

Latest Developments of Arbitration in the DIFC: On Arbitrability and Status as a Conduit

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To readers of this Blog, the Dubai International Financial Centre (DIFC) is well known as an arbitration-friendly seat of arbitration in its own right. Developments there are fast paced and have more recently given rise to two challenge actions that, in turn, have raised considerations of arbitrability within the DIFC and the status of the DIFC Courts as a conduit jurisdiction. Both of these challenges arose within the context of applications for recognition and enforcement of DIFC-LCIA arbitration awards before the DIFC Courts. In both instances, the DIFC Courts dismissed the challenge as unmeritorious and proceeded to recognition and enforcement without further ado.

In the first case, which dates back to 2016 (but has only been reported on the DIFC Court website most recently) (see *Gauge Investments Limited v. Ganelle Capital Limited* [2016] DIFC ARB 003/2016), Sir Richard Field rejected the award debtor's challenge to the effect that the subject matter of the arbitration was non-arbitrable and that the award violated UAE public policy. For the avoidance of doubt, the disputed arbitration was seated in the DIFC and governed by DIFC Law on merits and procedure under the auspices of the DIFC-LCIA. In brief, the Sole Arbitrator rejected all Gauge's pleaded breaches of the regulatory rules of the Dubai Financial Services Authority (DFSA) and Gauge's claims for civil law remedies under Arts 65 and 94 of the DIFC Regulatory Law (see DIFC Law No. 1 of 2004), i.e. a declaration that the parties' underlying debt advisory agreement was null and void and an award of compensation for the various pleaded breaches.

Justice Sir Field, in turn, was unimpressed by the award debtor's argument that the Sole Arbitrator's findings violated basic principles of arbitrability and UAE public policy and that the award therefore had to be refused enforcement under Art. 41(2)(b)(i) and (iii) of the DIFC Arbitration Law. In Field's self-explanatory assessment:

"43. Plainly, steps or proceedings taken by the DFSA and the FMT [the Financial Markets Tribunal] under their enforcement, disciplinary and adjudicative powers will not be undertaken in arbitration proceedings. This is so, first, because it is inconceivable that the DFSA and the FMT would agree to perform these functions through the medium of arbitration and, second, because as matter of statutory interpretation, neither the DFSA nor the FMT can delegate to an arbitral tribunal their enforcement, disciplinary and adjudicative powers. Does it follow that where a user of financial services relies on regulatory breaches to found a private civil remedy under Article 65 or Article 94 in arbitration proceedings that such proceedings are non-arbitrable and/or contrary to the public policy of the UAE?

[...]

46. As exemplified by *Khorafi et al v (1) Bank Sarasin-Alpen (ME) Ltd and (2) Bank J Safra Sarasin Ltd* (formerly *Bank Sarasin & Co Ltd*) (CFI 026/2009 and CA 003/2015), Articles 65 and 94 of the Regulatory Law contemplate proceedings before a DIFC Court to which the DFSA is not a party and in which private civil remedies are sought on the back of breaches of DFSA rules and regulations. In my judgment, such civil claims are arbitrable and are not contrary to the public interest of the UAE. They do not trespass on or conflict with the public functions of the DFSA. A party to an arbitration asserting a civil contract remedy founded on a regulatory breach or breaches would remain free to present a complaint to the DFSA and the DFSA would remain free of its own motion to investigate the breaches relied on in the arbitration proceedings and to bring disciplinary proceedings if thought appropriate. The doctrine of *res judicata* would not apply since the former proceeding will have involved a private civil claim, whilst the other will have been in the nature of public disciplinary/enforcement proceedings.”

In other words, absent any statutory prohibition to the contrary, the civil law consequences of any DFSA regulatory matters are clearly arbitrable under DIFC Law. Arbitration in this sense provides an alternative to recourse to the otherwise competent DIFC Courts.

The second case (see ARB 006/2017 – *Isai v. Isabelle*, Amended Orders with Reasons of H.E. Justice Omar Al Muhairi, dated 28 February 2018) invites re-consideration of the proper competence of the DIFC Courts as a conduit. I have discussed the concept and role of the DIFC as a conduit jurisdiction in a number of previous blogs (most recently, see <http://arbitrationblog.kluwerarbitration.com/2017/12/18/difc-courts-conduit-saving-grace-just-lifeline/>) and will not repeat this here. Suffice it to recall that previous reporting has raised concerns that the days of the DIFC as a conduit may be counted. Al Muhairi’s findings in *Isai v. Isabelle* give hope that the DIFC Courts’ role as a conduit jurisdiction has been granted a new lease of life, at least for purposes of recognition and enforcement of DIFC-LCIA awards rendered in onshore Dubai (irrespective of the location of assets of the award debtor, i.e. whether on- or offshore).

More specifically, Al Muhairi did not hesitate to confirm the concurrent jurisdiction of the onshore Dubai and the offshore DIFC Courts for recognition and enforcement of a DIFC-LCIA award rendered in onshore Dubai (as the seat of the arbitration) even absent any assets of the award debtor offshore. In doing so, Al Muhairi rejected the award debtor’s application for dismissal of the awards creditor’s application for recognition and enforcement before the DIFC Courts. Al Muhairi had no doubt that the DIFC Courts had proper jurisdiction to recognise and enforce the subject DIFC-LCIA award by virtue of Art. 42(1) of the DIFC Arbitration Law, which empowers the DIFC Courts to recognise as binding any arbitral award “irrespective of the State or jurisdiction in which it was made”. The Judge correctly identified as a “gateway” for the Court’s jurisdiction Art. 5(A)(1)(e) of the Judicial Authority Law (which confers exclusive jurisdiction on the DIFC Courts to hear and determine any action over which the Courts have jurisdiction in accordance with DIFC Laws and Regulations) read together with Art. 8(2) of Dubai Law No. 9 of 2004, as amended by Dubai Law No. 7 of 2011 (which requires the DIFC Courts’ jurisdiction to be determined by reference to DIFC Laws) (paras 13-16). Pursuant to Al Muhairi, neither the Judicial Authority Law nor the DIFC Arbitration Law contained any requirement for a connection with the DIFC as a pre-requisite for the DIFC Courts’ competence to hear an action for recognition and enforcement (para. 16). Instead, he relied upon Art. 7 of the Judicial Authority Law to emphasise the concurrent jurisdiction of both the onshore and offshore courts, terming the two courts’ jurisdictions “complementary”:

“In enacting Article 7 of the Dubai Judicial Authority Law, the legislators contemplated that both the DIFC Courts and the Dubai Courts would have power (in appropriate cases) to ratify (or recognise) arbitral awards. There is no conflict between the jurisdiction of the two courts, as is reflected in the

complementary relationship highlighted by Article 7 of the Judicial Authority Law.” (para. 20)

Importantly, Al Muhairi was clear that the onshore Dubai and offshore DIFC Courts have “concurrent but separate jurisdiction” (para. 22) to hear applications for recognition and enforcement on- respectively offshore:

“18. It is clear that the DIFC Courts and Dubai Courts cooperate to facilitate the recognition and enforcement of arbitral awards and it is customary, as evidenced by the legislation above, that both the DIFC Courts and Dubai Courts may recognise and/or enforce the same arbitral award.

19. Additionally, the jurisdiction of the DIFC Courts does not deprive the Dubai Courts of any jurisdiction which they may have in respect of the recognition and enforcement of arbitral awards pursuant to Articles 31 and 236 of the UAE Civil Procedure Code [establishing the Dubai Court’s jurisdiction].

20. Not only are the jurisdiction of the DIFC Courts and the jurisdiction of the Dubai Courts in relation to the recognition and enforcement of an arbitral award mutually exclusive, they are also complementary.”

This, no doubt, was intended to serve as a timely reminder that the onshore and offshore courts form part of the same family of UAE courts, ordained by the Ruler of Dubai: There is no judicial hierarchy between the onshore Dubai and offshore DIFC Courts; each is properly competent to determine the limits of its own jurisdiction. Art. 7 of the Judicial Authority Law, in turn, establishes the mutual bond of trust that holds the on- and offshore limbs of the Dubai judicial system together to form part of an integrated whole.

Al Muhairi’s Order in *Isai v. Isabelle* has to be saluted for its attempt to redress the proper balance of the judicial relationship between the onshore Dubai and offshore DIFC Courts with a measure of encouraging sobriety and to breathe life back into the DIFC Courts’ status as a conduit jurisdiction. Essentially, absent a pending challenge before the Dubai Courts, an onshore DIFC-LCIA award may be properly subject to an application for recognition and enforcement before the DIFC Courts (irrespective of the absence of assets of the award debtor from the DIFC). For the avoidance of doubt, the seating of the arbitration onshore does not prevent recognition and enforcement offshore. That said, had the award creditor applied for a challenge onshore pending the application for recognition and enforcement offshore, Al Muhairi may have considered adjournment of the application by virtue of Art. 44(2) of the DIFC Arbitration Law, or a refusal to enforce the subject award under Art. 44(1)(a)(v) of the DIFC Arbitration Law in the event that the award had been nullified before the onshore courts. This, no doubt, would have been a natural consequence of the operation of the principle of mutual recognition under Art. 7 of the Judicial Authority Law. Al Muhairi was not prepared to give deference to a prospective challenge onshore especially in circumstances where there had been ample time (10 months) for mounting such a challenge. Al Muhairi’s assessment will sit well with the 4-month time-limit introduced for onshore challenge actions by the draft UAE Federal Arbitration Law (which is expected to enter into force later this year).

By way of conclusion, it is encouraging to see the resolve with which the DIFC Courts deal with matters of recognition and enforcement. Vexatious arguments going to the arbitrability and/or public policy will not be entertained, demonstrating the arbitration-friendliness with which the DIFC Courts approach such questions. Equally, the DIFC Courts will not lightly give up their status as a conduit jurisdiction. It is telling in this context that it is a local resident judge, Al Muhairi, who obtained his judicial formation onshore, that turns out one of its most ardent supporters!

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