

The Dubai-DIFC Judicial Committee and DIFC Conduit Jurisdiction: A Sequel in Four Parts - The Dubai Court of First Instance on the Attack (Part 3)

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Gordon Blanke (DWF (Middle East) LLP)

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In a recent ruling (see Commercial Case No. 1619/2016, ruling of the Dubai Court of First Instance of 15 February 2017), the Dubai Court of First Instance annulled the DIFC Courts' rulings in the Banyan Tree line of cases (see Case No. ARB/003/2013, rulings of the DIFC Court of First Instance of 2nd April 2015 and 8 April 2015 (recognising and enforcing a DIAC award and confirming the DIFC Courts' competence to serve as a conduit jurisdiction); and Appeal No. CA/005/2014, ruling of the DIFC Court of Appeal of 26 February 2015 (in relation to costs); for relevant background, [see my previous blog](#), that recognised and ordered the enforcement of a Dubai International Arbitration Centre (DIAC) arbitration award for onward execution against Meydan Group LLC, the award debtor, in onshore Dubai. It was these cases that originally established the status of the DIFC Courts as a conduit jurisdiction for onshore domestic (non-DIFC) awards for onward execution outside the DIFC. The nullification of these awards at first instance essentially calls into question the DIFC's acquired conduit jurisdiction status, at least within the context of domestic non-DIFC awards.

The basis of the Dubai Court of First Instance's decision is a finding that the DIFC Courts did not have proper jurisdiction over the recognition and enforcement of the subject DIAC award:

"It is clear from the documents on record that the case brought in the DIFC Courts to recognize, confirm and enforce the arbitral award does not meet any of the DIFC Courts' jurisdiction criteria set out in the law. There is nothing in the record to prove that any of the parties are licensed Centre establishments or are duly established or carrying on activity in the Centre or that the agreement in question was executed or performed in the Centre or that the case involves an incident that has occurred in the Centre. The parties have not agreed to give jurisdiction to the Centre nor has the Defendant claimed that any of the jurisdiction criteria are met. It certainly does not appear from reading the two decisions issued by the DIFC Courts in Claim No: ARB/003/2013, dated 2nd April 2015 and 8 April 2015, which are to be invalidated, that any of the DIFC Courts' jurisdiction criteria set out in the law are met. The decision dated 2nd April 2015 held that the DIFC Courts have jurisdiction under Article 5(A)(d) of Law No. (12) of 2004 on the Judicial Authority at DIFC when there is no evidence in that decision or in the record to support the DIFC Courts' jurisdiction. Nevertheless, the DIFC Courts confirmed their own jurisdiction to hear the claim then ruled, in their decision of 8 April

2015, that the arbitral award would be recognized and enforced.

[...]

Having established from the record that the DIFC Courts have no jurisdiction to confirm or set aside the arbitral award in question, it follows that the said two decisions are devoid of one of the basic elements of validity (being issued by a court that has no jurisdiction to issue such orders and decisions). The decisions are fatally flawed and void ab initio. The decision in Appeal No. 005/2014, dated 26 February 2015 (concerning the costs of the application contesting jurisdiction), which was issued consequent to the invalid decision of 2nd April 2015 issued in respect of that challenge, is also invalid." (my translation)

The Dubai Court of First Instance's conclusion denying the DIFC Court's proper jurisdiction evidently ignores the true ambit of the jurisdictional gateway under Art. 5(A) of the Judicial Authority Law as amended (see DIFC Law No. 12 of 2004 as amended by DIFC Law No. 16 of 2011), upon which H.E. Justice Al Muhairi himself – correctly – relied in *Banyan Tree* when confirming the power of the DIFC Courts to serve as a conduit jurisdiction for domestic non-DIFC awards. Art. 5(A)(1) clearly confers upon the DIFC Courts "exclusive jurisdiction over [...] (d) any application over which the [DIFC] Courts have jurisdiction in accordance with the Centre [i.e. the DIFC]'s Laws and Regulations", including – no doubt – the DIFC Arbitration Law. Art. 42(1), the DIFC Arbitration Law, in turn, empowers the DIFC Courts to hear actions for enforcement of both domestic and foreign awards ("[a]n arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognised as binding within the DIFC and, upon application in writing to the DIFC Court"), including – no doubt – any non-DIFC awards (irrespective of whether these are of onshore UAE or properly foreign origin).

The Dubai Court of First Instance further claims to have general jurisdiction – inter alia by virtue of Art. 4 of Decree No. (19) of 2016 (establishing the Dubai-DIFC Judicial Tribunal or simply the "JT") – over the validity of the DIFC Courts' decisions and more specifically over the question as to whether the DIFC Courts' decisions have been issued within the limits and scope of their proper jurisdiction. For the avoidance of doubt, this proposition entirely disregards the role given to Art. 7 of the Judicial Authority Law as amended, which establishes a regime of mutual recognition between the onshore Dubai and offshore DIFC Courts and hence creates an area of free movement of all judgments, orders and ratified arbitral awards between onshore Dubai and offshore DIFC and vice versa. The fact of the matter is that for the purposes of the operation of Art. 7, the Dubai and the DIFC Courts both qualify as UAE Courts of equal status (there being no vertical hierarchy between them). This is a fundamental pre-condition for the regime of mutual recognition that exists between the two courts and which is based on a presumption of mutual trust, each court deferring to the other on the proper determination of its competence within its own jurisdiction. Neither of the two courts has the power to review the orders, judgments or ratified awards that the respectively other Court has found and declared fit for execution under Art. 7 (by affixing an execution formula). In addition and in any event, to the extent that there were to have been a conflict of jurisdiction or a risk of contradictory outcomes between the Dubai and DIFC Courts in *Banyan Tree*, reference should have been made to the JT, which has been created precisely for that purpose (see Decree No. (19) of 2016, Art. 2(2)). By way of reminder, the JT has been established as a catalyst for the resolution of any jurisdictional conflicts that may arise between the onshore Dubai and the offshore DIFC courts ([see my previous blog](#)).

The above criticism aside, the Dubai Court of First Instance's ruling also arguably runs counter to the position taken by the UAE Federal Supreme Court when seized by *Meydan* of the purported jurisdictional conflict between the onshore Dubai and the offshore DIFC courts in the same matter (see Petition No. 2 of 2015, ruling of the UAE Federal Supreme Court of 23rd December 2015 (Jurisdictional Challenge)) prior to the establishment of the JT. By virtue of its powers under Arts 33(9) and (10) and 60 of UAE Federal Law No. (10) of 1973 concerning the Federal Supreme Court, vesting

the Federal Supreme Court with exclusive jurisdiction to determine, inter alia, positive and negative conflicts of jurisdiction between local judicial bodies within the same Emirate, the Federal Supreme Court denied that there was a positive conflict of jurisdiction between the offshore DIFC and the onshore Dubai courts in the matter before it. The Federal Supreme Court's conclusion was based on the fact that the proceedings before the DIFC Courts had already completed and the DIFC Courts had issued an order for recognition and enforcement before the commencement of the challenge proceedings in the onshore Dubai courts (see Commercial Action No. 2127-2014, application for setting aside the subject DIAC award). In a sense, the Federal Supreme Court's approach confirms the first-seized rule, which I have proposed in previous [blogs](#) as a conceptual basis for a principled solution to the present jurisdictional stand-off between the onshore Dubai and offshore DIFC Courts.

That said, the Dubai Court of First Instance (short of its recent ruling being understood as a declaration of war on the jurisdiction of the DIFC Courts) is clearly on the attack. It is to be hoped that on appeal, the Court of Appeal and the Dubai Court of Cassation will fend off the Dubai Court of First Instance, overturn its recent ruling and put the relationship between the onshore Dubai and the offshore DIFC Courts back into balance.