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The DIFC Courts as a Conduit: Saving Grace or Just a Lifeline?

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A recent decision of the Dubai-DIFC Judicial Tribunal (the “JT”) (see Cassation No. 6/2017 (JT) – Assas Investments Limited v. Fius Capital Limited) – even though not quite a saving grace – appears to throw a lifeline to the DIFC Courts in their role as a conduit jurisdiction. Regular readers of this Blog will recall that the JT was established by Decree (19) of 2016 by the Ruler of Dubai in an attempt to deal with conflicts of jurisdiction between the onshore Dubai and the offshore Dubai International Financial Centre (DIFC) Courts. Such conflicts are prone to arise where an award creditor seeks the enforcement of an award before the DIFC Courts whilst the award debtor challenges the same award before the onshore Dubai Courts pursuant to Art. 216 of the UAE Arbitration Chapter.

By way of reminder, the DIFC Courts have extended their jurisdiction on the basis of Art. 42 of the DIFC Arbitration Law to the recognition and enforcement of both domestic and foreign arbitral awards – even absent any assets of the award debtor in the DIFC – for onward execution before the onshore Dubai Courts, thus operating as a conduit of enforcement between the offshore DIFC and onshore Dubai. The DIFC Courts’ role as a conduit is in particular facilitated by the operation of Art. 7 of the Judicial Authority Law as amended, which establishes a regime of mutual recognition between the offshore DIFC and the onshore Dubai Courts and which prohibits the review on the merits by either court of the respectively other court’s legal instruments. The Dubai Courts have not taken well to the DIFC’s Courts role as a conduit and have declared the DIFC’s conduit jurisdiction null and void at first instance, setting aside the DIFC Courts’ findings in the Banyan Tree line of cases, which are widely recognised as the locus classicus of the DIFC Courts’ role as a conduit for the enforcement of domestic arbitral awards (see Commercial Case No. 1619/2016, ruling of the Dubai Court of First Instance of 15 February 2017 and my previous reporting here, <https://arbitrationblog.kluwerarbitration.com/2017/06/11/dubai-difc-judicial-committee-difc-conduit-jurisdiction-sequel-four-parts-dubai-court-first-instance-attack-part-3/>). The JT, too, has pronounced itself against the proper jurisdiction of the DIFC Courts in matters of onshore enforcement on the mistaken basis of the onshore Dubai Courts’ “general jurisdiction” (see my previous reporting here, <https://arbitrationblog.kluwerarbitration.com/2017/10/16/dubai-difc-judicial-committee-difc-conduit-jurisdiction-sequel-four-parts-game-part-4/>). This approach ignores the proper scope of Art. 42 of the DIFC Arbitration Law and the fact that constitutionally speaking, both the onshore Dubai and the offshore DIFC Courts are UAE courts at the same level of hierarchy.

The JT’s most recent decision in Cassation No. 6/2017 brings some welcome clarification to the

subject by emphasising that the question of the proper competence of the UAE courts – whether onshore or offshore – is one of the location of the award debtor’s assets: To the extent that an award debtor has assets in the DIFC, the award creditor may seek enforcement and execution of an award there. The JT equally clarifies that an award creditor may commence parallel enforcement and execution actions against assets of the same award debtor in relation to the same award in both the DIFC and in onshore Dubai provided the presence of assets both on- and offshore. More specifically, the JT rejected the proposition that there was a conflict of jurisdiction between the onshore Dubai and the offshore DIFC Courts in this respect.

By way of background, Assas Investment Limited (“Assas”), a Dubai-based investment company, applied to the JT for a decision as to which court – the onshore Dubai or the offshore DIFC Courts – was properly competent to hear an application for enforcement of a DIFC-LCIA award rendered in favour of Fius Capital Limited (“Fius”), a company incorporated in the DIFC and regulated by the DIFC Financial Services Authority (DFSA), for Assas’s failure to pay the balance of an outstanding debt advisory fee to Fius. This followed an unsuccessful challenge of the award before the Dubai Courts, where execution proceedings are presently pending. Assas then applied to the JT out of a concern of multiplicity of proceedings on the same subject matter between the same parties, two parallel execution proceedings having been initiated by Fius, one before the onshore Dubai Courts and the other one before the offshore DIFC Courts. Pursuant to Assas, this may result in double recovery and hence unjust enrichment on part of Fius or in inconsistent outcomes before the onshore and offshore courts.

The JT rejected Assas’s arguments as unmeritorious. Pursuant to the JT:

“9. [...] Any award creditor is entitled to pursue the award debtor for execution on the award in whatever jurisdiction that the award is recognized for enforcement. Presumably Dubai Courts [sic] accepted the DIFC-LCIA Arbitration Centre Award for execution pursuant to Article 7(2) of the Judicial Authority Law (Dubai Law no. 12 of 2004 as amended by Law No., 16 of 2011). If so, that is simply the law taking its natural course.

10. Pursuing execution proceedings in respect of an arbitration award in a jurisdiction which recognizes that Award does not mean that the award creditor is not permitted also to commence execution proceedings in the jurisdiction in the seat of arbitration. This is the same process as for court judgments whereby award creditors are not restricted in their execution process to a single jurisdiction but can at any time take the award to any other jurisdiction that recognizes the award, and then proceed to execute on assets of the award debtor in that jurisdiction.

11. Of course, the award creditor cannot carry out execution proceedings which will result in the creditor being able to recover more than 100% of the sum due under the relevant award, but the execution proceedings in force in various jurisdictions will keep a careful account of:

- (a) The amount due to the award creditor; and
- (b) The amount realized on the execution.

The award debtor will also be made aware of these figures, and can inform each enforcing court of the amount paid under the Award at the time of the execution so that the enforcing court does not overpay the creditor.

12. This is not a question of conflict of jurisdiction because each set of execution proceedings is

carried out in respect of different assets. The award (unless it is set aside [...]) will have equal force in all other states where it is recognized as in the seat of the arbitration.

13. It is indisputable that arbitration awards from the DIFC will be recognized in mainland Dubai. There is simply no reason in principle or in law why multiplicity of execution proceedings cannot proceed simultaneously and/or cumulatively.” (see Cassation No. 6/2017 (JT), paras 9-13)

The bottomline is that pursuant to the JT’s decision in Cassation No. 6/2017, enforcement and execution of an arbitral award go hand in hand and require the presence of an award debtor’s assets in the chosen enforcement jurisdiction. This questions the proper operation of Art. 7(2) of the Judicial Authority Law as amended to the extent that it allows an award creditor to apply directly to the onshore Dubai Court execution judge for execution of an award ratified by the DIFC Courts (in a situation where the award debtor does not have any assets offshore). The JT’s decision – albeit slightly confusing on the subject – appears to insist that execution of an award in onshore Dubai will ultimately depend upon the proper recognition of that same award by the onshore Dubai Courts and thus require a separate recognition and enforcement process in onshore Dubai. That said, the JT appears to recognise at the same time the “natural course” of Art. 7(2) of the Judicial Authority Law as amended, pursuant to which the onshore Dubai Courts may accept a DIFC-LCIA ratified award for execution (without a separate ratification process). It remains to be seen whether this requires the presence of any of the award debtor’s assets in offshore DIFC. If not, then the DIFC’s role as a conduit appears to stand unaffected and as such confirmed (at least in relation to the recognition and enforcement of domestic awards).

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