

DIFC Courts' update: the Conduit Jurisdiction Dilemma

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Over a number of years, the potential for conflicts of jurisdiction between the DIFC Courts and the Dubai Courts outside of the DIFC have risen. This risk has been exacerbated by the expansive attitudes both Courts have to their jurisdictional reach. Almost inevitably, situations have arisen where parallel sets of proceedings have been introduced in both Courts where it would be contrary to the administration of good justice for both sets to continue.

This article considers the latest decisions of the Joint Judicial Committee ('the Judicial Committee'), established by Dubai Decree 19 of 2016 on the Formation of the Judicial Committee for the Courts of Dubai and the Courts of the Dubai International Finance Centre ('the Decree'), analysing the legal principles that have emerged since the Judicial Committee's inception and the impact its decisions have had on the DIFC Courts' status as a conduit jurisdiction for the enforcement of foreign judgments and arbitral awards seated outside its jurisdiction.

Article 2 of the Decree empowers the Judicial Committee to:

1. Determine the competent court to hear a claim or application in respect of which there may arise a conflict as to whether the Dubai Courts or the DIFC Courts have jurisdiction.
2. Determine the judgment that should be enforced in a case of conflicting judgments issued by the Dubai Courts and the DIFC Courts in relation to the same parties and the same subject matter.
3. Propose, for approval by the President of the Judicial Council, the rules and regulations necessary to avoid any conflicts as to jurisdiction, whether positive or negative, between the Dubai Courts and the DIFC Courts or between the execution departments of those Courts.

4. Give opinions in matters relating to cooperation and coordination between the Dubai Courts and the DIFC Courts.
5. Consider any other matters as may be the subject of a request by the Judicial Council or the Ruler.

The Judicial Committee is comprised of four Dubai Court judges, including the chairman, who has the casting vote in the event of a tie and three DIFC Court judges. This constitution has on several occasions proven crucial in the Committee's decision-making, where decisions have been issued with the judges split 4-3.

Emergence of general principles in the Judicial Committee's reasoning

After its formation, the Judicial Committee began to hear applications where both the Dubai Courts and the DIFC Courts had the jurisdiction under their respective laws to hear matters involved in the same dispute. We covered the Judicial Committee's decisions in our February 2017, April 2017 and August 2017 editions of Law Update.

Two years after the Decree was issued, we consider that general guidance can be derived from the judgments of Judicial Committee and bring welcome clarity as to the legal position when conflicts of jurisdiction between the Dubai Courts and DIFC Courts arise.

- There must be concurrent proceedings in both sets of Courts in order to trigger Article 4 of the Decree and engage the jurisdiction of the Judicial Committee to consider the matter. Every decision of the Judicial Committee addresses this Committee's own jurisdiction before determining the merits of an application (Judicial Committee Cassation No. 3 of 2016).
- The decisions of the Judicial Committee are final. The principles of *res judicata* and issue estoppel apply, meaning that decisions of the Judicial Committee cannot be re-litigated or reconsidered. However, the Judicial Committee does not have authority to make rulings on the constitutionality of legislation that is the remit of the Federal Supreme Court (Judicial Committee Cassation No. 5 of 2017).
- A party cannot withdraw a concession or submissions to the jurisdiction of the DIFC Courts after it has been made. In cases where a party appeals to the Judicial Committee after making and withdrawing such an admission, the Committee has held that even if there had been another reason to confer jurisdiction to the Dubai Courts, the DIFC Courts are the competent Court to determine the dispute (Judicial Committee Cassation No. 4 of 2016). Furthermore, appearing in the DIFC Courts does not automatically mean that a party has submitted to the jurisdiction of the DIFC Court. Concessions on jurisdiction should not be inferred but should be expressly set out in writing (Judicial Committee Cassation No. 4 of 2017).
- The conflict of jurisdiction must arise as between the Dubai Courts and the DIFC Courts. In Judicial Committee Cassation No. 2 of 2017, the conflict was between the Dubai Courts and the DIFC/LCIA Arbitration Centre in respect of a tenancy agreement. Article 4 of the Decree was not triggered and therefore the application to the Judicial Committee failed.
- There is no principle of "Court first seized" where the dispute is allocated to whichever Court was first seized of the dispute (usually defined as where proceedings were first issued). As long as a decision is not issued by either Court, it makes no difference which proceedings are filed first (Judicial Committee Cassation No. 4 of 2017).
- It is not within the Committee's jurisdiction to decide the appropriate procedures for the Dubai Courts or DIFC Courts, nor to substitute its own decision (Judicial Committee Cassation No. 7 of 2017).
- An injunction issued by the DIFC Court in anticipation of an arbitration is an interim measure and does not deal finally with the substantive issues in the case. Interlocutory decisions therefore does not create a conflict of jurisdiction between the Dubai Courts and the DIFC Courts (Judicial Committee Cassation No. 8 of 2017).

Enforcement of Domestic Arbitral Awards

The enforcement of domestic arbitral awards in the DIFC has been a contentious subject but the Judicial

Committee's decisions have shed more light on their treatment in the Emirate of Dubai.

- The Judicial Committee has acknowledged that ordinarily a DIFC entity would be bound by the jurisdiction of the DIFC Courts in accordance with the Judicial Authority Law. However, this jurisdiction can be set aside when a DIFC party elects to arbitrate a dispute, in which case the seat of the arbitration determines the supervisory Court and therefore the Court with jurisdiction to ratify and enforce the award. The Dubai Courts therefore have jurisdiction to ratify or annul a Dubai-seated arbitral award (e.g. DIAC) even though (a) a DIFC entity was a party to the arbitration and (b) the eventual execution of the Award would need to take place in the DIFC. The DIFC Court judges dissented from this position on the basis that the DIFC Courts had exclusive and mandatory jurisdiction and that the DIFC Court proceedings should have been stayed (upon posting of at least 50% security) rather than ceased completely (Judicial Committee Cassation 1 of 2016).
- The same principle applies where a party seeks to enforce and ratify a DIAC, Dubai-seated arbitral award and there is no other connection to the DIFC: "pursuant to the general principles of law embodied in procedural laws", the Dubai Courts have jurisdiction. The DIFC Court judges dissented on the basis that the DIFC Courts have exclusive and compulsory jurisdiction to determine the application for ratification and enforcement (Judicial Committee Cassation 2 of 2016 confirmed by Cassation 3 of 2017).
- A DIFC/LCIA arbitral award seated in the DIFC will be ratified and enforced through the DIFC Courts even if there are concurrent proceedings in the Dubai Courts to execute the award. The Judicial Committee distinguished between the ratification and enforcement process (which can give rise to conflict of jurisdiction) and the execution stage (separate from the ratification proceedings), concluding that no conflict of jurisdiction would therefore arise. Parties are free to enforce the award in more than one jurisdiction (including in the DIFC and Dubai) and this will not give rise to a conflict of jurisdiction (Judicial Committee Cassation 6 of 2017).

Enforcement of Foreign Arbitral Awards

The Judicial Committee will allow a London seated arbitral award to be ratified and enforced through the DIFC Courts, as long as there are no concurrent proceedings in the Dubai Courts. In Judicial Committee Cassation 3 of 2016, the jurisdiction of the Judicial Committee (under Article 4 of the Decree) was not triggered because there were no concurrent proceedings.

Where there are concurrent proceedings in the enforcement of a foreign arbitral award, "pursuant to the general principles of law embodied in procedural laws" the Dubai Courts have jurisdiction. In Judicial Committee Cassation 1 of 2017, the DIFC Court judges issued a lengthy, dissenting and compelling obiter opinion that took issue with this approach, saying that conflicts of jurisdiction need to be resolved by using existing and specific laws and not "general principles". Article 2 and Article 8(2)(7) of the Judicial Authority Law and Article 42 of the DIFC Arbitration Law confer exclusive jurisdiction to the DIFC Courts to enforce and ratify foreign arbitral awards irrespective of the State or jurisdiction where they are issued.

Enforcement of Foreign Judgments

The Judicial Committee will allow a judgment of the Commercial Court in England to be ratified and enforced through the DIFC Courts, as long as there are no concurrent proceedings in the Dubai Courts (Judicial Committee Cassation No. 5 of 2016 and No. 5 of 2017). The jurisdiction of the Judicial Committee under Article 4 of the Decree was not triggered because there were no concurrent proceedings.

Where there are concurrent proceedings in the enforcement of a foreign judgment (such as the English High Court) the "Dubai Courts are the competent Courts to entertain this case because they have general jurisdiction embodied in the procedural laws" (Judicial Committee Cassation No. 4 of 2017).

Latest 2018 Judicial Committee Judgments

The latest decisions of the Judicial Committee have confirmed some and developed many of principles discerned from earlier cases.

- An arbitral award from a tribunal seated in non-DIFC Dubai and operating under DIFC-LCIA Rules was ratified and enforced by the DIFC Courts on the basis that “the DIFC/LCIA Arbitration Centre had been established in the DIFC. Accordingly, the supervising Court of the arbitration should be the DIFC Court and not the Dubai Court” (Judicial Committee Cassation No. 1 of 2018). The DIFC Court judges agreed that the application should be dismissed but dissented on the reasoning (which was not published).
- The DIFC Courts have exclusive jurisdiction to hear a case where one of the parties is a DIFC registered establishment, regardless of whether the factual events leading to the dispute arose before the party was registered in the DIFC, in accordance with Article 5(1) of the Judicial Authority Law (Judicial Committee Cassation No. 2 of 2018). The Judicial Committee found that there were proceedings before the Dubai Courts and DIFC Courts between the parties. However, this did not give rise to a conflict between the two Courts on the basis that, although the cases were related, they were not about the same subject matter. The Judicial Committee found that “the case before the Dubai Court may depend upon the decision in the case before the DIFC because it is a defamation case based on the alleged untrue facts in the other case.” Further, as there were no contradictory judgments, the Judicial Committee declined to intervene. The implication is therefore that for there to be a conflict of jurisdiction, it is not only necessary that there are concurrent proceedings between the parties in both courts but that the dispute must be about the same subject matter.
- Finally, the Judicial Committee has confirmed the principle that the Dubai Courts have general jurisdiction to enforce a foreign judgment where there are concurrent proceedings in both Courts (Judicial Committee Cassation No. 3 of 2018).

Conclusion

A clear pattern of reasoning is emerging from the judgments of the Judicial Committee, which allows legal practitioners in Dubai to assess the potential outcome of a jurisdiction challenge with a greater degree of certainty. This is a welcome development; it has likely contributed to increased activity in both courts and instils greater confidence in the legal system in the Emirate of Dubai.

From a legal practitioners’ perspective, it also opens up an array of possibilities and tactical issues to consider when deciding whether to continue to use the DIFC Courts as a conduit jurisdiction for the enforcement of foreign judgments and domestic and foreign arbitral awards. The conduit jurisdiction status of the DIFC Courts has undoubtedly been curtailed, but has not been extinguished completely.

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