



HFw MIDDLE EAST ENFORCEMENT SERIES: OBSERVATIONS ON THE FIRST TWO YEARS OF THE JOINT JUDICIAL COMMITTEE

For many UAE legal practitioners, the overnight creation of the Joint Judicial Committee (“JJC”) in June 2016 was anticipated to be a major impediment to litigants seeking onshore recognition and enforcement of foreign judgments in Dubai via the then still relatively new conduit jurisdiction offered by the DIFC Courts.

However, two years on from the JJC's first decision issued in December 2016, many of the anticipated risks of the JJC have not materialised. In this article, HFW reviews the key decisions and trends which have emerged in the first two years of the JJC's jurisprudence.

Dubai's Joint Judicial Committee ("JJC") was set up in June 2016 pursuant to Decree No. 19 of 2016 to determine conflict of jurisdiction issues arising between the Dubai International Financial Centre Courts ("DIFC Courts") and the local onshore Dubai Courts ("Dubai Courts"). For many, the establishment of the JJC appeared to pose a direct threat to the newly-confirmed "conduit jurisdiction" of the DIFC Courts, which had only fully emerged the year prior in the DIFC Court of Appeal's decision in *Gulf Navigation Holding PJSC v DNB Bank ASA* [2015] DIFC CA 007. The founding of a conduit jurisdiction in the DIFC Courts was an important legal development in the UAE. It created a simplified and speedy common law route for foreign judgments and arbitral awards to be recognised in the DIFC Courts before then traveling to the local Courts to enforce against assets held onshore in the Emirates, with fewer avenues of challenge at that enforcement stage.

However, following the JJC's decisions, a number of which found in favour of the Dubai Courts, many UAE legal practitioners considered that the JJC's decisions would largely circumscribe the DIFC's conduit jurisdiction. Six more decisions later, those concerns remained, the JJC having allowed the DIFC Courts to continue exercising jurisdiction in four of eight matters. As a result, there was a general assumption that the creation of the JJC would equip parties with a further avenue of appeal, and particularly, a basis for defendants to disrupt a smooth recognition and enforcement process by invoking the JJC's

jurisdiction, pursuant to which it has power to order the DIFC Court to cease exercising jurisdiction. Such litigation tactics are not unique to the UAE, and are faintly reminiscent of the infamous "Italian torpedo" tactic that prompted the overhaul of the EU jurisdictional rules in the *Brussels I Recast*.

However, a closer analysis of Decree No. 19 of 2016 and its treatment in two full years' worth of JJC Cassation decisions now highlights that there are (i) actually reasonably few circumstances in which the JJC's jurisdiction might be successfully invoked; and (ii) JJC jurisprudence tends to reject cases where a conflict is tenuously claimed by a challenging party.

The JJC in Numbers

Since its inception in June 2016, the JJC has issued 17 decisions in respect of the same number of referrals to the JJC. Over the same period, at least 150 cases have been commenced before the DIFC Court of First Instance ("CFI"). It follows that the intervention of the JJC has only been sought by parties in a relatively small percentage of cases – around 11% of overall DIFC CFI cases.

To date, the JJC has ordered that the DIFC Court cease exercising jurisdiction in only six of the 17 cases referred to it, (i.e. in 35% of referrals and 4% of DIFC CFI cases overall)¹. In three of those six cases, arbitration proceedings had been commenced before the Dubai International Arbitration Centre ("DIAC"), Dubai's main local arbitration centre, and were decided on the basis that the Dubai Courts (and not the DIFC Courts) should exercise supervisory jurisdiction over those DIAC arbitrations². This included the situation where there were simultaneous annulment proceedings before the Dubai Courts and enforcement proceedings before the DIFC Courts in relation to the same DIAC

arbitral award, as was the case in *Daman Real Capital Partners Company LLC v Oger Dubai LLC*³ (the inaugural decision issued by the JJC). In that case, the JJC held that there was a conflict of jurisdiction requiring the JJC's intervention, such that "*only one of the two courts should determine to annul or recognize the...arbitral award*".

In 2018, it is perhaps an unlucky coincidence that in one of the most recent and perhaps the highest profile JJC decisions to date the JJC referred a claim originally filed in the DIFC Courts to the Dubai Courts, and directed the DIFC Courts to cease exercising jurisdiction, on public policy grounds. In the now well-known JJC decision of Cassation No. 3 of 2018, which decided the fate of the £300m super yacht *Luna MV*, the JJC held that the Dubai Courts had jurisdiction over the claim (which was a claim for recognition and enforcement of an English Court judgment) instead of the DIFC Courts on the basis that the underlying case was a matrimonial dispute, rather than a commercial dispute giving rise to a money judgment. As has been the case in all but one of the JJC cases decided in favour of the Dubai Courts, the three DIFC Courts members unanimously dissented on the JJC panel.

JJC Decisions in favour of:	
Dubai Courts	DIFC Courts
No 1 of 2016	No 3 of 2016
No 2 of 2016	No 4 of 2016
No 1 of 2017	No 5 of 2016
No 3 of 2017	No 2 of 2017
No 4 of 2017	No 5 of 2017
No 3 of 2018	No 6 of 2017
	No 7 of 2017
	No 8 of 2017
	No 1 of 2018
	No 2 of 2018
	No 4 of 2018

1. Namely, in Cassation Nos.1 and 2 of 2016, Nos.1, 3 and 4 of 2017 and No.3 of 2018. In 5 of those 6 cases, the members of the JJC who are judges of the DIFC Courts issued a dissenting opinion.

2. Cassation No 1 of 2016, No 2 of 2016, No 3 of 2017.

3. Cassation No. 1 of 2016.

4. Cassation Nos. 5 of 2016 and No.5 of 2017.

5. Cassation Nos.2 and 6 of 2017 and No.1 of 2018

6. Cassation No.7 of 2017.

7. Cassation No.8 of 2017 and No.4 of 2018.

Of the eleven cases in which the JJC did not order the DIFC Courts to cease exercising jurisdiction, three of those related to claims brought in the DIFC Courts for the recognition and enforcement of foreign money judgments⁴. In four cases, the referring party had either agreed to DIFC-LCIA arbitration⁵ or had conceded in the course of the parallel DIFC Courts proceedings that the DIFC Courts did have jurisdiction⁶. In another two cases, the DIFC Courts had granted interlocutory injunctive relief in its supervisory capacity over DIFC-LCIA arbitration proceedings, which the JJC did not consider gave rise to a conflict of laws (at least at that time, although it acknowledged that a conflict could arise in the future)⁷.

Recalling the JJC's mandate

Under Article 2 of Decree No. 19 of 2016, the JJC's jurisdiction only extends to:

- Art 2(1): Competing invocations of jurisdiction between the DIFC Courts and the Dubai Courts; and
- Art 2(2): Competing judgments of the DIFC Courts and Dubai Courts.

At first blush, these heads of jurisdiction may seem to provide broad potential for JJC referrals. However, this has not been what has transpired. As confirmed by the JJC in recent cases, the JJC's has interpreted its own jurisdiction quite narrowly.

Firstly, as regards Art 2(1), the JJC has made clear that the conflict must be an active, and real conflict, rather than a prospective one – i.e. the conflict must be a classic *lis alibi pendens* situation in which two simultaneous cases on the same subject matter are already being run by the same parties, where neither court abandons jurisdiction and the JJC needs to decide which of the two courts is properly seized.

In this respect, the JJC has also made clear that it will not intervene prematurely to prevent a prospective conflict from occurring. I.e. it is not sufficient that a party could create an active conflict (but has not yet done so). For example, in *Cassation*

No. 8 of 2017 (Assas Opco Limited v VIH Hotel Management Ltd), the JJC found that where a party had successfully claimed interim relief in one court (in this particular case, an injunction had already been sought and granted by the DIFC Courts) in circumstances where a parallel claim was being heard for full relief in the Dubai Courts, that still did not create a sufficient conflict for the JJC to intervene.

Additionally, the JJC has also clarified that the existence of enforcement proceedings before the Dubai Courts to enforce a judgment issued by the DIFC Courts does not create a conflict of courts for the purposes of invoking the JJC's jurisdiction. This was the finding in the case of *Cassation No. 5 of 2016 (Gulf Navigation Holding PJSC v DNB Bank ASA)* in respect of a foreign judgment, and *Cassation No. 5 of 2017 (Emirates Trading Agency v Bocimar International NV)* in respect of an arbitral award. In those cases, each defendant unsuccessfully attempted to argue that proceedings before the Dubai Courts to enforce a DIFC judgment against assets in Dubai created a conflict between the Dubai and DIFC Courts. This argument was rejected on both occasions, the JJC concluding that there was no conflict within the meaning of Article 2 in using Dubai Courts to enforce a DIFC Courts judgment.

JJC referrals in respect of Art 2(1) therefore exist in a relatively small window of opportunity: they must ordinarily occur where there are two active cases being simultaneously heard on their merits in both the DIFC and Dubai Courts. This suggests that in many respects the race to judgment (including default judgment) has never been more important, as the quicker the judgment is obtained, the quicker any risk of active conflict between courts ceases for the purposes of extinguishing a JJC challenge.

Finally, Art 2(2) vests the JJC with referral jurisdiction to reconcile competing judgments of the DIFC Courts and Dubai Courts; i.e. a situation with two *decided* cases with conflicting judgments, where the JJC must decide the primacy of

one judgment over the other. This appears to present quite a minimal set of circumstances in which a conflict can arise. It would mean that either:

- There had been an active conflict of courts at some stage (i.e. where an Art 2(1) challenge was permissible, but not acted on by either party); or
- It would require the Dubai Courts or the DIFC Courts to choose not to exercise their discretion to stay proceedings in favour of the other Court where a judgment and to attempt to overrule another judgment, in breach of judicial comity requirements.

The rise of the JJC “opt-out” clause?

Despite the instances of the JJC directing the DIFC Court to cease acting jurisdiction being more narrow than anticipated, contracting parties should consider what steps they might take to (a) ensure the survival of their DIFC Courts' jurisdiction clause; and (b) further reduce the scope for any referral to the JJC.

For example, parties may consider adding to their usual DIFC Courts jurisdiction clauses a further clause by which the parties mutually agree to waive their right to refer a matter to the JJC and “opt-out” of the JJC's jurisdiction.

As far as we are aware, there has been no attempt to do so to date. As such there is no indication as to how such clauses might be treated at law before the JJC itself, or in either the DIFC Courts or Dubai Courts. However, given (a) the JJC operates as a non-mandatory referral jurisdiction in any event; and (b) the DIFC Courts case of *Al Khorafi & Anor v Bank Sarasin-Alpen (ME) Ltd & Anor* [2011] DIFC CA 003 [89]-[93] recognised the implicit right of parties to opt out of DIFC Courts jurisdiction, there may be strength to the case for a JJC opt-out clause.

Friendly competition from the ADGM Courts

Another interesting development in the first two years of the JJC's operation has occurred well away

from Dubai, in the neighbouring Emirate of Abu Dhabi. May 2016 saw the inception of the ADGM Courts, formally opened in December 2018, which is a competing set of common law courts. Since February 2018, the ADGM Courts now also offer

an alternative conduit jurisdiction into onshore UAE via the Abu Dhabi Courts (see HFW's publication on this development⁸).

For some parties, the alternative ADGM Courts / Abu Dhabi Courts

conduit tie-up may be more attractive than the DIFC Courts / Dubai Courts equivalent. This is because the JJC only has jurisdiction in Dubai, such that there is no risk of JJC referral in Abu Dhabi.

8. <http://www.hfw.com/ADGM-Courts-and-the-Abu-Dhabi-Judicial-Department-formalise-cross-court-judgment-and-arbitral-award-enforcement-regime>

Conclusions

1. The JJC has referred jurisdiction from DIFC Courts to the Dubai Courts in 6 successful challenges out of approximately 150 CFI cases, since June 2016 – i.e. **less than 4% of cases**.
2. Parties' attempts to successfully invoke the jurisdiction of the JJC have generally failed on more occasions than they have succeeded.
3. On balance, the JJC has taken a relatively narrow view of its own jurisdiction and has been quick to reject spurious or obviously manufactured claims of conflict.
4. It is not sufficient for a party to merely assert that it could create a conflict of courts issue. To invoke the jurisdiction of the JJC there must be an actual conflict already on foot.
5. Foreign money judgments are far less susceptible to JJC challenge than foreign arbitral awards. This is because arbitral awards (including even foreign arbitral awards) are liable to annulment proceedings in the UAE onshore courts under the UAE Arbitration Law, whereas there is no equivalent procedure for a party to seek to annul a foreign judgment.
6. There is limited scope for a referral to the JJC in circumstances where the referring party has already accepted the jurisdiction of the DIFC Court, either by agreeing to DIFC-LCIA arbitration in the first place (and therefore ostensibly to the supervisory jurisdiction of the DIFC Courts for the purposes of enforcement) or otherwise accepting jurisdiction in the course of ongoing DIFC Courts proceedings.
7. It is unlikely that a referral to the JJC designed to override interlocutory injunctive relief ordered by the DIFC Courts will succeed.
8. A party who successfully obtains a DIFC Courts judgment can enforce that judgment in the Dubai Courts with no risk that opening a Dubai Courts execution file would create a conflict of courts to trigger a JJC referral.
9. Parties should consider contractual agreement to opt-out of the JJC's jurisdiction.
10. At least insofar as claims for recognition and enforcement of foreign judgments and arbitral awards are concerned (although note our comments above in respect of foreign judgments), parties may consider the ADGM Courts as an alternative conduit jurisdiction, using Abu Dhabi as their first port of call into the wider UAE/GCC, and out of the jurisdiction of the JJC.

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