



## The DIFC as a conduit: Latest developments<sup>1</sup>

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### Introduction

Despite fears that the Dubai International Financial Centre (DIFC) Courts' role as a conduit jurisdiction for the recognition and enforcement of onshore non-DIFC awards in offshore DIFC for onward execution against assets of award debtors in onshore Dubai might be moribund,<sup>2</sup> most recent case law of the DIFC Court of First Instance (the "CFI")<sup>3</sup> shows that the DIFC as a conduit is alive. Even the Dubai-DIFC Joint Judicial Tribunal (the "JT"), which was originally established by the Ruler of Dubai to deal with conflicts of jurisdiction between the onshore Dubai and offshore DIFC Courts<sup>4</sup> and which so far had found systematically in favour of the onshore Dubai Court's jurisdiction on the basis of the latter's purported general jurisdiction<sup>5</sup>, appears to have come full circle, following an almost imperceptible correction of course.

### *Isai v. Isabelle* (CFI)

As I reported on a previous occasion,<sup>6</sup> a ruling of the CFI of earlier this year<sup>7</sup> already provided some welcome clarity on the seemingly limited scope of the DIFC Courts' status as a conduit jurisdiction at the crossroads between the jurisdictional competence of the onshore Dubai and the offshore DIFC Courts. More specifically, in *Isai v. Isabelle*<sup>8</sup>, 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. By way of reminder, in that case, H.E. Justice Al Muhairi rejected the award debtor's application for dismissal of the awards creditor's application for recognition and enforcement before the DIFC Courts. According to Al Muhairi, the DIFC Courts had proper jurisdiction to recognise and enforce the subject DIFC-LCIA award by virtue of Art. 42(1) of the DIFC Arbitration Law<sup>9</sup>, which empowers the DIFC Courts to recognise as binding any arbitral award "*irrespective of the State or jurisdiction in which it was made*". Al Muhairi correctly identified as a "gateway" for the Court's jurisdiction (i) Art. 5(A)(1)(e) of the Judicial Authority Law as amended, which confers exclusive jurisdiction on the DIFC Courts to hear and determine any action over which the Courts have jurisdiction in accordance with DIFC Laws and Regulations, read together with (ii) Art. 8(2) of Dubai Law No. 9 of 2004<sup>10</sup>, which requires the DIFC Courts' jurisdiction to be determined by reference to DIFC Laws.<sup>11</sup> Pursuant to Al Muhairi, neither the Judicial Authority Law as amended nor

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<sup>1</sup> This article is based on G. Blanke, "The DIFC as a conduit: Alive and kicking ... after all! (Part 1)", Practical Law Arbitration Blog, Thomson Reuters, forthcoming November 2018; and G. Blanke, "The DIFC as a conduit: Alive and kicking ... after all! (Part 2)", Practical Law Arbitration Blog, Thomson Reuters, forthcoming December 2018.

<sup>2</sup> For further background, see G. Blanke, "The DIFC Courts' Conduit Jurisdiction: Time for a Post Mortem?", Practical Law Arbitration Blog, Thomson Reuters, 26 October 2017, available online at <http://arbitrationblog.practicallaw.com/the-difc-courts-conduit-jurisdiction-time-for-a-post-mortem/>; and G. Blanke, "Dubai Courts v. DIFC Courts: Just a jurisdictional stand-off or an outright declaration of war?", Practical Law Arbitration Blog, Thomson Reuters, 12 June 2017, available online at <http://arbitrationblog.practicallaw.com/dubai-courts-v-difc-courts-just-a-jurisdictional-stand-off-or-an-outright-declaration-of-war/>.

<sup>3</sup> *Chenshan Liu v. Dubai Waterfront LLC* [2016] ARB 004, Order with Reasons of Justice Sir David Steel, 29 July 2018.

<sup>4</sup> See Decree No. (19) of 2016 establishing the Dubai-DIFC Judicial Tribunal.

<sup>5</sup> See e.g. 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.

<sup>6</sup> See G. Blanke, "The DIFC as a conduit: resurrected from the dead?", Practical Law Arbitration Blog, Thomson Reuters, 5 April 2018, available online at <http://arbitrationblog.practicallaw.com/the-difc-as-a-conduit-resurrected-from-the-dead/>.

<sup>7</sup> ARB 0006/2017 – *Isai v. Isabelle*, Amended Order with Reasons of H.E. Justice Omar Al Muhairi, 28 February 2018.

<sup>8</sup> Cited *supra*.

<sup>9</sup> DIFC Law No. 1 of 2018.

<sup>10</sup> As amended by Dubai Law No. 7 of 2011.

<sup>11</sup> *Isai v. Isabelle*, at paras 13-16.

the DIFC Arbitration Law contained any requirement for a connection with the DIFC as a pre-requisite for the DIFC Courts' competence to hear an action for recognition and enforcement.<sup>12</sup> Instead, he relied upon Art. 7 of the Judicial Authority Law as amended to emphasise the concurrent jurisdiction of both the onshore and offshore courts, describing the two courts' jurisdictions as "complementary":

In enacting Article 7 of the Dubai Judicial Authority Law, the legislators contemplated that both the DIFC Courts and the Dubai Courts would have power (in appropriate cases) to ratify (or recognise) arbitral awards. There is no conflict between the jurisdiction of the two courts, as is reflected in the complementary relationship highlighted by Article 7 of the Judicial Authority Law [as amended].<sup>13</sup>

Importantly, Al Muhairi emphasised that the onshore Dubai and offshore DIFC Courts have "*concurrent but separate jurisdiction*"<sup>14</sup> to hear applications for recognition and enforcement on- respectively offshore. This, no doubt, was intended to serve as a timely reminder that the onshore and offshore courts form part of the same family of UAE courts, ordained by the Ruler of Dubai: There is no judicial hierarchy between the onshore Dubai and offshore DIFC Courts; each is properly competent to determine the limits of its own jurisdiction. Art. 7 of the Judicial Authority Law as amended, in turn, establishes the mutual bond of trust that holds the on- and offshore limbs of the Dubai judicial system together to form part of an integrated whole.

#### ***Assas Investments Limited v. Fius Capital Limited (JT)***

The CFI's ruling in *Isai v. Isabelle*<sup>15</sup> followed the JT's ruling in *Assas Investments Limited v. Fius Capital Limited*<sup>16</sup>. In that case, the JT conceded that on the basis of the proper operation of Art. 7 of the Judicial Authority Law as amended, both the onshore Dubai and offshore DIFC Courts enjoyed concurrent jurisdiction over the recognition, enforcement and execution of a DIFC-LCIA award rendered in the DIFC as the seat of arbitration provided the presence of assets both on- and offshore.

#### ***Sinbad Marine In. LLC v. Essam Abdulameer Hamadi Alfadli Al Tamimi (JT)***

A more recent JT<sup>17</sup> 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 that Mr. Al Tamimi had purchased from Sinbad Marine. 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.<sup>18</sup>

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*<sup>19</sup>, it is difficult to follow the logic of the JT when

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<sup>12</sup> *Ibid.*, at para. 16.

<sup>13</sup> *Ibid.*, at para. 20.

<sup>14</sup> *Ibid.*, at para. 22.

<sup>15</sup> Cited *supra*.

<sup>16</sup> Cassation No. 6/2017 (JT) – *Assas Investments Limited v. Fius Capital Limited*.

<sup>17</sup> Cassation No. 1/2018 (JT) – *Sinbad Marine In. LLC v. Essam Abdulameer Hamadi Alfadli Al Tamimi*.

<sup>18</sup> Cassation No. 1/2018, at p. 5.

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<sup>20</sup>. 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<sup>21</sup>.

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.

### ***Chenshan Liu v. Dubai Waterfront LLC (CFI)***

Most recently, in *Chenshan Liu v. Dubai Waterfront LLC*<sup>22</sup>, the CFI has extended the logic it applied to the determination of its own jurisdiction in *Isai v. Isabelle*<sup>23</sup> to an application for the offshore recognition and enforcement of a DIAC award rendered in a Dubai-seated arbitration for onward execution onshore. In that case, 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*"<sup>24</sup>. 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*"<sup>25</sup>. 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 it retained "residual jurisdiction" for the recognition and enforcement of the award on the basis of (i) the original and exclusive jurisdiction accorded to it 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

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<sup>19</sup> Cited *supra*.

<sup>20</sup> At the time of writing, the dissent has not yet been published on the DIFC Courts' official website.

<sup>21</sup> 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.

<sup>22</sup> Cited *supra*.

<sup>23</sup> Cited *supra*.

<sup>24</sup> Cassation No. 2/2016 (JT) – *Dubai Water Front LLC v. Chenshan Liu*.

<sup>25</sup> *Ibid*.

34. It is clear from [Article 2] (and Article 4) [of Decree No. (19) of 2016] [which set out the jurisdictional limits of the JT] that the mischief which the Decree is intended to resolve is that of a conflict of jurisdiction [between the Dubai and the DIFC Courts]. Accordingly by virtue of Article 5, the Joint Judicial Committee [i.e. the JT] should suspend proceedings until the decision determining the competent court is made.

35. On one view there is no risk of conflicting decisions given the careful allocation of jurisdiction under the statutes. The only issue in the present that might have given rise to a conflict of jurisdiction and/or conflicting decisions was that of the validity of the Award. In according jurisdiction to the Dubai Courts on this issue (an outcome which was hardly controversial) the Joint Judicial Committee [i.e. the JT] must be treated as having complied with the requirements of Article 4(3) of the Decree:

*“[The Tribunal] adjudicates applications submitted as provided in the Decree in accordance with the legislation in force and the rules on jurisdiction prescribed in this regard.”*

36. Accordingly the ruling of the Joint Judicial Committee [i.e. the JT] should not be construed as extending further than resolving the potential conflict but otherwise preserving the jurisdictional provisions applicable to the DIFC Courts. 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.<sup>26</sup>

and reinstated the original DIFC Court Order for recognition and enforcement.

The CFI’s approach in *Chenshan Liu*<sup>27</sup> must be saluted without reservation as it firmly re-establishes the DIFC Courts’ role as a conduit and delimits the proper jurisdiction of the onshore Dubai and the offshore DIFC Courts in relation to the recognition and enforcement of non-DIFC awards rendered in onshore Dubai: Whereas the onshore Dubai Court’s jurisdiction to nullify the award in its curial capacity is exclusive, both courts have concurrent jurisdiction to recognise and enforce. Where the onshore curial court is seized of an action for nullification, the DIFC Courts will suspend an action for recognition and enforcement before it and only re-activate that action once the onshore action for nullification has failed. In the event that the onshore action for nullification succeeds, the DIFC Courts will be bound by that outcome by virtue of Art. 7 of the Judicial Authority Law as amended and will have to discontinue the action for recognition and enforcement pending before it.<sup>28</sup> Importantly, the 30-day moratorium for an award debtor to mount a challenge under Art. 54(2) of the new UAE Federal Arbitration Law<sup>29</sup> self-evidently assists this process.

## Conclusion

Taking these recent developments in the round, there is hope that slowly but surely, the onshore Dubai and the offshore DIFC Courts are discovering the potential of Art. 7 of the Judicial Authority Law as amended to operate as an agent of mutual trust between the two courts in the determination and operation of their respective spheres of jurisdiction. A correct operation of that Article will ultimately validate and consolidate the role of the DIFC Courts as a conduit jurisdiction for the offshore recognition and enforcement of both DIFC and non-DIFC for onward execution onshore.

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<sup>26</sup> [2016] ARB 004, at paras 34-36.

<sup>27</sup> Cited *supra*.

<sup>28</sup> For the avoidance of doubt, Art. 7 of the Judicial Authority Law as amended can, of course, also operate *vice versa*, i.e. in respect of an action for nullification before the DIFC Courts in their curial capacity pending an action for ratification and enforcement before the onshore Dubai Courts.

<sup>29</sup> UAE Federal Law No. 6 of 2018.