The Dubai-DIFC Judicial Committee and DIFC Conduit Jurisdiction: A Sequel in Four Parts – Game over? (Part 4)

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This is the final one in sequel of four parts on the status of the DIFC Courts as a conduit jurisdiction. It reports on a further number of recent decisions of the Dubai-DIFC Judicial Committee – also known as the Judicial Tribunal or in shorthand the JT – that question the DIFC Courts' role as a conduit jurisdiction in the recognition and enforcement of arbitral awards for onward execution in mainland Dubai. Two of these decisions consolidate the position that it is the onshore Dubai courts – and not the DIFC courts – that retain proper jurisdiction for the recognition and enforcement of awards in onshore Dubai absent any geographic link to the DIFC. Both these decisions have met with strong criticism from the DIFC members of the JT, led by the Chief Justice of the DIFC Courts Michael Hwang. A third decision appears to confirm that despite the controversial developments of the JT's case law, the concept of the DIFC conduit survives for now. Read in their proper context, there is even an argument for saying that these recent decisions preserve an opportunity for the JT to rely on a first-seized rule – in the terms that I have presented in previous blogs – as an ultimate solution to the jurisdictional dilemma between the Dubai and DIFC Courts.

The first decision (Cassation No. 1/2017 – *Gulf Navigation Holding PJSC v. Jinhai Heavy Industry Co Ltd*, hearing of 22nd May 2017) deals with a jurisdictional conflict between the Dubai Centre for Amicable Settlement of Disputes, which forms part of the Dubai Courts, (the "Settlement Centre") and the offshore DIFC Courts in relation to the recognition and enforcement of a New York Convention award rendered in London under the London Maritime Arbitration Association (LMAA) Rules. The award found in favour of Jinhai Heavy Industry Co Ltd (JHIC), Chinese shipbuilding enterprise, ordering Gulf Navigation Holding PJSC (GNH), a UAE-incorporated company, to pay JHIC an outstanding installment of USD 14.55 million plus interest under a shipbuilding contract concluded with JHIC as builders in 2011. In October 2015, GNH failed in an application for setting aside before the English courts given the "unarguable" nature of the application. JHIC, as award creditor, secured an *ex parte* order for recognition and enforcement of the award from the DIFC Courts in December 2016, relying on Art. 42 of the DIFC Arbitration Law (see DIFC Law No. 1 of 2008), which, in turn, replicates the enforcement provisions of the 1958 New York Convention (on the recognition and enforcement of foreign arbitral awards). By way of reminder, pursuant to Art. 42(1) of the DIFC Arbitration Law, the DIFC Courts are bound by international enforcement instruments that bind the UAE, including for present purposes the New York Convention. Importantly, GNH did not challenge the DIFC Court order for recognition and enforcement and has hence to be taken as having accepted the supervisory jurisdiction of the DIFC courts. In early February 2015, i.e. around eight months before JHIC's application for recognition and enforcement before the DIFC Courts, GNH filed a claim with the Settlement Centre seeking the appointment of an expert for examination of the issues that had already been decided in the earlier arbitration and that were therefore *res judicata*. Nevertheless, the majority of the JT found that *"[a]ccording to the general principles of laws embodied in the procedural laws and since Dubai Courts have the general jurisdiction, […] they are the competent courts to entertain this case"* (see Cassation No. 1/2017, p. 4). Further, the majority concluded that *"[…] this case is not similar to cases in which the Courts apply the provisions of the New York Convention 1958 because the two courts are in one Emirate, viz, Dubai Emirate)."* (*ibid*.)

In a dissenting opinion of 4 June 2017 (Cassation No. 1/2017, Dissenting Opinion), Chief Justice Michael Hwang, Deputy Chief Justice Sir David Steel and H.E. Justice Omar Al Muhairi – all three of the DIFC Courts – categorically disagreed with the JT's findings: There was no principle of general jurisdiction according precedence to the onshore Dubai Courts in the event of a jurisdictional conflict between the onshore and offshore courts (see Dissenting Opinion, para. 16). To the contrary, a combined reading of Art. 5(A)(1) and Art. 5(A)(1)(e) of the Judicial Authority Law (see Dubai Law No. (12) of 2004 as amended), which defines areas of exclusive jurisdiction of the DIFC Courts, including in particular *"[a]ny claim or action over which the Courts have jurisdiction in accordance with DIFC laws and DIFC Regulations"*, such as Art. 42(1) of the DIFC Arbitration Law (see Dissenting Opinion, at paras 17-19), militate in favour of the DIFC Courts' exclusive jurisdiction in the present circumstances. Further, the majority's statement on the New York Convention was *"an incorrect statement of international law"* (Dissenting Opinion, at para. 21): *"If the DIFC [Courts] were to be prevented from enforcing this foreign Award, this would place the UAE in breach of its obligations under Article III of the New York Convention, which requires all States which have acceded to the Convention to enforce foreign awards."* (*ibid*.) According to Hwang, Steel and Al Muhairi, Art. 4 of Decree 19 of 2016 (establishing the JT) require the JT to determine conflicts of jurisdiction *"in accordance with the legislation in force and the rules of jurisdiction applicable in this regard"*, including the DIFC Courts' exclusive jurisdiction to interpret the DIFC's laws and regulations, and not general principles of law in the terms wrongly stipulated by the majority (see Dissenting Opinion, at paras 22-23).

No doubt, the JT's reliance on the general jurisdiction of the Dubai Courts taking precedence over the DIFC Courts challenges a natural reading of the distribution of competence between the onshore Dubai and offshore DIFC courts pursuant to the existing laws and regulations in the terms outlined by the JT's dissenting members. The Dubai Courts are simply not hierarchically superior in jurisdiction to the DIFC Courts, both courts qualify, constitutionally speaking, as UAE courts with their respsective jurisdictional limits defined in the prevailing legislation. Pursuant to that legislation, the DIFC Courts are clearly competent to hear applications for ratification and enforcement of both domestic and foreign arbitral awards, even absent any assets of the award debtor in the DIFC. The onward execution of DIFC

Court orders for the ratification and enforcement of those awards in onshore Dubai, in turn, is sanctioned by the regime of mutual recognition in place between the Dubai and DIFC Courts by virtue of Art. 7 of the Judicial Authority Law. In relation to foreign awards, the enforcement obligations under the New York Convention add further weight to this position, requiring the DIFC Courts to comply with the terms of the Convention in their capacity as a UAE court. The only way that the JT could reconcile its present position with the statutory status quo is by introducing a first-seized rule, the court first seized taking jurisdictional precedence on a case-by-case basis (on the present facts, the Settlement Centre was seized first by the award debtor, i.e. before the award creditor filed an application for recognition and enforcement with the DIFC Courts and could be attributed preferential jurisdiction on that basis). On a further note, though, it is not clear whether the JT had proper jurisdiction in the present circumstances in the first place given that (i) the recognition and enforcement proceedings before the DIFC Courts were already complete at the time of GNH's application to the JT and (ii) the subject matter of that application (appointment of an expert) was different from the subject of the dealings before the DIFC Courts (recognition and enforcement), there being hence no competing proceedings between the onshore and offshore Dubai Courts nor a risk of contradictory outcomes.

In the second decision (Cassation No. 3/2017 – *Ramadan Mousa Mishmish v. Sweet Homes Real Estate*, hearing of 22nd May 2017), the JT relies upon the same rule (read: assumption) of general jurisdiction, finding in favour of the jurisdiction of the onshore Dubai Courts. That case dealt with the recognition and enforcement of a domestic award (rendered under the DIAC Rules in Dubai) before the DIFC Courts for onward execution in onshore Dubai, i.e. a classic conduit jurisdiction case. The award debtor, Mr. Ramadan Mousa Mishmish, filed for nullification before the onshore Dubai Courts sometime in 2016 whilst the award creditor, Sweet Homes Real Estate, secured a DIFC Court order for recognition and enforcement in March 2016. That order remained unchallenged. The dissenting members of the JT – again Hwang, Steel and Al Muhairi – confirmed that *"while the Dubai courts have sole jurisdiction in regard to the validity of the award [Dubai being the seat of the arbitration and the onshore Dubai Courts having curial jurisdiction over an award rendered there], there is concurrent jurisdiction in regard to enforcement."* (see Cassation 3/2017, Dissenting Opinion of 5 June 2017, at para. 11). Further, the

dissenting members found that there was no jurisdictional conflict given the concurrent jurisdiction for enforcement of the onshore and offshore Dubai Courts (*ibid*., at para. 13). One may add that there further is a pre-requisite of proceedings being pending before both courts at the time of the application to the JT, which is not the case here (this application only having been filed in January 2017). Whatever the formal points that could be raised against the proper competence of the JT, the JT's findings in the present case would only be compatible with the existing statutory status quo if the JT were to introduce a first-seized rule (the nullification proceedings before the onshore Dubai Courts having been initiated before the award debtor's application for recognition and enforcement before the DIFC Courts).

In the third decision (Cassation No. 5/2017 – *Emirates Trading Agency LLC v. Bosimar International N.V.*, hearing of 22nd May 2017), the JT confirmed that there was no conflict of jurisdiction between the onshore and offshore courts (there being no proceedings pending before the onshore Dubai Courts), thus rejecting the application. The JT confirmed that the DIFC Courts had issued a final and binding order for recognition and enforcement of a foreign award rendered in London and that the JT was not competent to hear questions of the constitutionality of the DIFC Court's conduit jurisdiction (such determinations being reserved for the Union Supreme Court under Art. 99 of the UAE Constitution).

Taking the above developments in the round, the game for the DIFC Courts as a conduit is not quite over yet. Importantly, given that the JT decisions are not binding on future JTs, there is a chance that going forward, the general jurisdiction assumption which presently forms the basis of the JT's support for the attribution of preferential jurisdiction onshore, may be substituted with a first-seized rule that will accord jurisdictional precedence to the court first seized, whether onshore or offshore. Such an approach would be compatible with the existing regime of mutual recognition in place between the Dubai and DIFC Courts under Art. 7 of the Judicial Authority Law and mark a promising way forward in the co-operation between the onshore and offshore Dubai Courts.