Jurisdiction and the Dubai Courts: Self-Immolation or Order Out of (Potential) Chaos?

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Introduction

The Emirate of Dubai continues to develop as a regional and global financial centre. It has earned itself a reputation in no small part due to the establishment in 2004 of the Dubai International Finance Centre (DIFC), an offshore financial free zone located in the heart of 'mainland' or 'onshore' Dubai. The DIFC, unlike the majority of offshore financial centres established in other jurisdictions, however, has its own court system (comprising a court of first instance and a court of appeal) and its own body of substantive laws modelled on English law. In effect the DIFC is a jurisdiction in its own right distinguished from the civil law jurisdiction of mainland Dubai and the wider United Arab Emirates (UAE), in that it generally applies common law. Chief Justice Michael Hwang, the current President of the DIFC Courts, has described the DIFC as 'a common law island in a civil law ocean'. Until relatively recently it was unique in that respect,[1] its development as a bridge

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1 The Abu Dhabi Global Market commenced operations in 2014; its courts also apply common law. Similar courts have also been set up in Qatar and Singapore and will soon operate in Baku. In late 2017, the President of France announced that a division of the French Commercial Court in Paris would be created in which the parties would be permitted to plead in English and apply common law.

between the financial markets of the East and West and a gateway for capital and investment to and from this region has earned it a reputation as a catalyst for the economic renaissance of the Middle East and North Africa (MENA) region.

As a gateway facilitating flows of investment, however, it is also susceptible to fraud; it has been targeted by international criminals using increasingly sophisticated methods to defraud companies and investors. Money and activity can flow across jurisdictions simply by crossing the road. Furthermore, in the context of recovering the proceeds of fraud and corruption, and enforcement of judgments or arbitral awards, the juxtaposition of a civil and a common law jurisdiction raises issues of compatibility. To date the DIFC Courts have rarely been asked to decide cases of fraud and corruption, but as Dubai continues to develop as a financial centre the very peculiar jurisdictional boundaries and limitations of the DIFC Courts will inevitably raise issues for fraud and corruption inquiries.

Recently, in long-running and very high-value divorce proceedings in the UK, a yacht was 'arrested' by an interim attachment order made by the Dubai Courts, supporting a freezing order made by the DIFC Court, itself made in support of enforcement of the financial provision order made in those divorce proceedings. Those developments provide an opportune moment to review the difficulties which can be caused by the particular features of the jurisdiction of the DIFC Court and its relationship with the rest of the Dubai Courts system.

On 9 June 2016 a Decree[2] (the 'Decree') was issued by the ruler of Dubai dealing with, inter alia, the resolution of conflicts of jurisdiction between the DIFC Courts and the onshore courts of Dubai. The Decree establishes a Judicial Committee of the Dubai Courts and the DIFC Courts (the 'Dubai–DIFC Judicial Committee', referred to in the translation of its own decisions as the 'Judicial Tribunal'). Pursuant to Article 2 of the Decree, the Judicial Tribunal is responsible for the determination of jurisdictional disputes in relation to conflicts of jurisdiction between the Dubai and the DIFC Courts, and conflicting judgments of the Dubai and DIFC Courts, involving the same parties and bearing on the same subject-matter, including conflicting orders of enforcement issued by the Dubai and DIFC Courts in relation to the same arbitral award. There was a great deal of academic and professional

2 Decree No (19) of 2016 forming the Judicial Committee of the Dubai Court and the DIFC Courts, dated 9 June 2016), which entered into immediate effect (see Art 8, Decree No (19) of 2016). A regime of mutual recognition between the onshore Dubai and offshore DIFC courts in the form of Art 7 of the Judicial Authority Law as amended (see DIFC Law No 12 of 2004 in respect of the Judicial Authority at Dubai International Financial Centre as amended) is already in place.

commentary about the Decree even before an official translation was released,[3] not least in the context of the development of Dubai as a 'conduit jurisdiction' for proceedings in the Middle East. Some have commented that it represents a curb on the jurisdiction of the DIFC Courts,[4] all are agreed that it represents a fundamental change in the way such conflicts are to be resolved. So, what is all the fuss about and what does the Decree mean for asset recovery in cases that touch Dubai?

Background

First, a little more background is provided. For those readers not familiar with the structure, the DIFC is a special zone of Dubai with its own laws, but it remains part of the Emirate. The DIFC Courts were created by Dubai Law No 12 of 2004 and afforded 'exclusive jurisdiction' over a number of categories of dispute. Its working language is English. Its rules of procedure are modelled on the Civil Procedure Rules of England and Wales, and where the DIFC laws, rules and judgments are silent, it applies English and other common law. In short, it could not be further from the practice, procedure and applicable laws of the onshore Dubai courts. However, the Supreme Legislative Council of Dubai, the courts of onshore Dubai and the DIFC Courts have all held that the DIFC Courts are an integral part not only of Dubai but also the federal UAE judicial system, and that when one speaks of 'the Dubai Courts' one includes the DIFC Courts. Since December 2009, a protocol has provided that judgments and orders of the DIFC Courts are to be enforced in the onshore courts of Dubai without consideration of the merits of the claim and vice versa. A legal opinion of the Supreme Legislative Council on 30 June 2015 concluded that the DIFC Courts have jurisdiction in respect of civil and commercial disputes concerning departments of the Dubai Government in certain circumstances.

As well as this slightly schizophrenic identity as a tribunal that is both separate from and integral to the Dubai judicial system, judgments of the DIFC Courts are recognised across the Gulf Co-operation Countries (GCC), and memoranda of understanding regarding mutual recognition

3 An official translation was released by the Legislation Committee of Dubai in early 2017, which contains a footnote, as with all Emirati legislation, providing that for the purposes of interpretation, the original Arabic text should be used. This article has been written with reference to the English translation.

4 See, eg, Michael Black QC and Tom Montagu-Smith, 'A Curb on the Jurisdiction of the DIFC Courts? Decree 19 of 2016: Judicial Tribunal for the Dubai Courts and DIFC Courts', XXIV Old Buildings, https://xxiv.co.uk/a-curb-on-the-jurisdiction-of-the-difc-courts accessed 12 January 2017. As discussed below the commentary has only become more heated as the Judicial Committee has begun to issue decisions.

and enforcement of judgments have been entered into between the DIFC Courts and the following:

- the Dubai Courts;
- the Abu Dhabi Judicial Department;
- the United States District Court for the Southern District of New York (SDNY);
- the courts of Ras Al Khaimah through the Ras Al Khaimah Department of Economic Development;
- the Shanghai High People's Court;
- the Ministry of Justice – Hashemite Kingdom of Jordan;
- the Dispute Resolution Authority of the Jebel Ali Free Zone Authority, as well as the Dubai Multi Commodities Centre (DMCC) and the Dubai Health Care City Free Zone authorities;
- the Federal Court of Australia;
- the Commercial and Admiralty Divisions of the High Court of Kenya;
- the Commercial Court of the High Court of England and Wales;
- the Supreme Court of New South Wales;
- the Supreme Court of Singapore;
- the Supreme Court of Korea;
- the Supreme Court of Kazakhstan;
- the Federal Court of Malaysia; and
- the High Court of Zambia.

The DIFC Courts were set up by the Dubai Government precisely to afford a common law bridge between Dubai and the rest of the world, and thereby to promote Dubai as a hub within the region for both business and dispute resolution. However, the jurisdictional limits of the DIFC Courts within Dubai have led to complications. The decisions of the DIFC Courts have asserted an expansive definition of the breadth of its jurisdiction. However, there are apparently inconsistent judgments of the DIFC Court of Appeal regarding the applicability of the doctrine of forum non conveniens. (The balance of authority is that the doctrine applies when deciding between Dubai and a jurisdiction outside the UAE, but it does not apply where the competing jurisdictions are the DIFC and onshore Dubai or the rest of the UAE.) The Dubai law that governs the resolution of jurisdictional conflicts between the courts of the UAE was passed in 1973 and provides for resolution of such conflicts by the Union Supreme Court of the Emirates.

Use of the DIFC court as a 'conduct' jurisdiction

To this mix has been added the emergence of the use of the DIFC as a 'conduit jurisdiction'. This is an interesting development from the world of international arbitration. Recognition of an arbitral award by a tribunal

seated in, for example, New York can be sought before the DIFC Court, and, having secured such recognition, the judgment of the DIFC Court recording that recognition can be deployed onshore in Dubai (or indeed in another Emirate or GCC country). Being a DIFC Court judgment it enjoys a level of recognition that might not be afforded to the arbitration award itself or to a judgment of the US District Court (SDNY) concerning it. The DIFC Courts have shown themselves content to exercise this jurisdiction, and have done so on principles that would be recognised by any arbitration lawyer considering recognition of an arbitral award in a foreign state. To some, this development is a useful gateway to international judicial cooperation, to others it is a blatant circumvention of the principles governing the conflict of laws and the sovereign independence of nations throughout the GCC.[5] Of course, if it works going into the region, it might be expected to work going out – if the DIFC Court recognises a judgment or arbitral award from onshore Dubai (or another Emirate or GCC country), it will presumably become a DIFC judgment and thus the many cross-border memoranda of understanding listed above will apply to it.

When all of this works it works very well. However, one can immediately appreciate that this complex jurisdictional sectioning is ripe for machination by the unscrupulous. An illustration of the difficulties that can emerge was provided by the jurisdictional wrangling that arose in *Standard Chartered Bank v Investment Group Private Limited*[6] (not a fraud case). In that case a claim was issued in the DIFC Court of First Instance in August 2014, which was met with a challenge to jurisdiction by the defendant. In parallel, a claim was issued by the defendant in the courts of Sharjah (UAE), which was met by a challenge to jurisdiction by the claimant. The challenge to the DIFC Courts' jurisdiction failed while the challenge to the Sharjah Court's jurisdiction succeeded. Appeals against both judgments failed. Pleadings were exchanged after which the defendant instituted proceedings before the Amicable Dispute Centre onshore in Dubai. It then applied to the Union Supreme Court (USC) under the 1973 Law to determine this somewhat manufactured conflict of jurisdiction, and applied to both the DIFC Court and the Dubai Amicable Dispute Centre for stays pending a determination by the USC. Eventually, Deputy Chief Justice Sir David Steel held that the acts of issuing parallel proceedings did not set up a jurisdictional conflict, rather what is required is the presence of conflicting decisions of the courts

5 The courts of onshore Dubai, eg, are prohibited from recognising and enforcing the judgments of other courts unless a bilateral treaty is in place between the UAE and the country in which the foreign court is located.

6 Claim No: CFI-026-2014, Court of first Instance, DIFC.

of the DIFC and the onshore Dubai Court. Two years had elapsed, however, before this point was concluded.

At the same time, although the DIFC Courts and the onshore Dubai Courts are anxious to assist one another, they remain separate jurisdictions. Thus, in *GFH Capital v Haigh*,[7] the DIFC Court of First Instance had to issue a letter of request to a bank onshore in Dubai to obtain banking records necessary to prove a fraud, in circumstances where money had been stolen from a DIFC registered company and placed in a bank onshore in Dubai.

The aim of the decree: limiting the scope for jurisdictional clashes in Dubai

While not purporting to repeal any existing laws, the Decree was plainly made with a view to bringing an end to, or at least limiting the scope for, the sort of jurisdictional clashes considered above. It creates a judicial tribunal whose chairman is the President of the Dubai Court of Cassation (the DIFC Courts are, after all, part of the judicial system of Dubai). The remaining members are the Chief Justice of the DIFC Courts, the Secretary General of the onshore Dubai Judicial Council, the President of the onshore Dubai Court of Appeal, the President of the Dubai Court of First Instance and two further judges of the DIFC Courts. It is charged with resolving conflicts of jurisdiction between the DIFC Courts and the onshore Dubai Courts, and provides for a paper procedure that yields a decision within six weeks. An application to the Judicial Tribunal operates as an automatic stay of the proceedings from which it arises, and of enforcement of the judgments that are said to be in conflict, until a decision has been delivered.

It has been argued that the Decree replaces the jurisdiction of the USC as regards conflicts between the DIFC and the onshore Dubai Courts.[8] Ultimately, only the USC could authoritatively determine the issue, and, although in the one case before the DIFC Courts in which it was raised the expert witnesses on Emirati law on both sides were agreed, it is likely that Emirati jurists could debate the issue at very considerable length.

The Decree provides for little in the way of participation by the parties, but it must be remembered that the onshore Dubai Courts are much more used to investigating cases for themselves (as in the civil law tradition in continental

7 Claim No: CFI-020-2014, Court of first Instance, DIFC.

8 In *Standard Chartered Bank v Investment Group Private Limited* (CFI 026/2014) both parties' experts on UAE law agreed that the Decree eliminates the jurisdiction of the USC to determine conflicts of jurisdiction between the DIFC courts and the Dubai courts and confers this jurisdiction on a new judicial authority composed of DIFC court and Dubai court judges. Although Justice Sir David Steel expressed reservations as to whether or not the Decree could take jurisdiction away from the USC the point was not decided in the judgment.

Europe), than is the position in the common law world. It is also charged with proposing rules and giving opinions regarding cooperation between the DIFC Courts and the onshore Dubai Courts, giving cause for optimism that a clear scheme of judicial assistance will be developed.

The Decree has been invoked in a number of cases. Twelve decisions are available to the authors[9] that seem to identify some emerging principles, but the judgments are short, at first reasons for dissent were not recorded, and they do not express themselves as laying down generally applicable principles. Consequently, it is perhaps dangerous to attempt to extrapolate too much from them, particularly at such an early stage in the development of the jurisdiction.

In *Daman Real Capital Partners Company LLC v Oger Dubai LLC*[10] the parties went to arbitration in onshore Dubai before the Dubai International Arbitration Centre (DIAC). The unsuccessful party launched proceedings before the Dubai Courts for annulment of the award, and the successful party launched proceedings before the DIFC for recognition and enforcement of the award. The annulment proceedings were first in time. The Judicial Tribunal held by a majority that the Dubai Courts should continue with the annulment proceedings while the DIFC Courts 'should cease from entertaining the case'. However, the Judicial Tribunal said expressly that its decision did not affect the position of foreign arbitral awards that are sought to be enforced through the DIFC Courts.

In *Dubai Water Front LLC v Chenshan Liu*[11] a very similar issue arose, and again the Judicial Tribunal held by a majority that the case should proceed before the Dubai Courts and that the DIFC Courts 'should cease from entertaining the case'.

In both of these cases the Judicial Tribunal divided along jurisdictional lines; the Dubai judges constituting the majority and the DIFC judges the minority. Interestingly, however, in both cases the Tribunal was unanimous on the question of whether the case should proceed before the Dubai Courts – the issue of dissent was whether at the same time the DIFC Courts 'should cease from entertaining the case' altogether. Of course, in any enforcement proceedings there are many issues that are ancillary to the central question of whether the underlying judgment or award should be declared valid. It is possible to infer from the decisions that the dissenting DIFC judges, while agreeing that the Dubai Court was the appropriate forum to litigate the issue of whether the arbitral award should be annulled, were concerned at

9 Decisions of the Tribunal are published in Arabic and English on the DIFC court's website.
10 Cassation No 1/2016 (Judicial Tribunal).
11 Cassation No 2/2016 (Judicial Tribunal).

the injunction that the DIFC Courts should cease to entertain any part of the case at all.

An indication that the words 'cease from entertaining the case' were not intended to have an absolute meaning was given by the Tribunal in *Assas Opco Limited v VIH Hotel Management Limited*.[12] In that case Assas entered into an agreement to operate a hotel on the Palm Jumeirah for VIH. Assas terminated the agreement claiming that VIH had no licence to operate in Dubai from the Dubai Economic Department, and also that it was employing personnel who did not have proper work permits. VIH launched arbitration proceedings and, in support of that arbitration, obtained an injunction from the DIFC Court. Fairly soon afterwards Assas launched proceedings in onshore Dubai claiming the 'annulment' of the contract and damages. It then made an application to the Judicial Tribunal saying there was a conflict of jurisdiction between the onshore proceedings and the injunction granted by the DIFC.

The Tribunal, unanimously, held that the DIFC injunction was an interim measure intended to maintain the status quo until the dispute had been determined (it is not possible at the time of writing to find any further details of the nature of the injunction), and consequently it had no impact on the ability of any court or arbitral tribunal to determine the merits of the case. This decision indicates that where the onshore courts of Dubai are the appropriate forum in which to litigate a dispute, the DIFC will be accepted to retain its jurisdiction to make ancillary orders in support of such proceedings (most notably, in the context of asset recovery, worldwide freezing orders in the standard English Commercial Court form).

The same applies where what is sought to be achieved is recognition and enforcement of an arbitral award or a judgment in the DIFC Court against assets located in the DIFC, or against a DIFC-registered entity, and in onshore Dubai against assets located onshore. In *Assas Investments Limited v Fius Capital Limited*[13] the Tribunal held that for proceedings in the two jurisdictions to run in parallel in such circumstances was no different to multiple enforcement proceedings taking place in multiple countries; the only limit was that courts in all jurisdictions had to be astute to ensure that judgment creditors were not able to achieve double recovery.

In *Marine Logistics Solutions LLC v Wadi Woraya LLC*[14] the parties arbitrated in London and the successful party brought proceedings before the DIFC Courts for the recognition and enforcement of the award. There were no proceedings of any nature before the Dubai Court, but the unsuccessful

12 Cassation No 8/2017 (Judicial Tribunal).
13 Cassation No 6/2017 (Judicial Tribunal).
14 Cassation No 3/2016 (Judicial Tribunal).

party nevertheless argued before the Tribunal that only the Dubai Court had jurisdiction to determine the dispute. On this occasion the Judicial Tribunal decided unanimously that because there were no parallel proceedings onshore and offshore there was essentially no issue for it to determine and dismissed the application.

The facts of *Gulf Navigation Holding PJSC v DNB Bank ASA*[15] were a little more complicated. In 2014, DNB Bank obtained judgment against Gulf Navigation Holding for sums due under finance agreements and certain guarantees. Later that year it brought a claim before the DIFC Courts for recognition and enforcement of that judgment. Gulf Navigation unsuccessfully challenged the jurisdiction of the DIFC Courts, but at first instance it was held that it was impermissible to invite the DIFC Court to refer 'foreign judgments' to the Dubai Courts for execution. An appeal against that qualification was successful and in August 2016 the DIFC Courts sent letters rogatory to the Dubai Court requesting assistance with the enforcement and execution of the United Kingdom Commercial Court judgment. This was one of the cases that established the 'conduit jurisdiction' of the DIFC Courts.

Shortly after the decision in August 2016, and without launching any proceedings of its own before the Dubai Courts, Gulf Navigation Holding made an application to the Judicial Tribunal for a declaration that only the Dubai Courts had had jurisdiction all along, and inviting the Judicial Tribunal to set aside the decisions of the DIFC Courts, both at first instance and on appeal. The company argued that there was a conflict of jurisdiction, and in the alternative, it seems, that the Judicial Tribunal should propose a rule regarding this issue for approval by the Judicial Council. Both arguments were rejected and the application was dismissed. In the course of its short ruling, the Judicial Tribunal stated that it could only intervene to determine the appropriate court to hear a case 'if neither of the courts has abandoned its jurisdiction for handling the case or if both courts have abandoned their jurisdiction or if they issued conflicting judgments'.

This mirrors the wording of the Decree, but also of the 1973 Law governing conflicts of jurisdiction within the UAE that fall to be determined by the USC. It also follows the approach adopted by Deputy Chief Justice Sir David Steel (who was a member of the Tribunal) in the *Standard Chartered Bank* case.[16]

For good measure, the litigation between Standard Chartered Bank and Investment Group Private was also referred to the Tribunal in 2016, which directed that Investment Group Private would be bound by a submission

15 Cassation No 5/2016 (Judicial Tribunal).

16 A similar decision was reached in *Emirates Trading Agency LLC v Bocimar International NV* (Cassation 5/2017 (Judicial Tribunal)).

to the jurisdiction of the DIFC Court which it had made at one stage in the proceedings.

Three decisions from 2017 make the position a little less clear. In *Gulf Navigation Holding PSC v Jinhai Heavy Industry Co Limited*[17] Jinhai received an arbitral award in London of some $14.55m plus interest arising from a dispute in connection with a shipbuilding contract. Gulf Navigation applied to the English court to set aside the award, but failed. It launched proceedings before the Amicable Disputes Centre of the Dubai Courts (part of the onshore Dubai Courts) in February 2015, essentially seeking to relitigate the London arbitration, but it was unable to serve that claim because Jinhai had no presence in Dubai. Jinhai launched proceedings in the DIFC for recognition and enforcement of the award in November 2015, which was granted. In so doing they acquired an address for service within the UAE, and were served with Gulf Navigation's proceedings before the Amicable Disputes Centre. Gulf Navigation (having made no application to set aside the recognition of the arbitral award by the DIFC Court) applied to the Tribunal to declare that the onshore Dubai Courts were the correct forum, an application to which the majority of the Tribunal acceded.

The same result obtained in *Ramadan Mousa Mishmish v Sweet Homes Real Estate*,[18] relating to enforcement proceedings in the DIFC of an arbitral award in Sweet Homes' favour by the onshore DIAC. In that case Mr Mishmish had launched proceedings in onshore Dubai to challenge the substantive arbitral award, which remained outstanding.

In *Endofa DMCC v D'Amico Shipping Italy CBA*[19] D'Amico secured a substantial judgment in its favour from the Commercial Court in London, and launched enforcement proceedings in the DIFC. Endofa filed an acknowledgement of service in which it stated an intention to defend the claim, but did not file a defence. It did, however, file a claim in the onshore Dubai Courts, and referred the case to the Tribunal. The Tribunal held that the DIFC must cease entertaining the claim.

In all three of these cases the DIFC judges of the Tribunal dissented, in the first two recording a detailed dissenting opinion. It is right to recognise that all three cases had at best a tenuous connection with the DIFC on their facts, and in one of them a challenge to the substantive arbitration award was outstanding in onshore Dubai. One could therefore understand these decisions as being to the effect that where the connection with onshore Dubai is stronger, a conflict of jurisdictions will be resolved in favour of the

17 Cassation No 1/2017 (Judicial Tribunal).
18 Cassation No 3/2017.
19 Cassation No 4/2017 (Judicial Tribunal).

onshore courts. However, that is not the basis on which the majority reached their decision.

In *Gulf Navigation* the majority stated that the two sets of proceedings were taking place in a single Emirate, and therefore the New York Convention on recognition and enforcement of arbitration awards did not apply to the case (apparently contradicting its decision in *Assas Opco Limited*). In all three cases the substantive reasoning of the majority was restricted to a single sentence: 'Dubai Courts are the competent courts to entertain this case, because they have the general jurisdiction embodied in the procedural laws.' As stated by the minority in their dissenting opinions in *Gulf Navigation* and *Ramadan Mousa Mishmish*, this might be read as suggesting that wherever there is a genuine conflict of jurisdiction (in the sense of there being two sets of proceedings running concurrently with respect to the same subject matter), the DIFC Court should give way. At the same time, it is fair to observe that some of the reasoning of those dissenting opinions could be read as suggesting a view that, because the Law creating the DIFC Court refers to it having 'exclusive' jurisdiction, wherever there is a genuine conflict of jurisdiction the onshore courts must give way.

These cases show that the thinking of the Tribunal continues to evolve, but one may tentatively propose a resolution of the various decisions considered above by positing the following principle: where there is a genuine connection with the DIFC, or the exercise of its jurisdiction will not impact on the ability of the onshore court to consider a case on its merits, its jurisdiction will be vindicated by the Tribunal. Where, however, a case has no or only a tenuous connection with the DIFC and there are properly constituted proceedings under way in onshore Dubai (even if apparently unmeritorious), the onshore courts will be preferred.

Such a principle would of course be problematic for the evolution of the 'conduit jurisdiction' inasmuch as that jurisdiction is sought to be invoked to enable the DIFC Courts to be used as an alternative to litigating cases with no connection to the DIFC against Dubai resident companies and individuals in the onshore Dubai Courts. However, for asset recovery lawyers it would have the benefit of providing a level of predictability and procedural efficiency – of ensuring order rather than *Standard Chartered*-type chaos.

What is clear, however, is that if there are no competing proceedings onshore the Judicial Tribunal will not intervene to prevent the DIFC Courts from hearing a case (and presumably vice versa), meaning that it cannot

be used as an informal court of further appeal within Dubai by a litigant unhappy with a decision on jurisdiction.[20]

The recent case of Akhmedova v Akhmedova: cross-border asset recovery

The particular jurisdictional settlement of the DIFC Courts as a part of the Dubai judicial system and its effect on asset recovery was directly engaged by the *Akhmedova* litigation. Mr Akhmedov is a very wealthy Russian businessman whose wife pursued divorce proceedings against him in the UK. Mr Justice Haddon-Cave awarded her over £450m[21] in compensation. Mr Akhmedov did not pay any portion of the award and in April 2018 Mr Justice Haddon-Cave held that he had moved assets in breach of freezing orders made in England and Lichtenstein, and for the purpose of moving them beyond enforcement. In particular, the judge held that a yacht named 'MV Luna' had been transferred to a Lichtenstein Anstalt named 'Straight Establishment', referred to in the judgments as 'Straight'. It has been reported that the 115 metre-long 'MV Luna' is worth $540m.

Mrs Akhmedoav's lawyers identified Straight as the owner of MV Luna, and also located the yacht to a dry dock in onshore Dubai, where it was undergoing maintenance. She made an application to the English court to add Straight as a respondent to the divorce proceedings, and applied to the DIFC Court for a freezing order against Mr Akhmedov and Straight preventing them from removing MV Luna from Dubai. The freezing order application was heard first.

Straight relied on the facts that it is not a DIFC entity, it was not then subject to any judgment of the English court which might be sought to be enforced through the DIFC Court, and MV Luna was located outside the DIFC. Accordingly it argued (it might be said understandably) that the DIFC Court had no jurisdiction to make a freezing order against it with respect to MV Luna. Mrs Akhmedova relied on the facts that she had applied for a judgment against Straight in England, an application to be determined within a matter of weeks, and had already obtained a judgment against Mr Akhmedov which could already be enforced against him. Accordingly she argued (it might said equally understandably) that she was doing no more than seeking to preserve the position and it would denude the DIFC Court's

20 So much is confirmed by the 2017 decision of the Tribunal in the *Standard Chartered v Investment Group Private* litigation (Cassation No 7/2017 (Judicial Tribunal), in which IGPL's application for an order effectively overturning a decision of the DIFC court imposing conditions on the grant of permission to bring a counterclaim was held to be outside the permissible scope of the Decree.

21 *AAZ v BBZ and Others (Financial Remedies: Sharing Principle: Special Contribution)* [2016] 1 FLR 153.

jurisdiction to ratify and enforce foreign judgments (and indeed enforce its own judgments) if a defendant were able to avoid its jurisdiction by the simple expedient of placing his assets in an entity registered in what was described as 'an offshore secrecy jurisdiction'. HE Justice Ali Al Mahdani held[22] that as a matter of policy the DIFC Court could not hold itself powerless in the face of 'fraud' (the judge's word). As Mrs Akhmedova had presented a good arguable case and Straight had not sought to establish that it was in substance as well as form a separate entity from Mr Akhmedov, the DIFC judge made an ancillary freezing order. Shortly afterwards, and upon the basis of a letter of request issued by the DIFC Court, the onshore Dubai Court made an interim attachment order, recognising and giving effect to the DIFC freezing order, and preventing MV Luna from being sailed away from her berth in Dubai.

On one view these judgments of the DIFC and onshore Dubai courts give reason to be optimistic that they will see through form to the substance of the issue and ensure that the particular jurisdictional settlement between the courts is not permitted to enable the unscrupulous to evade their liabilities. However, a few notes of caution must be sounded:

- HE Justice Ali Al Mahdani did not engage in any detail to identify the 'jurisdictional gateway' through which Mrs Akhmedova could pass to pursue Straight before the DIFC Court. Instead he based his decision on the public policy of the importance of ensuring that the DIFC Court did not hold itself powerless in cases of 'fraud'. He was also careful to say that he was making his decision '*in order or to the level of granting a Freezing Injunction only*'. Thus, the judge was careful not to be seen as deciding the question whether the DIFC Court has jurisdiction over Straight with respect to the substantive case.
- The onshore Dubai Court made its attachment order to preserve the position pending the DIFC Court's resolution of the case. It too therefore did not claim to be deciding the substantive jurisdictional issue.
- The two decisions of the Dubai Courts may thus be seen as being in line with the decision of the Judicial Tribunal in *Assas Opco Limited v VIH Hotel Management Limited*, namely that the making of a freezing order does not amount to a final decision on the substantive case, and does not prevent any other court from deciding that substantive issue.
- There are indications that Straight certainly sought to appeal at one stage. If the decision is appealed to the DIFC Court of Appeal, a number of interesting but difficult issues regarding the freezing order/*Mareva* jurisdiction, as well as regarding the jurisdiction of the DIFC Court over foreign persons or entities, are likely to arise.

22 [2018] DIFC CFI 11.

The Decree: a procedural point

The Decree lays down a procedure that must be followed in Article 4, which appears to make no provision for involvement by the respondent party to an application. However, in all of the decisions referred to above, there is reference to memoranda of defence being submitted by the respondent, indicating that in practice the parties are rather more involved than the wording of Article 4 might suggest. The practice that has been adopted is one of paper submissions by the parties followed by a decision by the Tribunal. This is almost certainly the appropriate balance between affording the parties a full opportunity to present their respective cases and ensuring the efficient disposal of references to the Tribunal; the facts giving rise to the jurisdiction issue are unlikely to be in dispute and the decisions so far issued suggest that the Tribunal will limit itself to considering that issue without regard to the merits, or indeed any other aspect, of the underlying case.

Artificially manufactured conflicts in jurisdiction

One issue that will surely come in for greater scrutiny as the Tribunal's decisions evolve is how an artificially manufactured conflict of jurisdiction (such as might be said to have happened in the *Standard Chartered Bank* case) should be addressed. Prior to the creation of the Judicial Tribunal the only way to resolve such manufactured conflicts was to engage in the proceedings in each jurisdiction and seek to win on each occasion, aware that the case could end up before the USC. It is possible that, rather than operating as a means of frustrating progress in the case, the Judicial Tribunal may turn out to be a weapon in the armoury of asset recovery lawyers. The Decree gives standing to 'any party' to refer a case to it, meaning that where proceedings are started before the Dubai Courts solely to create an apparent conflict of jurisdiction with the DIFC, or vice versa, it is open to a claimant to refer the case to the Judicial Tribunal immediately. By so doing it would be possible to avoid the costs of engaging with the proceedings in both jurisdictions, and instead obtain a final decision on the jurisdiction question, binding on the courts (including the appellate courts) of both Dubai and the DIFC, within a few weeks.

The wider impact of jurisdictional conflicts within a sovereign land

These are of course not just issues for Dubai and the DIFC. There are now international commercial dispute centres in Qatar, Abu Dhabi and Singapore. A new court is being set up in Kazakhstan and President Macron announced

recently a change to the procedural code of the French Commercial Court in Paris to create a division in which parties are permitted to plead in English and apply common law. All of these courts operate, or will operate, as both an integral part of their respective national legal systems and as separate jurisdictions. It can be expected that unscrupulous litigants will seek to take advantage of the complexities that brings wherever they find them.

Conclusion

A very great deal of money flows through Dubai as a conduit, and this is a measure of its success. If the DIFC Courts can act as an equally effective conduit in asset recovery that can only be to the good. Indeed, some may argue that providing for such an effective conduit for creditors' rights and the recovery of assets should be an integral component of an international financial centre. A complex jurisdictional settlement will necessarily hinder the development of Dubai as such an effective conduit for recovery, and is ripe for manipulation by the dishonest. It is early days, but the Decree and the institution of the Judicial Committee have the potential to afford a robust means of dealing with such jurisdictional machinations.