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The Judicial Tribunal Confirms DIFC Courts' Proper Jurisdiction for Challenge of Awards Under the DIFC Arbitration Law and the Role of the DIFC Courts as a Conduit

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In a ruling of 11 December 2019 (*see* Cassation No. 8/2019 (JT) – *Al Taena: AF Construction Company LLC (formerly Al Futtaim Carillion – Abu Dhabi LLC v. Power Transmission Gulf)*), the Dubai-DIFC Joint Judicial Tribunal, also commonly known as the “Judicial Tribunal” or simply the “JT”, was required to deal with the conflicting jurisdiction between the onshore Dubai and the offshore Dubai International Financial Centre (the “**DIFC**”) Courts for nullification and enforcement of a domestic DIFC-award rendered under the [DIFC Arbitration Law, DIFC Law No. 1 of 2008](#) (the “**DIFC Arbitration Law**”). In doing so, it essentially confirmed that the DIFC Courts are properly competent to hear actions for nullification of awards rendered under the DIFC Arbitration Law. Unwittingly, it also confirmed the DIFC Courts’ role as a conduit for the enforcement of DIFC awards for onward execution against non-DIFC assets of award debtors based in Abu Dhabi.

The JT

By way of reminder, the JT was established by Decree of the Ruler of Dubai (*see* Decree No. (19) of 2016 forming the Judicial Committee of the Dubai Court and the DIFC Courts, dated 9 June 2016; for reporting on the subject, [see my previous blog posts](#)) precisely to deal with conflicts of jurisdiction between the onshore Dubai and the offshore DIFC Courts. Generally speaking, the JT’s competence is confined to situations of genuine jurisdictional conflict, that is where both the onshore and offshore courts have been seized simultaneously in related proceedings or where both courts have declined jurisdiction on the same or related subject-matter.

In an arbitral context more specifically, a qualifying conflict of jurisdiction typically arises in circumstances where an award creditor seeks to enforce a domestic (whether on- or offshore) award before the DIFC Courts pending an action for nullification of the same award initiated by the award debtor before the onshore Dubai Courts. Some of these cases have given rise to the operation of the DIFC Courts as a conduit jurisdiction for the recognition and enforcement of onshore non-DIFC awards for onward execution against the award debtor’s assets offshore by virtue of the area of free movement of judicial instruments, including ratified awards, established by Article 7 of the [Judicial Authority Law, Dubai Law No. 12 of 2004](#), as amended by [Dubai Law No. 16 of 2011](#) (the “**JAL**”) ([see my previous post](#)).

Interestingly, even though the present case appears straightforward on its face, dealing with the nullification and enforcement of a DIFC Award through the DIFC Courts, it is evident that given the registration of both Parties in onshore Abu Dhabi, this is, more likely than not, a case that will ultimately require *execution* of the award, once ratified by the DIFC Courts, against assets of the award debtor in onshore Abu Dhabi, and in this sense require the DIFC Courts to act as a conduit. To say the least, no mention is made in the JT's ruling of the presence of any of the award debtor's assets in the DIFC (despite the passing reference to the purported *execution* of the subject award by the DIFC Courts, see para. 4 of the ruling).

The Facts

By way of background, the Appellant, Al Taena, a subcontractor with registered offices in mainland Abu Dhabi, entered into a subcontract agreement with the Respondent, Power Transmission Gulf, equally registered in mainland Abu Dhabi, for the supply, manufacture, installation, operation and testing of mechanical and electrical works and the plumbing for New York University in Abu Dhabi (the “**Subcontract**”). The Subcontract contained an arbitration clause providing for any disputes between the Parties to be referred to arbitration under the [Arbitration Regulations of the Abu Dhabi Commercial Conciliation and Arbitration Centre](#) (the “**ADCCAC**”), to be held in Abu Dhabi before a sole arbitrator (the “**Arbitration Clause**”). The Arbitration Clause was subsequently amended, shifting the arbitral forum from ADCCAC to the DIFC-London Court of International Arbitration (the “**DIFC-LCIA**”) and providing for a three-member panel to conduct any arbitration under the [Rules of Arbitration of the DIFC-LCIA](#) (the “**DIFC-LCIA Rules**”) and the DIFC Arbitration Law (the “**Arbitration Agreement**”). In addition, Clause 10 of the Subcontract provided for the exclusive jurisdiction of the DIFC Courts in relation to any dispute arising between the Parties with respect to the Arbitration Agreement.

Subsequently, a dispute arose between the Parties and was referred to DIFC-LCIA arbitration under the DIFC Arbitration Law (*see* Arbitration Case No. 16068 DL). The arbitral proceedings were conducted in Dubai Marina, that is onshore, *i.e.* outside the DIFC. On 15 March 2019, the Tribunal rendered an award in favour of the Respondent. In further course, the Respondent in its capacity as award creditor filed for recognition and enforcement before the DIFC Court of First Instance (DIFCCFI) (DIFCCFI Case No. ARB-009-2019).

Around the same time, the Appellant in its capacity as award debtor applied for the nullification of the award to the onshore Dubai Courts (*see* Petition No. 13/2019) on the basis of the purported invalidity of the award and the purported exclusive jurisdiction of the Dubai Courts given the fact that the arbitral proceedings had been conducted in mainland Dubai and hence outside the DIFC.

The JT's findings

Against this background, the JT held as follows:

- To start, the JT cited in relevant part Article 5(1) and (2) of the DIFC Courts Law (*see* [DIFC Law No. 10 of 2004](#)), in order to conclude: “Although the DIFC and the DIFC Arbitration Center – London International Arbitration Tribunal are separate entities, the DIFC Arbitration Center is an established institution in the DIFC, and therefore pursuant to Article 5, paragraph 1 / a above, the

DIFC Court shall be responsible for monitoring the aforementioned arbitration award and not the Dubai Court.” (para. 9)

I have difficulties following this type of reasoning. The DIFCCFI’s competence to hear actions for recognition and enforcement of DIFC awards stems from Article 42(1) of the DIFC Arbitration Law, which provides that “[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, shall be enforced”. Further, the DIFC Courts’ powers conferred by the DIFC Arbitration Law originate in Article 5(1)(E) of the DIFC Court Law, which provides for the “exclusive jurisdiction” of the DIFCCFI “to hear and determine [...] any [a]pplication or action that the courts have the power to consider under the Center’s laws and regulations”, one of those laws being the DIFC Arbitration Law. Contrary to the JT’s proposition, the DIFCCFI’s competence in the present circumstances does not result from Article 5(1)(A), which confers exclusive jurisdiction upon the DIFCCFI for any “[c]ivil or commercial applications and claims to which the Center or any of the Center’s bodies, the Center’s institutions or the Center’s licensed institutions are a party” (no such bodies or institutions being involved in the present proceedings).

- The JT also emphasised the apparent agreement between the Parties to arbitration in the terms set out in the Arbitration Agreement, including in particular the DIFC Courts’ competence to hear actions for recognition and nullification of awards under the DIFC Arbitration Law (see para. 8). This, no doubt, is a correct assessment of the position under the DIFC Arbitration Law, including in particular Article 42(1) in the terms outlined above.
- The JT further confirmed that according to Article 16(2) of the DIFC-LCIA Rules, a DIFC-LCIA tribunal is empowered to hold meetings and hearings outside the legal place or the seat of the arbitration: A resultant award would still be considered issued by the DIFC-LCIA (para. 10). I concur with this proposition in principle, but would add that Article 38(3) of the DIFC Arbitration Law equally confirms that “[t]he award shall be deemed to have been made at the Seat of the Arbitration” and according to Article 27(2) of the DIFC Arbitration Law, “the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties [...].”
- That said, the JT also made reference to the “general jurisdiction” of the onshore Dubai Courts (para. 10). It is not clear what this general jurisdiction is. Given that there is no judicial hierarchy between the onshore Dubai and the offshore DIFC Courts, the two courts are of equal status and are as such empowered to determine the limits of their own jurisdiction, neither of the having a “general” jurisdiction that trumps the jurisdiction of the respectively other.

Conclusion

In the light of the foregoing, the JT, correctly in my view, concluded in favour of the DIFC Courts’ jurisdiction. For the avoidance of doubt, even without the provision at Clause 10 of the Subcontract, the DIFC Courts are competent to hear actions for nullification in their curial capacity

in the terms of Article 41 of the DIFC Arbitration Law. To the extent that parties contract into the DIFC Arbitration Law, the DIFC Courts have competence to exert such curial functions.

On a further note, the JT's ruling in *Al Taena v. Power Transmission Gulf* raises the question of the extent to which the DIFC Courts are competent to serve as a conduit for the enforcement of awards (whether on- or offshore) for onward execution outside the DIFC, here in mainland Abu Dhabi. This could be facilitated by the operation of Article 7 JAL, which establishes a system of mutual recognition of DIFC Court orders for enforcement of on- and offshore awards before onshore Dubai Courts, without a review on the merits. A mainland Dubai Court order recognizing the DIFC Court order for recognition and enforcement would in further course be subject to recognition by the Abu Dhabi onshore courts under Article 11 of the UAE Federal Law No. 11 of 1973 (Concerning the Organization of Judicial Relationships Amongst Emirates Members in the Federation, issued 25 July 1973).

In the alternative, the DIFC Court order might benefit directly from the terms of UAE Federal Law No. 11 of 1973, the DIFC Courts qualifying as a court of the Federation. In a further alternative, the DIFC award itself might be enforceable in the terms of Article 13 of UAE Federal Law No. 11 of 1973 (“*The decisions of the arbitrators issued in one of the emirates shall be executable in any other emirate member of the federation. The juridical body being demanded to carry out the execution cannot reinvestigate the same incident concerning which the decision of the arbitrators was issued.*”), there being no need for the more cumbersome enforcement process via the Dubai onshore courts or even the DIFCCFI.

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