includes any modules, file loads, benefit templates and data structures by any other name in Dimensions' systems, which use in whole or in part the Trade Secrets and/or Confidential Information.
- 8 The making of this injunction shall not prevent Dimensions from performing the contracts it had entered into with its customers at the date of the Partial Award, but MedImpact is at liberty to take all legal action open to it with respect to the said contracts and this injunction shall be without prejudice to any such action.

- 9 For the avoidance of doubt, the orders at paragraphs 4, 5 and 6 above shall not prevent Dimensions (whether directly, indirectly, including through any Affiliate) developing any product or service using publicly available or independently developed third-party information, including a) information collected from clients or prospective clients b) benefits c) file formats and data elements/fields d) user interfaces and/or e) adjudication logic.
- 10 Notwithstanding paragraphs 6 and 7 above, Dimensions may continue to use the Trade Secrets and Confidential Information only for the purposes of MIA's business while remaining a shareholder of, and active participant in, MIA, provided that it maintains confidentiality over the Trade Secrets and Confidential Information (including, as soon as reasonably practicable, by segregating the Trade Secrets and Confidential Information, limiting employee access to the Trade Secrets and Confidential Information as far as possible and ensuring that those with access provide legally enforceable confidentiality undertakings), and only to the extent reasonably required to carry out such business as determined by the Claimants in their absolute discretion.
- 11 Subject to paragraph 10 above, Dimensions shall and shall procure that its Affiliates (as defined in the JVA) as soon as reasonably practicable:
- (a) deliver up to FTI Consulting for destruction all files or documents (in whatever form) containing any of the Trade Secrets or Confidential Information coming into Dimensions' possession, custody or control; and
 - (b) until such delivery up has been made, maintain confidentiality over the Trade Secrets and Confidential Information.
- 12 The Parties shall, and shall instruct FTI Consulting and Berkeley Research Group to, act in accordance with the Protocol annexed hereto, so as to secure the delivery up of such files and documents and their destruction.

ANNEX
THE PROTOCOL

INTRODUCTION

1. FTI Consulting ("**FTI**") have been engaged by Dimensions to conduct a search, collation and destruction exercise pursuant to the issuance of Procedural Order No. 10 dated 16 April 2019 ("**PO10**" or "**Interim Injunction**").
2. The purpose of the exercise is to:
 - a) gather and collate all files and documents (in whatever form) potentially containing any of the Trade Secrets or Confidential Information or information deriving from any of the Trade Secrets or Confidential Information, as defined in the Interim Injunction and any final injunction to be issued in the Final Award (the "**Final Injunction**") as ordered by the Tribunal (the "**Trade Secrets and Confidential Information**");
 - b) review the collated files and documents (in whatever form) to determine if they contain or derive from any of the Trade Secrets or Confidential Information; and
 - c) As set out in this Protocol (paragraph 18), after providing Berkeley Research Group ("**BRG**") with a right of inspection (as set out herein) of the collated files and documents (in whatever form) that FTI have determined contain or derive from any of the Trade Secrets or Confidential Information, FTI will forensically erase the aforementioned files and documents (in whatever form) in accordance with the Interim Injunction and the Final Injunction.
3. All parties will act at all times in compliance with the terms of the Interim Injunction and Final Injunction. Subject to the above, the parties agree and acknowledge that FTI is the party responsible for this exercise and will have the final say on all matters under this Protocol.
4. As set out herein, specially paragraph 20 of this Protocol, BRG will be permitted to inspect and review the files and documents (in whatever form) containing any of the Trade Secrets or Confidential Information collated by FTI to be deleted pursuant to the Interim Injunction and Final Injunction. BRG's fees and expenses are the sole responsibility of the Claimants.

SCOPE

5. FTI will determine during the week commencing 14 July 2019 which components or individuals should be captured in the project scope. Scoping will cover the following:
- a) **Identification of all relevant employees (custodians)** – i.e. those that have been exposed to clients/software information:
 - i. BRG will be provided with the list of Dimensions' employees/directors identified as custodians before searches are performed. FTI will accept, where it deems it appropriate, suggestions from BRG upon receipt of reasonable justification. A simple list of employee names will not suffice. FTI will conduct interviews with such employees/directors, and undertake a search of their documents, emails and any devices used for Dimensions/MIA work.
 - ii. Identification of the in-scope devices for the selected custodians is based on asset tracking information supplied by Dimensions on 12 June 2019. This may be expanded based on follow-up custodial interviews. The consolidated asset tracking information (with respect to the assets belonging to the in-scope employees/directors) supplied by Dimension will be contained within the FTI Final Report (defined below).
 - iii. Scoping is limited to any company issued devices in Dimensions' possession and control and all document and materials (in whatever form) obtained from Dimensions' Affiliates.
 - iv. Review of Dimensions' IT user off-boarding procedures to understand how assets of previous employees were managed e.g. formatted and reissued to other users. The intent of this exercise is to determine if data is appropriately wiped and not easily recoverable by Dimensions e.g. user folders that still exist or data that can be found in the recycle bin. This may include a limited sample forensic analysis of an "off-boarded" device to validate the process. Any easily recoverable data will be recovered within reason if FTI determines it may contain Trade Secrets or Confidential Information. Any documents not easily recoverable will be forensically erased from all Dimensions' devices.
 - v. Identification of all in-scope servers, relative databases, scripts and network file shares. This will be based on information supplied by Dimensions and custodial interviews, which will be set out in FTI's Final Report.
 - vi. **Backup procedures and retention policies.** Backup material to be held in escrow by an independent third party. Note, assessing back-up procedures and retention policies is purely for scoping. FTI's agreed work-plan does not cover the analysis, review and remediation of backups. This will be set out in FTI's Final Report.

- vii. **Dimensions' various e-mail environments and how this configuration has changed over time.** Recent migration from Google Mail to Microsoft Exchange to Office 365.
- a) Look to understand current archiving and journaling mechanisms and their associated policies, should they exist.
 - b) Backup procedures and retention policies. Note, assessing the backups is purely for scoping. FTI's agreed work-plan does not cover the analysis, review and remediation of backups.
6. Through the course of FTI's engagement, FTI may uncover additional documents/individuals/assets/servers/databases/network file shares of interest and therefore any findings shared during the course of the engagement will be preliminary, until a final report has been issued (the "**Final Report**").

COLLECTION AND PRESERVATION OF ELECTRONIC REPOSITORIES

7. **Imaging of laptops, and where applicable additional Dimensions' issued work devices e.g. mobiles or external electronic storage devices.** FTI will be using a range of industry standard tools to collect electronically stored data from any in-scope laptops and/or mobile devices for custodians. Where possible, a physical image of a custodian device will be taken, with a logical image approach being the backup. Tools which may be applied as required are, but not limited to:
- EnCase
 - Falcon Neo
 - Kali Linux utilising Guymager
 - OSF Mount
 - Arsenal Image Mounter
 - Cellebrite
 - MacQuisition
8. **Forensic data extraction of laptop image contents.** FTI will make use of EnScripts to extract user generated data i.e. excluding non-system files.
9. **Data processing, OCR and keyword searching.** FTI will utilise Nux for the document processing of custodian extracted data.
10. An initial set of search terms for identifying potential Trade Secrets will be prepared by FTI. They will be based on interpretations of outline Trade Secret definition found in PO10, the Partial Final Award and/or any Final Injunction.

11. FTI will also review all in-scope servers and their content including relative databases, scripts and network file shares using the above-mentioned process, and, if necessary, image the same.
12. Without prejudice to FTI's independence in reaching a final determination, BRG may provide FTI with a sample of documents which it views as containing Trade Secrets and Confidential Information. FTI will use these documents supplied by BRG to develop and refine the scope of its search processes. In the interest of efficiency, FTI proposes that the search terms are shared and agreed upon with BRG prior to initiating a review for relevancy.
13. Michele Carriero will lead the FTI team and will be assisted by Nicholas Evans. We understand that Donald Sowell will lead the BRG team and will be assisted by Nicholas John or Kelly Lynch.
14. FTI will make use of relevant technologies (e.g. Nuix) for OCRing standard file types such as .jpg, .gif, .pdf which do not have extracted text.
15. FTI's Final Report will include a list of documents responsive to keywords based on the agreed trade secrets search criteria and will categorise them by custodian / device / directory path and other appropriate categories.
16. FTI's Final Report shall include details of the searches carried out by FTI and identify which custodians have been searched. It will also specify what destruction and deletion is envisaged.
17. A copy of FTI's Final Report containing its findings will be provided to BRG and Dentons. They shall keep it strictly private and confidential and shall use it solely for the purpose of advising the Claimants on whether Dimensions has performed its obligations under PO10 and the Final Injunction and not for any ulterior or collateral purpose. BRG also confirm they shall keep strictly private and confidential all material including verbal discussions they hold with FTI throughout this exercise.
18. Once documents have been identified as potentially containing or deriving from Trade Secret content, FTI will review to determine whether the documents meet the criteria of being or deriving from a Trade Secret and/or Confidential Information in the context of PO 10 and/or any Final Injunction. FTI can raise any queries it has with the relevant parties, including BRG, but FTI will determine whether the material falls within the scope of Trade Secrets and/or Confidential Information within the meaning of PO 10 and/or any Final Injunction.

REVIEW OF DOCUMENTS AND BACK-UPS

19. FTI will hold original copies of data extracted along with summary findings. FTI will not disclose any of its draft work products as these are subject to change.

20. BRG will, in order to carry out its inspection prior to deletion, have access (as outlined further below) to all responsive documents and files (in whatever form) collated by FTI, associated to and at the time of issuing the Final Report, containing or containing information deriving from any, of the Trade Secrets or Confidential Information. Said files will be hosted at FTI's offices in Dubai, UAE, in order to permit BRG to inspect them prior to their deletion. The parties agree that following the issuance of the Final Report by FTI, BRG will have 30 calendar days to inspect the collated responsive files before their deletion. Should BRG request an extension to this deadline, it will be considered by FTI and not unreasonably refused. Any extension will be limited in time and the duration itself will be determined at the time of the request.
21. Following completion of this exercise, Dimensions will receive a new clean back-up of its systems once the relevant Trade Secrets and Confidential Information have been identified and deleted. The previous back-ups will either be deleted (taking into account any operational / compliance risk this may introduce) or held in escrow by an independent third party as further detailed below.
22. Following inspection by BRG, all of the files and documents (in whatever form) collated by FTI in accordance with the Interim Injunction and Final Injunction shall be destroyed or deleted, including from storage or active electronic repositories, servers, databases and electronic media. Notwithstanding the above, a copy of Dimensions' back-ups containing all such files and documents (in whatever form) will, at Dimensions' expense, be put into escrow with an independent third party until 31 December 2022, after which date they will be destroyed. The independent third party will be Equinix Data Centre and the backups will be stored securely at F 88 – 92 Dubai Production City Sheikh Mohammed Bin Zayed Rd Dubai, UAE 500389 or Maydan, Al Meydan Road Dubai, United Arab Emirates 500389 for the entire period. Any movement of the backups by Equinix Data Centre to another location outside the UAE or third party must be agreed by the Claimants' in writing 30 days in advance of such movement. Dimensions will have a right to request the extraction of information from the independent third party from such back-ups, provided that such information does not contain and/or is not derived from the Trade Secrets or Confidential Information. The Claimants will be party to the escrow agreement which be subject to DIFC law and the DIFC Courts.
23. Upon receipt of such request from Dimensions, Equinix Data Centre will notify the Claimants and then provide access to the requested data to FTI or an alternative independent third party expert appointed by Dimensions, who will determine whether the data contains any Trade Secrets or Confidential Information.
24. BRG is at liberty to review FTI's or the alternative independent third party expert's findings at the Claimants' cost, if so instructed.
25. For the avoidance of doubt, the data will only be released subject to FTI's or the alternative independent third party expert's confirmation that the data does not contain any Trade Secrets or Confidential Information.
26. If a disagreement arises with respect to the requested information containing or deriving from the Trade Secrets or Confidential Information, the parties are at

liberty to apply to the DIFC Courts. Save as aforesaid, Dimensions will have no other rights to request information out of escrow and will at no time have direct access to the backs-ups held in escrow.

AFFIDAVIT

27. FTI will provide a sworn affidavit from the lead team member within two weeks following destruction in accordance with paragraph 22 above. This affidavit will state that all required information identified within the scope has been collected with the full co-operation of Dimensions and all information deemed relevant by FTI from the keyword responsive population (as per agreed search terms) have been provided to BRG for inspection and subsequently deleted from Dimensions' systems. The affidavit will summarize the searches that have been undertaken and which custodians have been searched and the destruction and deletion that has taken place and any limitation to FTI's process.
28. This Protocol is governed by the laws of the DIFC. The operation of the Interim Injunction and Final Injunction, and any and all disputes arising out of this Protocol, will be subject to the exclusive jurisdiction of the DIFC Courts as the supervisory Court of DIFC-LCIA Arbitration No. DL18141. The Claimants and Dimensions are at liberty to apply to the DIFC Court for directions concerning the implementation of the Interim Injunction or Final Injunction (including this Protocol.)

DEFINITIONS

"In whatever form" – In the context of "*all files and documents (in whatever form)*", such as in paragraph (2.a), "*In whatever form*" means files with any extensions (e.g. docx, xlsx, txt, etc.) that contains any readable content or files with any extensions from which it is possible to extract text using OCR techniques.

"Forensically erase" – In the context of "forensically erase the files and documents", such as in paragraph (2.c), "*forensically erase*" means deletion of files and overwriting the content by zeroing the sectors on the disk.

"Contain or derive from any of the Trade Secrets or Confidential Information" – This sentence, as appears in paragraph (2.b) and slight variations of it present in other sections of this document, means files that (after having a positive hit in the keyword searches) have been relevant during the document review. For avoidance of doubt, only files and documents having positive hits in the keyword searches will be part of the review and subsequent report.

"Exposed to clients/software information" – In the context of paragraph (5.a) this means any employee whose role FTI deemed to be connected to the Trade Secrets or Confidential Information.