

Anti-Suit Injunctions in the DIFC

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Although it is called an 'anti-suit injunction', it applies to the party itself (being subject to the court's jurisdiction), and not the suit itself or the court before which the suit has been brought (which would not be in the court's jurisdiction). Such orders are nonetheless controversial because they will have the effect of interfering with the process of a foreign court (which goes against comity between national courts). This article will explore when such an order might be sought in the DIFC, the tests for seeking it, and whether we can expect to see more of these orders in the future.

Anti-Suit Injunctions - A Brief History

Anti-suit injunctions are a common law creation and have a long history. They developed in the English Chancery Courts and by the 16th century they were being issued to stop defendants filing actions before the various other civil courts that existed at that time (such as the King's Bench Courts and the Court of Common Pleas). This was in order to stop a defendant oppressing the claimant by bringing claims before the wrong court and so wasting the claimant's time and money, which is must the same reason that they continue to be issued today.

Anti-suit injunctions are however unknown to civil law jurisdictions, where there is a strong emphasis on the individual's right to have access to whichever courts they believe they have the right to use. It is then for that foreign court to determine if it has the jurisdiction to deal with the claim as filed. This necessarily involves questions of state sovereignty (the courts being an organ of the state), and it would be considered an affront to comity and an inference in the foreign state's judicial affairs for an anti-suit injunction to be issued.

The differences in approach between the civil and common law systems are clearly seen in the UAE, where both systems co-exist in the form of the UAE Courts (civil law) and the DIFC and ADGM Courts (common law).

The UAE Courts

The UAE Courts do not issue anti-suit injunctions. Instead they accept the notion that it is the right of people to file claims before whichever national courts they believe has jurisdiction to deal with the dispute. It is then for that court to determine if it does indeed have jurisdiction. It is not for the UAE Courts to interfere with such rights, or to interfere with the sovereign power of a foreign court to determine its own jurisdiction.

There is support for this approach in the UAE Civil Code, which states:

'Article 104 The doing of what is permitted by law negates liability, and no person who lawfully exercises his rights shall be liable for any harm arising thereout'

This means that the UAE Courts are unlikely to entertain a claim for damages in relation to the wasted costs incurred defending a claim wrongfully brought by the other party before a foreign court.

The DIFC Courts

The DIFC Courts are a common law court and will issue anti-suit injunctions in support of proceedings before the DIFC Courts, arbitration, and even foreign court proceedings. Breaching such an order would be a contempt of court and may lead to a fine or a person being arrested.

The DIFC Courts have discretion as to when to issue an anti-suit injunction, and will follow the English Courts' approach in considering the following factors:

- Whether the foreign proceedings are the best forum for the dispute, or are oppressive and vexatious on one of the parties.
- Whether the foreign proceedings breach a binding contract between the parties to arbitrate or to litigate before the DIFC Courts.
- Whether in the circumstances it is just and convenient to order the injunction. This will also involve a consideration as to whether the application was made promptly.

In *Brookfield Multiplex Construction LLC v DIFC Investments* (CFI 020/2016) the DIFC Courts were presented with an application for an order to restrain the defendant from pursuing proceedings in the Dubai Courts in alleged breach an arbitration seated in DIFC. The DIFC Court of First Instance ultimately rejected the application because the proceedings before the Dubai Courts were not substantive proceedings, they simply involved the Dubai Court appointing an expert to issue a report on the alleged faulty workmanship without making any binding findings. However the judge in that case, Justice Sir Jeremy Cooke, commented that if the Dubai Courts had taken jurisdiction over the matter, the DIFC Court would have had to have considered whether to issue an anti-suit injunction to restrain the defendant from pursuing the action before the Dubai Courts.

Whilst it has yet to actually occur, this raises the difficult and unusual possibility of parties obtaining anti-suit injunctions from the DIFC Court to restrain claims before the Dubai Courts, whilst the Dubai Courts themselves would not grant such injunctions to prevent a party from pursuing an action before the DIFC Courts. Decree 19 of 2016 goes some way to avoid this scenario, as it has created a tribunal to resolve issues of jurisdiction between the two courts. Nonetheless, it highlights some of the tensions that can arise in Dubai where there are two very different judicial systems co-existing.

The ADGM Courts have yet to deal with such issues but will likely take the same approach of the DIFC Courts.

The Future

The DIFC Courts have made it clear that they are willing to issue anti-suit injunctions, even if they relate to other judicial proceedings within the UAE. The creation of a judicial tribunal under Decree 19 of 2016 to resolve jurisdiction issues means that hopefully the DIFC Courts will not have to do this, but it nonetheless underlines the intent of the DIFC Courts to issue injunctions whenever it considers it appropriate. Indeed the Court issued an anti-suit injunction in early 2017 to restrain a party from continuing a civil claim in Pakistan in breach of an arbitration clause, the first time it has done so.

This represents a significant change in legal environment in the Middle East, which before the DIFC Courts had not seen the issuance of an anti-suit injunction. It is further reason for parties to consider using the DIFC Courts, as the availability of such orders severely reduces the prospect of one party ignoring an arbitration clause or exclusive jurisdiction clause, or otherwise attempting to cause problems by filing proceedings in its home jurisdiction.