

Ruler of Dubai Establishes new Judicial Committee to Resolve Conflicts of Jurisdiction Between the on- and Offshore Dubai Courts: Will it Undermine the DIFC Court's Acquired Status as a Conduit Jurisdiction for the Enforcement of Arbitral Awards?

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To the great excitement (some may say consternation) of the local legal profession, by adoption of a decree earlier this year (see Decree No. (19) of 2016 forming the Judicial Committee of the Dubai Court and the DIFC Courts, dated 9 June 2016), which entered into immediate effect (see Art. 8, Decree No. (19) of 2016), the Ruler of Dubai established a so-called Judicial Committee of the Dubai Courts and the DIFC Courts (the **"Dubai-DIFC Judicial Committee"**). For those who are unfamiliar with the jurisdictional landscape of the Emirate of Dubai, suffice it to recall that the Dubai International Financial Centre, in shorthand "DIFC", is an offshore financial free zone carved out of the heart of mainland or onshore Dubai, with its own self-contained common law court system (comprised of a court of first instance and a court of appeal) and its own body of substantive laws modeled on English law. The DIFC constitutes an autonomous jurisdiction in its own right and exists side-by-side the civil law jurisdiction of mainland Dubai and the wider UAE, a circumstance which has earned the DIFC the sobriquet *"a common law island in a civil law ocean"* (a phrase coined by Chief Justice Michael Hwang, the current President of the DIFC Courts).

From a comparative law point of view, the establishment of the DIFC common law jurisdiction alongside the civil law jurisdiction of the UAE - leaving aside the analogical development in the Qatar Financial Centre - has been a world-wide unique, unprecedented development (now followed by the Abu Dhabi Global Market (ADGM) Courts, which equally are of common law pedigree). Inevitably, the juxtaposition of two jurisdictions of diametrically-opposed legal traditions raises questions of compatibility or - couched in negative terms - jurisdictional conflict and how to resolve these. In order to facilitate the two-directional free movement of judgments, orders and ratified awards between the

Dubai and the DIFC, the Ruler of Dubai had presciently put in place a regime of mutual recognition between the onshore Dubai and offshore DIFC Courts in the form of Art. 7 of the Judicial Authority Law as amended (see DIFC Law No. 12 of 2004 in respect of The Judicial Authority at Dubai International Financial Centre as amended). This Article imposes an obligation on the onshore and offshore Courts of the Emirate of Dubai to recognise and enforce judgments, orders and ratified arbitral awards issued by the respectively other Court without a review on the merits. The conceptual idea behind this regime of mutual recognition is essentially that constitutionally speaking, the Dubai and DIFC Courts are both part of the same Dubai family of Courts, each having been decreed by the Ruler of Dubai, and are as such expected to respect and trust the sound exercise of each other's judicial authority. In the words of one leading local advocate:

“Article 7 of the JAL [i.e. Judicial Authority Law] establishes a regime of mutual recognition between the DIFC and Dubai Courts, which is intended to facilitate the free movement of judgments, decisions and orders between the Dubai and DIFC Courts and vice versa. This regime is based upon a statutory relationship between the two courts, which in turn finds its origin in both the DIFC and Dubai Courts belonging to the same family of courts, namely the Dubai Courts. This is supported by the fact that both courts have been established by decrees of the Ruler of Dubai and render their rulings in the name of the Ruler of Dubai. In other words, the DIFC Courts form part of the legal system of the Emirate of Dubai and as such ultimately qualify as a Dubai Court. With this in mind, it is the Ruler of Dubai, who is the fountain of powers in the Emirate, who has ordained the co-existence of the two sets of courts in the same Emirate.” (see Claim No. XX - **(1) Egan (2) Eggert v. (1) Eava (2) Efa, Judgment of the DIFC Court of First Instance of 29 July 2015**)

The ultimate objective underlying such a regime of mutual recognition is no doubt to achieve the full mutual integration of the Dubai civil law and the DIFC common law systems into a functional whole. Such a holistic approach to the functional integration of a common and civil law legal system within one and the same jurisdiction (although, of course, reminiscent of related supranational precursors, such as the legal integration of both common and civil law jurisdictions within the framework of the European Union) is conceptually unprecedented and as such a world-first. In similar terms, the Abu Dhabi and ADGM Courts are now poised to adopt what appears to be a similar system of mutual recognition (see Memorandum of Understanding between the Abu Dhabi Judicial Department and Abu Dhabi Global Market Courts concerning cooperation in legal and judicial matters).

Both in deference to and in recognition of the scope and objective of Art. 7 of the Judicial Authority Law as amended, the DIFC Courts have established themselves as a host or conduit jurisdiction for the recognition and enforcement of both domestic (i.e. onshore, or non-DIFC Dubai) and foreign arbitral awards for onward execution against assets of award debtors in onshore Dubai even in the absence of any (whether geographic or other) connection with the DIFC (bar the actual application for enforcement) (see in particular ARB 003/2013 - *Banyan Tree Corporate Pte Ltd v. Meydan Group LLC*, ruling of the DIFC Court of First Instance of 2nd April 2015; and Case No. ARB 002/2013 - (1) X1, (2) X2 v. (1) Y1, (2) Y2, ruling of the DIFC Court of First Instance, undated, 2014). The reliance on Art. 7 for such enforcement purposes has survived a number of challenges before the DIFC Courts (see, e.g., Case No. XX - (1) X1 (2) X2 v. (1) Y1 (2) Y2, ruling of the DIFC Court of First Instance of 29 July 2015; and Case ARB 001/2014 - (1) X1 (2) X2 v. (1) Y, Order of the Dubai Court of First Instance of 5 January 2014) and has - according to unverified anecdotal evidence - now also been recognised by the Dubai Courts. Viewed from the perspective of the creation of the DIFC Courts and their true *raison d'être*, there is nothing surprising about this. To the contrary, one would have expected matters to follow precisely this course given that ultimately, the DIFC Courts have always been intended to offer a jurisdictional choice to international investors as an alternative to the local courts, which - whether rightly or wrongly - have always been perceived as less arbitration- and hence enforcement-friendly. In my view, the Dubai-DIFC Judicial Committee has been established precisely to promote (rather than

“demote”) the very objective of the full mutual integration of the Dubai and DIFC Courts and further to consolidate the bond of mutual trust that is required between the two Courts to make the regime of mutual recognition develop its full (integrational) potential. I am confident that the Dubai-DIFC Judicial Committee will ultimately confirm the acquired status of the DIFC Courts as a conduit jurisdiction. Its real intended (yet unspoken) role is to serve as a catalyst between the critics and the proponents of the full integration and fend off any constitutional challenge of the functional form of that integration in support of the resultant free choice (or shall we say forum shopping) between the Dubai or DIFC Courts as a preferred enforcement jurisdiction. In other words, the Dubai-DIFC Judicial Committee is essentially established in order to internalise the potential constitutional conflict between the proper delimitation of jurisdiction between the onshore Dubai and the offshore DIFC Courts, a conflict that would otherwise have to be submitted to the Union Supreme Court, in shorthand “USC”, for resolution in accordance with Art. 60 of UAE Federal Law No. 10 of 1973, the Union Supreme Court Law (to this effect, see also CFI 026/2014 – *Standard Chartered Bank v. Investment Group Private Limited*, ruling of the DIFC Court of First Instance of 1st August 2016, as per Deputy Chief Justice Sir David Steel).

Returning to the text of the Decree No. (19) of 2006, the Dubai-DIFC Judicial Committee is chaired by the President of the Dubai Court of Cassation and otherwise comprises (i) the President of the DIFC Courts, (ii) the Presidents of the Dubai and the DIFC Courts of Appeal, (iii) the President of the Dubai Court of First Instance, (iv) a Judge of the DIFC Court of First Instance and (v) the Secretary-General of the Dubai Judicial Council (see Art. 1, Decree No. (19) of 2016). The DIFC Court members will be nominated by the President of the DIFC Courts in due course (*ibid.*). Despite the criticism that has been leveled at the constitution of the Dubai-DIFC Judicial Committee, concerns that there is an intended imbalance in favour of the onshore Dubai Courts are, in my view, overstated. So is the allegation that the required majority decision-making within the Committee and the casting vote of the onshore Dubai Chair (see Art. 3, Decree No. (19) of 2016) will create a balance in favour of the onshore Dubai Courts where no agreement can be reached between the onshore Dubai and offshore DIFC members of the Committee. Fact of the matter is that the legitimacy of the Dubai-DIFC Judicial Committee in the eyes of the local court-users and for it to serve as a catalyst between the local critics and the international (often expat) proponents of the jurisdiction of the DIFC Courts will ultimately depend on a sufficient degree of local representation and hence local influence on the decision-making within the Committee. In reality, a number of the members of the local judiciary are more arbitration-friendly than they are usually given credit for and can be expected to fully support the status of the DIFC Courts as a host-jurisdictional forum (so much the more, one may add, given that some of the DIFC Court judges that have been instrumental in establishing the DIFC Courts as a conduit jurisdiction are of local origin themselves (see, e.g., H.E. Justice Al Madhani in Case ARB 001/2014 – (1) X1 (2) X2 v. (1) Y, Order of the Dubai Court of First Instance of 5 January 2014) and close to the local, onshore Dubai, non-DIFC judiciary). That the Dubai-DIFC Judicial Committee is more likely than not to endorse the operation of Art. 7 of the Judicial Authority Law as amended in the terms proposed by the DIFC Courts to date is also supported the Committee’s obligation to exercise its own jurisdiction “*in accordance with the legislation in force and the rules on jurisdiction prescribed in this regard*” (see Art. 4(3), Decree No. (19) of 2016), including evidently the regime of mutual recognition contained in Art. 7 of the Judicial Authority Law as amended (and its construction to date, even though, of course, technically not binding upon the Dubai Courts).

Pursuant to Art. 2 of Decree No. (19) of 2016, the Dubai-DIFC Judicial Committee will in particular be entrusted with the determination of jurisdictional disputes in relation to (i) conflicts of jurisdiction between the Dubai and the DIFC Courts (see Art. 2(1), Decree No. (19) of 2016), including – one should think – the question as to whether the DIFC Courts may serve as a conduit jurisdiction, and (ii) conflicting judgments of the Dubai and DIFC Courts involving the same parties and bearing on the same subject-matter (see Art. 2(2), Decree No. (19) of 2016), including conflicting orders of enforcement issued by the Dubai and DIFC Courts in relation to the same arbitral award. The

Committee will also be charged with (iii) proposing rules that are necessary to prevent conflicts of jurisdiction between the Dubai and DIFC Courts and their respective Execution Departments (see Art. 2(3), Decree No. (19) of 2016) and (iv) advising on ways of co-ordination and co-operation between the Dubai and DIFC Courts (see Art. 2(4), Decree No. (19) of 2016), which, in turn, is anticipated to assist the mutual integration of the two Courts over time. It is understood that the Dubai-DIFC Judicial Committee will only decide upon conflicts of jurisdiction upon petition from a litigating party or the Public Prosecutor (see Art. 4(1), Decree No. (19) of 2016) and to the extent that a jurisdictional conflict has materialised (which will likely not be the case where one of the courts - whether mainland Dubai or DIFC - ultimately declines jurisdiction (see again CFI 026/2014 - *Standard Chartered Bank*)). The deliberations of the Committee will be confidential (see Art. 3(d), Decree No. (19) of 2016) and a final and binding, i.e. non-appealable decision (see Art. 7, Decree No. (19) of 2016) issued by the Committee within thirty days from the date of the petition (see Art. 3(b), Decree No. (19) of 2016). Pending the decision from the Dubai-DIFC Judicial Committee, the proceedings before the Dubai or DIFC Courts will be stayed (except for a court's power to "*discharge subsidiary orders so designed that, upon the ultimate enforcement of a final judgment, justice will be done*" (see CFI 013/2016 - *Oger Dubai LLC v. Daman Real Estate Capital Partners Limited*, ruling of the DIFC Court of First Instance of 28 July 2016, as per Justice Sir Richard Field, at para. 7). Little detail is presently available on the precise course of the proceedings before the Committee, but it is expected that more detailed procedural directions will be issued to provide further guidance in due course.

In the round, the establishment of the Dubai-DIFC Judicial Committee is intended to deal efficiently and effectively with the jurisdictional conflicts arising between the onshore Dubai and offshore DIFC Courts, without, however, undermining the status quo and in particular the DIFC Courts' acquired status as a conduit jurisdiction for the enforcement of domestic or foreign arbitral awards for onward execution in mainland Dubai. Further reporting on the emerging track-record of the Dubai-DIFC Judicial Committee will follow as and when: Exciting times