

The DIFC Court of First Instance’s ruling of 28 July 2016 in Case CFI 020/2016 – *Brookfield Multiplex Constructions LLC v. (1) DIFC Investments LLC (2) Dubai International Financial Centre Authority* and its continued relevance

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What is the continued relevance of the DIFC Court of First Instance’s ruling in *Brookfield*?

The DIFC Court of First Instance’s ruling in *Brookfield* retains its relevance to the present day given the fact that it was not appealed and that the Parties instead appear to have settled following issuance of the DIFC Courts’ ruling. The DIFC Court of First Instance through Justice Sir Jeremy Cooke ruled, in principle, in favour of the availability of interim measures issued by the onshore Dubai Courts in support of arbitrations seated in the offshore Dubai International Financial Centre (DIFC). Even though the DIFC Courts’ findings to this effect were not express but only implied² and in this sense *obiter dictum*, it bears mentioning that Justice Cooke ruled in no uncertain terms that measures of interim relief available before the onshore Dubai Courts in support of an arbitration with seat in mainland Dubai could equally be harnessed in support of arbitral proceedings seated in the DIFC (despite the exclusive role of the DIFC Courts as the curial courts of a DIFC-seated arbitration). The Court also took the opportunity to state its views on other matters, including in particular the DIFC Courts’ powers to grant anti-suit injunctions over the onshore Dubai Courts. The Court finally concluded with some musings over the proper designation of the DIFC as a seat of arbitration. The Justice’s conclusions on these various matters are not entirely beyond criticism and as such deserve, in my view, closer scrutiny, especially in the light of (i) the existing free area of movement in respect of legal instruments between the onshore Dubai and the offshore DIFC Courts within the terms of the Judicial Authority Law as amended (see DIFC Law No. 12 of 2004 as amended) and (ii) the proper scope of competence and the case law precedent of the newly-established Dubai-DIFC Joint Judicial Tribunal, commonly referred to in shorthand as the “JT”.

What is the background to the DIFC Courts’ ruling in *Brookfield*?

By way of background, Brookfield Multiplex Constructions LLC (“Brookfield Multiplex”), a Dubai-based construction company and the Claimant in the present action, commenced Part 8 proceedings before the DIFC Courts against the DIFC Investments LLC (DIFCI) and the Dubai International Financial Centre Authority (DIFCA), both DIFC authorities, in pursuit of two main declarations: (i) that there was a binding arbitration agreement between Brookfield Multiplex on the one hand and the DIFCI and the DIFCA on the other; and (ii) that, subject to the arbitration agreement, the DIFC Courts – as opposed to the onshore Dubai Courts – had exclusive jurisdiction to hear the underlying dispute on the merits. The mentioned arbitration agreement featured in a building contract concluded between the DIFCA and Brookfield Multiplex for the construction of the Gate Building, the main landmark of the DIFC, also known as “The Gate”, in 2003. That contract was said to “*be governed by and construed according to the laws of and applicable in the Emirate of Dubai*”, including “*without limitation, any ordinance, rule, decree, regulation or order of any governmental authority or agency of the Government of Dubai or the United Arab Emirates*”. The contract further provided for disputes or differences arising from it to be “*submitted to arbitration in the Emirate of Dubai as set forth below*”, to be “*conducted in the English language and in accordance with such procedures as the arbitrator agrees provided that no such procedures shall be contrary to any laws [...] for the time being in force or applicable in the Emirate of Dubai*”, default appointments of arbitrators to be secured by reference to “*the Committee for Conciliation and Arbitration of the Dubai Chamber of Commerce and Industry*” (which, it appears, no longer exists). Purported instances of deficient workmanship on part of Brookfield Multiplex, including the collapse of some marble cladding on the façade of The Gate, gave rise to a dispute between the Parties in late 2015.

¹ The law is stated as at 28 November 2017.

² Given that the Court was not required conclusively to determine the proper seat of the arbitration – whether onshore Dubai or the offshore DIFC – in the prevailing circumstances.

Pending settlement negotiations between the Parties, the DIFCI successfully applied to the onshore Dubai Court for the appointment of an expert to investigate and report back on the condition of The Gate under Art. 68 of the UAE Law of Evidence read together with Art. 28 of the UAE Civil Procedures Code. In response to this interim application before the onshore Dubai Court, Brookfield Multiplex requested the DIFC Courts to restrain any proceedings pending before the Dubai Court in favour of the proper exclusive jurisdiction of the DIFC Courts over the dispute, hence essentially asking for an anti-suit injunction from the offshore DIFC Courts over the pending proceedings before the onshore Dubai Court. In response, the DIFCI gave undertakings before the DIFC Courts that it would not pursue proceedings on the merits in relation to the building contract. This, pursuant to Justice Sir Cooke, made it unnecessary to make a finding on the first declaration requested by the Claimant and shifted the focus entirely onto the issue of which court was to have proper jurisdiction, the onshore Dubai or the offshore DIFC Courts. In the further sequence of events, the onshore Dubai Court granted the application and appointed an expert with the mandate to report on the status of the deficiencies in workmanship of The Gate and assess the damages thereof.

What were the main findings of the DIFC Court of First Instance in *Brookfield*?

In a first instance, Justice Cooke examined in some detail the true objective and scope of Art. 68 of the UAE Law of Evidence and concluded that an expert appointed under that Article did not usurp the competent court of the merits (whether an arbitral tribunal or a public court) and as such did not affect the substance of the dispute, i.e. the substantive rights and obligations of the Parties. In the Justice's view, it was *"a matter for [the arbitrators] as to whether or not all of the [resultant expert] report was properly admissible or whether it usurped their functions in some respects and required redaction."* (CFI 020/2016, at para. 23) In the light of the laws of the Emirate of Dubai applicable to the conduct of the arbitral procedure, the Justice concluded that *"it is [...] plain that the arbitrators can control their own procedures but could not view the expert's findings as being determinative of the issues which fell to them for decision, because the law of Dubai provides that such expert determination is not to affect the substantive rights of the parties."* (CFI 020/2016, at para. 24) This is essentially in line with the findings of the onshore Dubai Courts in response to Brookfield Multiplex's allegation that the Dubai Court did not have proper jurisdiction over the dispute, that matters of liability, causation and damages were referable to arbitration and that it was the DIFC Courts that had proper jurisdiction in relation to attendant ancillary measures. In reflection on the onshore Dubai Court's findings and paying deference to considerations of comity, Justice Cooke stated as follows:

"It is not for this Court to impugn the reasoning behind the decision of the non-DIFC Dubai Court nor the substance of the decision itself but if the Court had no jurisdiction to make the order or the pursuit of the proceedings and application for the order amounted to a breach of the arbitration agreement, this Court would be bound to consider whether or not the grant of an injunction was appropriate in accordance with settled authority constituted by the well-known line of cases commencing with the *Angelic Grace* [1995] 1 Lloyd's Rep 87." (CFI 020/2016, at para. 18)

Justice Cooke rightfully took care to emphasise that even the DIFC Arbitration Law expressly admitted the possibility of a non-DIFC interim measure, including measures from the onshore Dubai Courts, irrespective of the seat of the arbitration, whether DIFC or non-DIFC³. Conversely, the DIFC Courts' powers to issue interim measures were confined to arbitrations seated in the DIFC. (CFI 020/2016, para. 35) This, however, pursuant to Justice Cooke, had to be distinguished from the power to grant an application for an injunction to protect a party's negative right not to be sued in a court in violation of an agreement to arbitrate, i.e. the power to grant an anti-suit injunction, which – in reliance on relevant English case law precedent - Justice Cooke confirmed was available from the DIFC Courts even where the arbitration was not seated in the DIFC. In the Justice's reflections:

³ See DIFC Law No. 1 of 2008, Art. 15, which provides that *"it is not incompatible within the Arbitration Agreement for a party to request, before or during arbitral proceedings, from a Court an interim measure of protection and for a Court to grant such measures"*, read together with Art. 7 of the same Law.

“38. I do not [...] accept that, even if the seat of the arbitration is non-DIFC Dubai, the Court has no jurisdiction to grant an anti-suit injunction but it would be an unusual and exceptional case where the Court did so, particularly bearing in mind the appropriate respect that the courts of the two different systems in the Emirate of Dubai must have for each other. [...]

39. It is clear to me that, if non-DIFC Dubai is the seat of the arbitration, this Court would not interfere with an order made by that court because of the existence of an arbitration agreement. [...]

40. Although [by virtue of Art. 5(A)(1) of the Judicial Authority Law] the DIFC Courts are given exclusive jurisdiction over DIFC Bodies and Entities both generally and in relation to transactions of the character of the construction contract between the parties so that it has jurisdiction, in its own eyes, to enforce the arbitration agreement in that contract, regardless of the seat of the arbitration and the implied choice of the parties of the courts of the seat as the supervisory courts, the DIFC Court would not in practice do so, save in exceptional circumstances. Its jurisdiction cannot be ousted by the parties’ choice of the seat and supervisory jurisdiction, but comity would militate against the exercise of that jurisdiction when the courts of the seat can not [sic] only supervise the arbitration but are in a position to grant any injunction necessary and to ensure that the arbitration agreement is not breached by pursuit of remedies in that court.”

As regards the seat of the arbitration, Justice Cooke took the interesting view that the arbitration provision contained in the building contract was to be construed as providing for arbitration seated in the DIFC. His reasoning was thus:

“45. [...] Whilst at the time of concluding the contract, there was only one system of law and courts in existence, namely non-DIFC Dubai, it was the law of the Emirate of Dubai which was chosen as the governing law. Under the terms of that law, jurisdiction was then parcelled out between the DIFC and the non-DIFC Courts in 2004. From that point on, particular types of case were allocated to the DIFC and fell within the jurisdiction of that system, as opposed to that of the non-DIFC Courts. From that point on therefore, where, subject to the arbitration agreement, the DIFC Court had jurisdiction over the parties and/or contract in question, by reason of the terms of Article 5(A) of the Judicial Authority Law of 2004, the logic of the position would dictate that DIFC became the seat of the arbitration.”

What is your initial assessment of the DIFC Courts’ findings in *Brookfield*?

In my view, the DIFC Courts’ findings in *Brookfield*’s are not beyond criticism.

To start, even though Justice Cooke’s statement on the proper competence of the DIFC Courts to grant interim measures in non-DIFC seated arbitrations is only an *obiter dictum*, I have concerns that it does not give sufficient credit (let alone pay deference) to the regime of mutual recognition that has been put in place between the offshore DIFC and the onshore Dubai Courts by virtue of Art. 7 of the Judicial Authority Law. Pursuant to Art. 7, judgments, orders and ratified arbitral awards are to move freely between the DIFC and Dubai Courts and *vice versa* without any review of the merits by the receiving court. Art. 7 essentially presumes a relationship of trust between the DIFC and Dubai Courts, both forming part of the same family of courts, namely that of the Emirate of Dubai. This, one should think, would naturally extend to respecting the respectively other Court’s decision on its proper competence to hear a dispute and to treating as conclusive its finding as to the potential violation *vel non* of an arbitration agreement.

In a similar vein, it would seem to me that the consideration of anti-suit relief between the onshore Dubai and the offshore DIFC Courts does not sit well with the relationship of trust between the two Courts by virtue of Art. 7 of the Judicial Authority Law (even if anti-suit injunctions are brought *in personam* and not against a court). Whichever one of the two Courts were to decide first on a party’s application for a particular form of relief should be respected by the respective other Court and its decision enforced by virtue of Art. 7 of the Judicial Authority Law. In the light of the regime of mutual recognition and the relationship of mutual trust established by Art. 7 of the Judicial Authority Law, there is neither need nor room for the comity considerations entertained by Justice Cooke.

Finally, even though Justice Cooke’s reasoning on the seat of the arbitration is intuitive from a pure DIFC perspective, I find it difficult to ignore the strong indicators in the wording of the original arbitration

provision that all – without exception – point towards mainland Dubai as the proper seat of the arbitration: There is not one single mentioning of the DIFC and even the default appointment of the arbitral tribunal was entrusted to a mainland-Dubai seated (albeit now defunct) institution. How, one would ask, could the Parties have chosen DIFC-seated arbitration at the time of signing the building contract and the arbitration provision contained therein, when – at that time – they could not even have been aware – let alone have fully understood – the concept of arbitration in the DIFC. Arbitration is ultimately about party autonomy: To read retrospectively into an arbitration agreement elements that the parties could not have designed of their own free will at the time of contracting is artificially contrived and is not easily (if at all) reconcilable with the principle of party autonomy.

How are the DIFC Courts' findings in *Brookfield* impacted by the more recent case law precedent of the JT?

It is arguable that the recent rulings of the JT, which was established by the Ruler of Dubai by virtue of Decree (19) of 2016 in order to resolve conflicts of jurisdiction between the onshore Dubai and the offshore DIFC Courts in situations where these have been seized in parallel, are entirely incompatible with the findings of the DIFC Courts in *Brookfield* (at least to the extent that these go to the issue of the proper distribution of competence between the onshore Dubai and offshore DIFC Courts). The JT has routinely found in favour of the onshore Dubai Courts general jurisdiction in prevalence over the offshore DIFC Courts' exclusive jurisdiction to recognise and enforce non-DIFC awards within the meaning of Art. 42(1) of the DIFC Arbitration Law (see most recently *Cassation No. 1/2017 – Gulf Navigation Holding PJSC v Jinhai Heavy Industry Co Ltd and Cassation No. 3/2017 – Ramadan Mousa Mishmish v Sweet Homes Real Estate*). There is reason to believe that the JT's categorical approach in favour of the wholesale jurisdiction of the onshore Dubai Courts, in complete disregard of Art. 7 of the Judicial Authority Law as amended and the provisions of the DIFC Arbitration Law, will ultimately also inform the JT's position on the competing jurisdiction between the onshore and offshore courts for the issuance of interim measures (including anti-suits) and actions for enforcement of arbitration agreements (including declarations of validity).

For the avoidance of doubt, the JT's reliance on the general jurisdiction of the Dubai courts taking precedence over the DIFC Courts challenges a natural reading of the distribution of competence between the onshore Dubai and offshore DIFC Courts pursuant to the existing laws and regulations. The Dubai Courts are simply not hierarchically superior in jurisdiction to the DIFC Courts; both courts qualify, constitutionally speaking, as UAE courts with their respective jurisdictional limits defined in the prevailing legislation. Pursuant to that legislation, the DIFC Courts are clearly competent to hear applications for ratification and enforcement of both domestic and foreign arbitral awards, even absent any assets of the award debtor in the DIFC. The onward execution of DIFC Court orders for the ratification and enforcement of those awards in onshore Dubai, in turn, is sanctioned and facilitated by the regime of mutual recognition in place between the Dubai and DIFC Courts by virtue of Art. 7 of the Judicial Authority Law as amended, which establishes an area of free movement of judgments, orders and ratified awards between onshore Dubai and the offshore DIFC.

Is there a solution to the existing conflicts of jurisdiction between the onshore Dubai and the offshore DIFC Courts?

In response to the conflicts of jurisdiction foreshadowed by the DIFC Court of First Instance in *Brookfield*, there is merit in exploring the availability of a first-seized rule. Such a rule could accord jurisdictional precedence to the court first seized, whether onshore or offshore, and would be compatible with the existing regime of mutual recognition in place between the Dubai and DIFC Courts under Art. 7 of the Judicial Authority Law as amended. In actual fact, there is ground for saying that unspeakingly, the majority of the JT decisions to date have been based on a first-seized rule, the onshore Dubai Courts having invariably been seized first in the cases that have come before the JT to date. With this in mind, a first-seized rule could be easily incorporated into the regime of mutual recognition or free movement under Art. 7 of the Judicial Authority Law as amended by providing specific amending wording to the desired effect.