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DIFC Courts v. Dubai Courts in arbitration: interim measures and anti-suits

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On 28 July 2016, in a judgment of Justice Sir Jeremy Cooke (see CFI 020/2016 – Brookfield Multiplex Constructions LLC v. (1) DIFC Investments LLC (2) Dubai International Financial Centre Authority, ruling of the DIFC Court of First Instance of 28 July 2016), the DIFC Court of First Instance ruled, in principle, in favour of the availability of interim measures issued by the onshore Dubai Courts in support of arbitrations seated in the offshore Dubai International Financial Centre (DIFC). Even though the DIFC Court’s findings to this effect were not express but only implied (given that the Court was not required conclusively to determine the ultimate seat of the arbitration – whether onshore Dubai or the offshore DIFC – in the prevailing circumstances) and in this sense obiter dictum, it bears mentioning that Justice Cooke ruled in no uncertain terms that measures of interim relief available before the onshore Dubai Courts in support of an arbitration with seat in mainland Dubai could equally be harnessed in support of arbitral proceedings seated in the DIFC (despite the exclusive role of the DIFC Courts as the curial courts of a DIFC-seated arbitration). The Court also took the opportunity to state its views on other matters, including in particular the DIFC Court’s powers to grant anti-suit injunctions over the onshore Dubai Courts.

By way of background, Brookfield Multiplex Constructions LLC (“Brookfield”), a Dubai-based construction company and the Claimant in the present action, commenced Part 8 proceedings before the DIFC Courts against the DIFC Investments LLC (DIFCI) and the Dubai International Financial Centre Authority (DIFCA), both DIFC authorities, in pursuit of two main declarations: (i) that there was a binding arbitration agreement between Brookfield on the one hand and the DIFCI and the DIFCA on the other; and (ii) that, subject to the arbitration agreement, the DIFC Courts – as opposed to the onshore Dubai Courts – had exclusive jurisdiction to hear the underlying substantive dispute. The mentioned arbitration agreement featured in a building contract concluded between the DIFCA and Brookfield for the construction of the Gate Building, the main landmark of the DIFC, also known as “The Gate”, in 2003. That contract was said to “be governed by and construed according to the laws of and applicable in the Emirate of Dubai”. The contract further provided for disputes or differences arising from it to be “submitted to arbitration in the Emirate of Dubai”. Purported instances of deficient workmanship on part of Brookfield, including the collapse of some marble cladding on the façade of The Gate, gave rise to a dispute between the Parties in late 2015. Pending settlement negotiations between the Parties, the DIFCI successfully applied to the onshore Dubai Court for the appointment of an expert to investigate and report back on the condition of The Gate under Art. 68 of the UAE Law of Evidence read together with Art. 28 of the UAE Civil Procedures Code. In response to this interim application before the onshore Dubai Court, Brookfield requested the DIFC Courts to restrain any proceedings pending

before the Dubai Court in favour of the proper exclusive jurisdiction of the DIFC Courts over the dispute, hence essentially asking for an anti-suit injunction from the offshore DIFC Courts over the pending proceedings before the onshore Dubai Court. In the further sequence of events, the onshore Dubai Court granted the application and appointed an expert with the mandate to report on the status of the deficiencies in workmanship of The Gate and assess the damages thereof.

To start, Justice Cooke examined in some detail the true objective and scope of Art. 68 of the UAE Law of Evidence and concluded that an expert appointed under that Article did not usurp the competent court of the merits (whether an arbitral tribunal or a public court) and as such did not affect the substance of the dispute, i.e. the substantive rights and obligations of the Parties. In the Justice's view, it was "a matter for [the arbitrators] as to whether or not all of the [resultant expert] report was properly admissible or whether it usurped their functions in some respects and required redaction." (CFI 020/2016, at para. 23) In the light of the laws of the Emirate of Dubai applicable to the conduct of the arbitral procedure, the Justice concluded that "it is thus plain that the arbitrators can control their own procedures but could not view the expert's findings as being determinative of the issues which fell to them for decision, because the law of Dubai provides that such expert determination is not to affect the substantive rights of the parties." (CFI 020/2016, at para. 24) This was essentially in line with the findings of the onshore Dubai Courts in response to Brookfield's allegation that the Dubai Court did not have proper jurisdiction over the dispute, that matters of liability, causation and damages were referable to arbitration and that it was the DIFC Courts that had proper jurisdiction in relation to attendant ancillary measures. In reflection on the onshore Dubai Court's findings and paying deference to considerations of comity, Justice Cooke stated as follows:

"It is not for this Court to impugn the reasoning behind the decision of the non-DIFC Dubai Court nor the substance of the decision itself but if the Court had no jurisdiction to make the order or the pursuit of the proceedings and application for the order amounted to a breach of the arbitration agreement, this Court would be bound to consider whether or not the grant of an injunction was appropriate in accordance with settled authority constituted by the well-known line of cases commencing with the *Angelic Grace* [1995] 1 Lloyds Rep 87." (CFI 020/2016, at para. 18)

Even though this statement is only an obiter dictum, there are reasoned concerns that it does not give sufficient credit (not to mention pay deference) to the regime of mutual recognition that has been put in place between the offshore DIFC and the onshore Dubai Courts by virtue of Art. 7 of the Judicial Authority Law (see DIFC Law No. 12 of 2004 as amended). Pursuant to Art. 7, judgment, orders and ratified arbitral awards are to move freely between the DIFC and Dubai Courts and vice versa without any review of the merits by the receiving court. Art. 7 essentially presumes a relationship of trust between the DIFC and Dubai Courts, both forming part of the same family of courts, namely that of the Emirate of Dubai. This, one should think, would naturally extend to respecting the respectively other Court's decision on its proper competence to hear a dispute and to treating as conclusive its finding as to the potential violation vel non of an arbitration agreement.

This being said, Justice Cooke rightfully took care to emphasise that even the DIFC Arbitration Law expressly admitted the possibility of a non-DIFC, hence including the onshore Dubai Courts, to issue interim measures, irrespective of the seat of the arbitration, whether DIFC or non-DIFC (see DIFC Law No. 1 of 2008, Art. 15, which provides that "it is not incompatible within the Arbitration Agreement for a party to request, before or during arbitral proceedings, from a Court an interim measure of protection and for a Court to grant such measures", read together with Art. 7 of

the same Law). Conversely, the DIFC Courts' powers to issue interim measures were confined to arbitrations seated in the DIFC. (CFI 020/2016, para. 35) This, however, so Justice Cooke, had to be distinguished from the power to grant an application for an injunction to protect a party's negative right not to be sued in a court in violation of an agreement to arbitrate, i.e. the power to grant an anti-suit injunction, which – in reliance on relevant English case law precedent, Justice Cooke confirmed was available from the DIFC Courts even where the arbitration was not seated in the DIFC. In the Justice's reflections:

“38. I do not [...] accept that, even if the seat of the arbitration is non-DIFC Dubai, the Court has no jurisdiction to grant an anti-suit injunction but it would be an unusual and exceptional case where the Court did so, particularly bearing in mind the appropriate respect that the courts of the two different systems in the Emirate of Dubai must have for each other. [...]

39. It is clear to me that, if non-DIFC Dubai is the seat of the arbitration, this Court would not interfere with an order made by that court because of the existence of an arbitration agreement. [...]

40. Although [by virtue of Art. 5(A)(1) of the Judicial Authority Law] the DIFC Courts are given exclusive jurisdiction over DIFC Bodies and Entities both generally and in relation to transactions of the character of the construction contract between the parties so that it has jurisdiction, in its own eyes, to enforce the arbitration agreement in that contract, regardless of the seat of the arbitration and the implied choice of the parties of the courts of the seat as the supervisory courts, the DIFC Court would not in practice do so, save in exceptional circumstances. Its jurisdiction cannot be ousted by the parties' choice of the seat and supervisory jurisdiction, but comity would militate against the exercise of that jurisdiction when the courts of the seat can not [sic] only supervise the arbitration but are in a position to grant any injunction necessary and to ensure that the arbitration agreement is not breached by pursuit of remedies in that court.”

Again, it would seem that the consideration of anti-suit relief between the onshore Dubai and the offshore DIFC Courts does not sit well with the relationship of trust between the two Courts by virtue of Art. 7 of the Judicial Authority Law (even if anti-suit injunctions are brought in personam and not against a court). Whichever one of the two Courts were to decide first on a party's application for a particular form of relief should be respected by the respective other Court and its decision enforced by virtue of Art. 7 of the Judicial Authority Law. In the light of the regime of mutual recognition and the relationship of mutual trust established by Art. 7 of the Judicial Authority Law, there is neither need nor room for the comity considerations entertained by the Justice Cooke.

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