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The DIFC's Status as a Conduit: A Timely Update in the New Year

Gordon Blanke (Blanke Arbitration LLC) · Tuesday, February 5th, 2019

At the dawn of the New Year, it is time to provide an update on the Dubai International Financial Court (*DIFC*)'s role as a conduit. Since the DIFC's first entry onto the jurisdictional landscape as a conduit for the recognition and enforcement of awards for onward execution against assets of award debtors in [onshore Dubai](#), the DIFC's status as a conduit jurisdiction has been unstable, wavering between approval, half-hearted support and outright rejection. It did manage to clear the hurdles of [constitutional](#) and [public policy](#) concerns in the earlier days of its existence before entering into wanton – yet predictable – confrontation with the Dubai-DIFC Joint Judicial Tribunal (the “*JT*”). The JT was established precisely to deal with conflicts of jurisdiction between the onshore Dubai Courts and the offshore DIFC Courts.¹⁾

The latter half of 2018, however, saw the adoption of encouraging case law precedent, both at the hands of the DIFC Court of First Instance (the “CFI”)²⁾ and those of the JT³⁾

Isai v. Isabelle (CFI)

As I reported in a previous [blog](#), in a ruling of the CFI of early 2018⁴⁾, the CFI confirmed 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 in the absence of any assets of the award debtor offshore. The CFI based its findings in favour of its own jurisdiction on Art. 42(1) of the DIFC Arbitration Law, read together with Art. 5(A)(1)(e) of the Judicial Authority Law as amended⁵⁾ and Art. 8(2) of Dubai Law No. 9 of 2004.⁶⁾

Chenshan v. Dubai Waterfront (CFI)

In *Chenshan Liu v. Dubai Waterfront LLC*, the CFI extended the logic it applied to the determination of its own jurisdiction in *Isai v. Isabelle* to an application for the offshore recognition and enforcement of a DIAC award rendered in a Dubai-seated arbitration for onward execution onshore and holding the award debtor, Dubai Waterfront LLC, liable for repayment of a deposit paid for the intended purchase of a plot of land on the Dubai waterfront. The CFI promptly granted an order for recognition and enforcement in the summer of 2016. In response, the award debtor filed an application for setting aside before the DIFC Courts and moved for nullification of the award before the onshore Dubai Courts. In both proceedings, the award debtor raised, *inter alia*, the purported invalidity of the arbitration agreement as a ground for a successful challenge.

Shortly after, in around September 2016, following the establishment of the JT, the award debtor challenged the jurisdiction of the DIFC Courts before the JT, contending that Arts 42 and 43 of the DIFC Arbitration Law did not apply to DIAC awards. The JT found in favour of the onshore Dubai Court's jurisdiction to annul and enforce the award on the basis of "*the general principles of law embodied in the procedural laws*"⁷⁾. A dissenting minority (composed of the DIFC Courts' members of the JT) found that the Dubai Courts in their capacity as the curial courts did have jurisdiction to annul the award, but that the DIFC Courts had "*compulsory and exclusive jurisdiction to entertain an application for recognition and enforcement within the DIFC*"⁸⁾. In the prevailing circumstances, the DIFC Courts stayed their proceedings.

In 2017, the Dubai Courts rejected the award debtor's application for nullification, both on appeal and cassation. It was then that the award creditor applied to the DIFC Courts for re-instating the original 2016 DIFC Court Order for recognition and enforcement. The CFI, in turn, found that the CFI retained "residual jurisdiction" for the recognition and enforcement of the award on the basis of (i) the original and exclusive jurisdiction accorded to the CFI over any claim or actions over which the Courts have jurisdiction in accordance with the DIFC laws and (ii) Art. 24(1) of DIFC Law No. 10 of 2004, which accords jurisdiction to the DIFC Courts to ratify any recognised arbitral award. On this basis, Sir Justice David Steel of the CFI concluded as follows:

"There is nothing in the Decree [No. (19) of 2016] to suggest that the Joint Judicial Committee [i.e. the JT] has executory power to override the statutory jurisdiction of either [the onshore Dubai or the DIFC] court. It follows that once the Court of Cassation had dismissed the Defendant's appeal and the administrative stay had been lifted, the Claimant was entitled to reactivate the recognition proceedings. I reject the submission that the DIFC Courts had no residual jurisdiction in the matter."⁹⁾

Sir Justice Steel reinstated the original DIFC Court Order for recognition and enforcement. In arriving at this conclusion, he expressly discounted the proposition that under Decree No. (19) of 2016 "*once the Joint Judicial Committee decides on the appropriate court to have jurisdiction, there is no room for the other court to make any order whatsoever in relation to the global dispute in any of its aspects*"¹⁰⁾. According to Sir Justice Steel, "[t]his would lead to a black hole where it would be impossible to recognise and enforce an Award upheld by Dubai Courts within the DIFC, since there is no statutory mechanism for Dubai Courts to directly issue an order for enforcement of an Award within the DIFC save through the DIFC Courts."¹¹⁾ Further, "[t]he reliance on the alleged 'general principles of law' as supporting the Dubai Court's competence to entertain the case is difficult to reconcile with the allocation of 'exclusive jurisdiction' to the DIFC Courts pursuant to Article 5 of the Judicial Authority Law No. 12 of 2004."¹²⁾

Sinbad v. Al Tamimi (JT)

In *Sinbad Marine In. LLC v. Essam Abdulameer Hamadi Alfadli Al Tamimi*, a more recent JT pushed the boundaries of the DIFC's jurisdictional competence further, granting jurisdiction to the DIFC Courts for the recognition and enforcement of a non-DIFC award rendered in an onshore Dubai seat under the DIFC-LCIA Rules of Arbitration. In this case, the award creditor, Mr. Al Tamimi, sought recognition and enforcement of a DIFC-LCIA award for onward execution against

a Dubai-based award debtor, Sinbad Marine. In the arbitration, Sinbad Marine had been found to have failed in the renovation of a yacht owned by Mr. Al Tamimi. Sinbad Marine filed for nullification of the award before the onshore Dubai courts and contended for a conflict of jurisdiction that required resolution in favour of the onshore Dubai Courts on the basis that there was no automatic offshore DIFC Court jurisdiction and that both parties were based in onshore Dubai. Mr. Al Tamimi moved for dismissal of the cassation given that a DIFC Court order for recognition and enforcement had already been issued. Against this background, the JT concluded as follows:

“Despite the fact that the DIFC and the DIFC-LCIA [...] are separate entities, yet the DIFC-LCIA Arbitration Centre had been established in the DIFC. Accordingly, the supervising court of the arbitration should be the DIFC court [sic] and not Dubai Court.”¹³⁾

Even though the JT’s finding in favour of the DIFC Courts’ jurisdiction is, in principle, correct for the very reasons adduced by the CFI in its ruling in *Isai v. Isabelle*, it is difficult to follow the logic of the JT when it concludes from the offshore location of the DIFC-LCIA as the arbitration institution in charge of the administration of the reference in favour of the DIFC Courts’ status as the “supervising” court, a conclusion from which the DIFC Courts’ minority of the JT correctly dissented (a dissent that is presently still pending publication). For the avoidance of doubt, the geographic location of an arbitration institution does not assist in the identification of a competent enforcement court. A court’s jurisdictional competence and more specifically its competence to determine whether it is empowered to hear actions for recognition and enforcement is ultimately a question to be addressed by each court by reference to its own laws on jurisdiction. That said, the JT could have dismissed the cassation with relative ease on the basis that the DIFC Court proceedings for ratification and enforcement had already been closed and therefore, in the absence of two sets of proceedings pending in parallel before the Dubai and DIFC Courts, there was no conflict of jurisdiction within the meaning of Art. 4 of Decree No. (19) of 2016 to start (although, arguably, within the meaning of the Article, potentially divergent outcomes of the onshore and offshore courts – such as a successful nullification on the one hand and an order for enforcement on the other – suffice to accord the JT proper jurisdiction).

Be that as it may, Cassation No. 1/2018 provides good authority for the continued role of the DIFC Courts’ role as a conduit for the offshore recognition and enforcement of a non-DIFC DIFC-LCIA award for onward execution against assets of an award debtor in onshore Dubai.

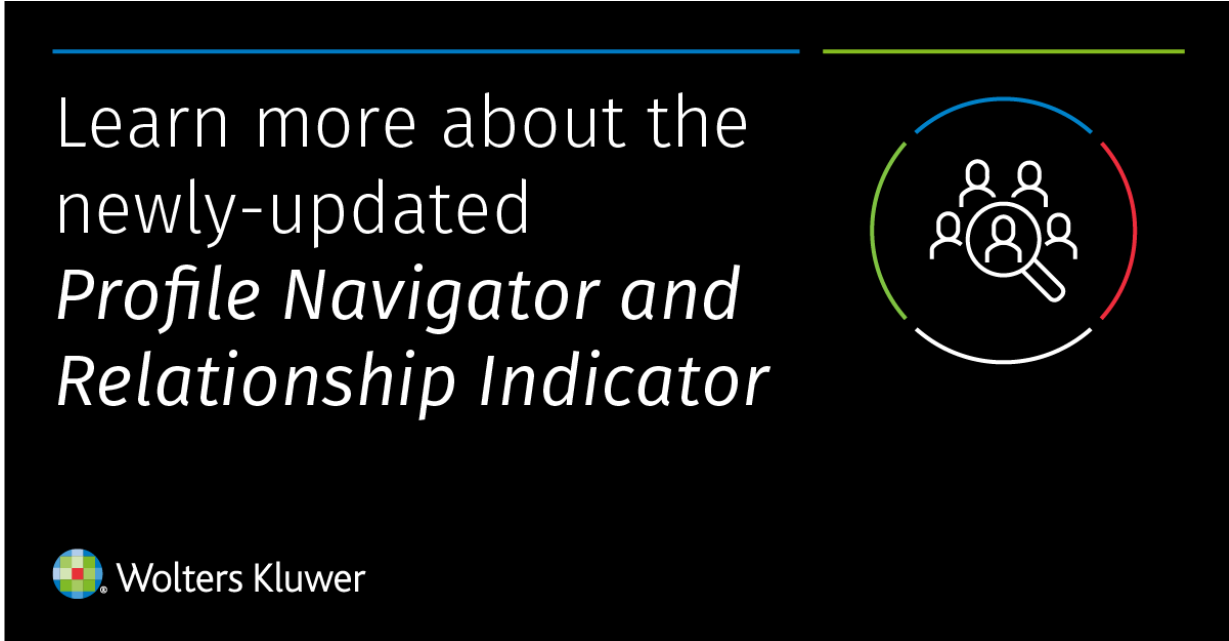
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References

- ?1 See Decree No. (19) of 2016 establishing the Dubai-DIFC Judicial Tribunal
- ?2 See *Chenshan Liu v. Dubai Waterfront LLC* [2016] ARB 004, Order with Reasons of Justice Sir David Steel, 29 July 2018.
- ?3 See Cassation No. 1/2018 (JT) – *Sinbad Marine In. LLC v. Essam Abdulameer Hamadi Alfadli Al Tamimi*
- ?4 See ARB 0006/2017 – *Isai v. Isabelle*, Amended Order with Reasons of H.E. Justice Omar Al Muhairi, dated 28 February 2018
- ?5 See Dubai Law No. (12) of 2004 as amended
- ?6 As amended by Dubai Law No. 7 of 2011
- ?7 See Cassation No. 2/2016 (JT) – *Dubai Water Front LLC v. Chenshan Liu*
- ?8 *Ibid.*
- ?9 [2016] ARB 004, at para. 36
- ?10, ?11 [2016] ARB 004, at para. 30b
- ?12 *Ibid.*, at para. 30d
- ?13 Cassation No. 1/2018, at p. 5

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