

The DIFC Courts - a "conduit jurisdiction" no more?

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As we predicted in our Annual Seminar on Recent Developments in the UAE Dispute Resolution Landscape, back in November 2016, the use of the DIFC Courts as a "conduit jurisdiction" has been called into question.

There has been much discussion in the Dubai legal community and beyond about the use of the DIFC Courts as a conduit jurisdiction for the recognition and enforcement of both foreign and domestic arbitral awards following the line of decisions in *Banyan Tree v Meydan Group LLC*, *DNB Bank ASA v Gulf Eyadah*, and the *Oger Dubai LLC v Daman Real Estate Capital Partners Ltd*. These and other cases led to the formation of the Judicial Tribunal created by Decree No.19/2016 ("**Decree**"). The Judicial Tribunal's purpose is to review and resolve "*conflicts of jurisdiction*" between the DIFC Courts and the Dubai Courts. The JT is made up of four Judges from the Dubai onshore Courts and three from the DIFC Courts.

In its very first decision *Cassation No. 1/2016 (Judicial Tribunal) Daman Real Capital Partners Company LLC v. Oger Dubai LLC* the Judicial Tribunal has determined whether the DIFC Courts can, in this instance, serve as a conduit jurisdiction for the onward enforcement of a domestic arbitral award in mainland Dubai. We have summarised and commented on the decision below.

Background

It is important to understand the background to the original matter before analysing the Judicial Tribunal's determination in detail.

Oger Dubai obtained an award in an arbitration seated in onshore Dubai against Daman and sought its recognition and enforcement before the DIFC Courts. As Daman was unable or unwilling to comply with the award, Oger Dubai sought and obtained an order from the DIFC Courts for recognition of the award and that Daman be wound-up. Daman applied to the Dubai Courts for recognition of the award and that Daman be wound-up. Daman applied to the Dubai Courts to annul the arbitral award and asked the DIFC Courts to adjourn its enforcement proceedings, pending the outcome of the annulment proceedings before the Dubai Courts. The Dubai Court of First Instance, subsequently, refused to annul the arbitral award on the grounds that it lacked jurisdiction to do so, as the DIFC Courts had already made a determination on the matter. This decision was confirmed by the Dubai Court of Appeal, but the matter was appealed to the Court of Cassation, before which it is still pending. Despite the on-going proceedings in the

Dubai Courts, the matter was referred to the newly formed Judicial Tribunal. On 30 June 2016, the DIFC Courts decided to stay the winding up of Daman until a decision was issued by the Judicial Tribunal as to the competent court to finally hear and determine the matter.

Judicial Tribunal Decision

In the first part of the decision, the Judicial Tribunal identified and confirmed the existence of a "*conflict of jurisdiction*" in this case between the DIFC Courts and the Dubai Courts. This related to the fact that enforcement proceedings have been brought before the DIFC Courts and, in parallel, annulment proceedings were filed before the Dubai Courts which are still pending.

The Judicial Tribunal emphasised that had the substantive case been brought before the DIFC Courts, there would be no conflict, as the DIFC Courts would be the only appropriate forum for the dispute. In support of this, it noted that the assets in question are located in the DIFC and Daman is a DIFC registered entity.

The Judicial Tribunal further emphasised that, for the sake of justice, pursuant to Article 4 of the Decree and to avoid contradictory judgments, such a conflict of jurisdiction should not be resolved by permitting both Courts to "entertain" the case. Only one of the Courts should be permitted to determine whether the arbitral award should be enforced or annulled.

Without giving very much substantive reasoning, the Judicial Tribunal concluded that pursuant to the procedural laws:

- 1.the Dubai onshore Courts were the competent Courts to make a determination on the validity of the arbitral award; and
- 2.the DIFC Courts should cease from "*entertaining the case*".

Analysis

At our Annual Seminar, we predicted that UAE arbitration cases referred to the Judicial Tribunal which otherwise had no nexus to the DIFC but where the claimants were attempting to use the DIFC Courts as a "conduit jurisdiction" to ultimately enforce against assets held in onshore Dubai would likely result in the Judicial Tribunal deciding the Dubai Courts in fact had jurisdiction. One possible factor is the Judicial Tribunal has an in-built majority of Dubai Court judges and it is noteworthy that the three DIFC Judges sitting on the Judicial Tribunal (Michael Hwang; Omar Al Muhairi; and Sir David Steel) dissented from the second part of the ruling that the DIFC Courts should refrain from entertaining the case.

This *Oger Dubai* case had a clear connection with the DIFC as the Respondent and the project in question were based in the DIFC. If a case with such a clear link to the DIFC can be determined in such a manner then it provides little hope to future cases brought before the Judicial Tribunal with no or a more tenuous link to the DIFC to successfully argue the DIFC Courts should have jurisdiction to give recognition where parallel proceedings are before the Dubai Courts seeking

nullification. Parties should carefully consider current or future actions they wish to enforce through the DIFC Courts, lest they fall victim to the same type of outcome. It now seems inevitable that attempts to use the DIFC Courts as a "conduit jurisdiction" will ultimately fail.

The brave new era excitedly predicted by many whereby Dubai seated arbitral awards could avoid scrutiny by the Dubai Courts (and the time that entails) by using the DIFC Courts as a shortcut, is seemingly coming to an end.

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