

Kluwer Arbitration Blog

Free Zone Arbitration in the UAE: Some Highlights of 2019 (Part 2)

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This is Part 2 of a blog published in two parts. Part 1 dealt with the Abu Dhabi Global Market Court of First Instance (“*ADGMCFI*”)’s rulings in *A3 v. B3* [2019] ADGMCFI 0004 (4 July 2019), enforcing an ADGM arbitration agreement, and in *A4 v. B4* [2019] ADGMCFI 0007 (8 October 2019), enforcing a foreign LCIA arbitral award under the [New York Convention](#). This Part 2 discusses a ruling issued by the Dubai International Financial Centre Court of First Instance (“*DIFCCFI*”), which re-considers the proper scope of application of Art. 7 of the [UAE Judicial Authority Law](#) (“*JAL*”).

YYY Limited v. ZZZ Limited [DIFC] 2017 ARB 005 (17 November 2019)

In this case, the DIFCCFI dealt with the question of whether it was bound by a prior declaratory ruling of the Dubai Court of Cassation (“*DCC*”) in the same matter, finding in favour of the invalidity of an arbitration agreement between the parties due to a purported lack of capacity of one of them to sign. The DIFCCFI found that it was not so bound given that the binding force of Art. 7(4) and (5) JAL was limited to judgments that were properly capable of enforcement by execution against the award debtor’s assets (the term “*executory*” as used in Arts 7(2)(a) and 7(4)(a) JAL being properly translated as “*appropriate for enforcement [by execution]*”). Declaratory judgments typically were not, whereas money judgments were. The DCC’s ruling was declaratory in nature, declaring the invalidity of the underlying arbitration agreement, and could as such not produce a binding effect upon the DIFC Courts under Art. 7(4) and (5) JAL. As a consequence, the DIFCCFI refused the automatic recognition of the DCC’s ruling under Art. 7(4) and (5) JAL. According to the DIFCCFI, this outcome was also dictated by the limitations of the execution process operated within the DIFC as provided for in Part 45 of the Rules of the DIFC Courts, which lists a limited range of methods of execution to the exclusion of enforcement by execution of declaratory judgments.

In concluding against automatic recognition, the DIFCCFI distanced itself from the broader approach taken by former Chief Justice Michael Hwang in *Oger v. Daman*¹⁾ & ARB-002-2015., in which the Chief Justice held that “*under Article 7(5), [the DIFC Courts] ha[d] no power to review the merits of any judgment of Dubai courts, except as to form, [but that instead,] it had to recognise and enforce it*” (paras 75-77).

The DIFC Courts also refused to recognise the DCC's ruling at common law. According to the DIFCCFI, pursuant to the conflict of laws rules applicable in the DIFC (which draw in general on the English conflict of laws rules), “[a] foreign judgment is impeachable on the ground that its enforcement or, as the case may be, recognition, would be contrary to public policy.” (*ibid.*, at 81). In applying this rule, the DIFCCFI found that the DCC's ruling must not be recognised as to do so would be contrary to the public policy of the DIFC (*ibid.*, at 82). Handing down the DIFCCFI's ruling, Justice Sir Richard Field reasoned as follows:

“82. [...] The NYC [i.e. the New York Convention] requires the courts of the contracting states to uphold arbitration agreements and I regard it as plain that when a domestic court is asked to find that an arbitration agreement is null and void in the circumstances contemplated in Article II.3, it should make that decision, as implicitly required by Article V 1. (a), on the basis of the law to which the parties have subjected the arbitration agreement [i.e. English law as the governing law of the underlying Hotel Management Agreement]. [...] [...] With very great respect, it therefore appears to me that, in deciding as it did, the Dubai Court of Cassation was in breach of the NYC. It was suggested in argument that the Dubai law as to the authority necessary for an arbitration agreement to be binding through the consent of an agent is in the nature of *ordre public* and cannot be contracted out of. Even if this be so, I respectfully still take the view that the CC Decision [i.e. the DCC's ruling] was made in breach of the NYC and for this reason that decision should not be recognized by this Court. The NYC compelled the Dubai Cassation Court to apply English law in determining the validity of the arbitration agreement.

83. Even if the CC Decision was not made in breach of the NYC, there are two further reasons why, in my opinion, it would be contrary to the public policy for the DIFC to recognise the decision. First, recognition of the CC Decision would put the DIFC Court itself in breach of the NYC for failing to uphold the validity of the arbitration agreement, there being nothing in the English law of agency, the applicable law, which is of the nature of *ordre public*. Second, the DIFC Court is the court of the seat and therefore the supervisory court whilst the arbitration is in progress and recognition of the CC Decision would disable this Court from carrying out this very important function.

84. Even if the correct view is that the CC Decision falls within Article 7 (4) and (5) of the JAL, notwithstanding that it is a declaratory judgment, I would still hold that the DIFC Court has a residual discretion in very exceptional circumstances not to recognise Dubai judgments covered by those provisions. And for the reasons given in paragraphs 82 and 83 above, I would still decline to recognise the CC Decision.”

At first sight, the DIFCCFI's reasoning with respect to the limited scope of application of Art. 7 JAL is compelling. To the extent that it affects the proper construction of both Arts 7(2)(a) and 7(4)(a) JAL, it will limit the automatic recognition of both onshore Dubai and offshore DIFC

declaratory rulings. In other words, as a result of the DIFCCFI's ruling (provided its reasoning is recognised and adopted as the standard interpretation of the onshore/offshore operation of Art. 7 JAL), the system of mutual recognition between the onshore Dubai Courts and the offshore DIFC Courts will no longer operate with respect to declaratory rulings of the Dubai and the DIFC Courts.

In this sense, going forward, the area of onshore/offshore free movement of judicial instruments will exclude declaratory rulings. This could have significant ramifications, in particular considering that such limitation might extend to orders for the recognition and enforcement of declaratory awards, such as awards on jurisdiction. In addition, it is worth noting that even though English law might be considered properly applicable to the arbitration agreement, to the extent that the issue of lack of capacity addressed by the DCC is properly qualified as of UAE public policy, it would need to be given full credit by both the onshore Dubai and offshore DIFC Courts, both of them being UAE Courts, which in turn are bound by UAE public policy. This even holds in application to the New York Convention, which is based on the public policy at the seat of the supervisory court.

Conclusion

In the round, it is fascinating to witness the gradual mutual integration of the onshore and offshore legal systems in both Abu Dhabi and Dubai. The extent to which the offshore courts will ultimately be able to serve as a conduit for the recognition and enforcement of onshore arbitral awards for onward execution outside the free zone is of residual importance. It will ultimately not affect the process of full integration between onshore and offshore, even though offering an intermediary forum for recognition and enforcement would, no doubt, promote onshore/offshore forum shopping.

In any event, it is encouraging to see that the ADGM Courts welcomed their first arbitration-relevant case law in 2019, testing the limits of free zone arbitration *à la* ADGM. For ADGM arbitration to mature and grow into its own, many more such cases will have to come before the ADGM Courts in years to come. Watch this space for future developments!

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References

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?1 <https://www.difccourts.ae/2018/10/17/cfi-013-2016-oger-dubai-llc-v-daman-real-estate-capital-partners-ltd/>>CFI-013-2016 & ARB-002-2015.

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