

Conflicts of jurisdiction resolved? Dubai Decree No. 19 of 2016 and the Judicial Tribunal's initial decisions

February 2017

The Dubai International Financial Centre (“**DIFC**”), a financial free zone with its own legal framework and courts within the Emirate of Dubai, serves as a hub for business activity in the Middle East. The English-language DIFC Courts operate a common law system, while the Dubai Courts (with jurisdiction over the rest of the Emirate) operate a civil law system and conduct proceedings in Arabic.

The creation of an autonomous legal system within the Emirate of Dubai has led to an overlap in the jurisdiction of the two sets of courts, with conflicts of jurisdiction becoming a recurring issue since the establishment of the DIFC Courts in 2004. The DIFC Courts have, through their judgments, interpreted the scope of their jurisdiction widely, perhaps most notably in the Corinth Pipeworks, Bank Sarasin and DNB Bank cases.

As a consequence of the potential and actual conflicts of jurisdiction between the two sets of courts, Dubai Decree No. 19 of 2016 (the “**Decree**”) was issued in June 2016 to establish the Judicial Tribunal for the Dubai Courts and DIFC Courts (the “**Tribunal**”). The first decisions of the Tribunal were recently issued.

Dubai Decree No. 19 of 2016

Article 2 of the Decree provides the Tribunal with the following remit:

The Tribunal shall have the following competencies and powers:

- Determining 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.
- Determining 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.
- Proposing 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. Such proposals shall be submitted for approval to the President of the Judicial Council.
- Giving opinions in matters relating to cooperation and coordination between the Dubai Courts and the DIFC Courts.
- Any other matters as may be the subject of a request by the Judicial Council or the Ruler.

The Constitutionality of the Tribunal

Initially, some commentators were of the view that the Tribunal could encroach on the jurisdiction of the Union Supreme Court. Pursuant to Article 60 of UAE Federal Law No. 10 of 1973 (the “**Union Supreme Court Law**”), conflicts of jurisdiction between the courts of an Emirate, such as the Dubai Courts and DIFC Courts, were to be submitted to the Union Supreme Court for determination, whereas under the Decree such conflicts are to be submitted to the Tribunal. As pointed out by the Deputy Chief Justice of the DIFC Courts, Sir David Steel, in *Standard Chartered Bank v Investment Group Private Limited*, this appeared to raise the important issue of whether “as a matter of constitutionality, a decree of the Emirate of Dubai can

override, indeed amend, a federal law.”

However, in a recent decision relating to the enforcement of a Dubai-seated DIAC award, the Union Supreme Court acknowledged the Tribunal’s jurisdiction to determine conflicts of jurisdiction between the DIFC Courts and the Dubai Courts. It based this decision on Article 104 of the Constitution, which stipulates that the authorities of an individual Emirate have jurisdiction in all matters not assigned to the Union Supreme Court under the Constitution. The constitutional legitimacy of the Tribunal is therefore not in doubt.

The Tribunal’s Initial Decisions

The Tribunal has issued a number of decisions on applications alleging conflicts of jurisdiction. These can be divided into two categories. First, the “conduit jurisdiction” decisions in *Gulf Navigation Holding PJSC v DNB Bank ASA* (Cassation No. 5 of 2016), relating to the enforcement of a foreign judgment, and another case (Cassation No. 3 of 2016) relating to the enforcement of a foreign arbitral award. The Tribunal, in rejecting the defendants’ applications in both cases, held that there were no conflicts of jurisdiction because there were no parallel proceedings in the Dubai Courts in either case. The Tribunal made no comment as to which set of courts would have been the appropriate forum had there been parallel proceedings in the Dubai Courts.

There is little in these two decisions of the Tribunal to indicate how it will deal with conflicts of jurisdiction relating to the enforcement of foreign arbitral awards or foreign judgments where parallel proceedings are in fact underway. For example, it is not known whether the location of a debtor’s assets will be taken into account when determining which courts have jurisdiction. If the Tribunal does adopt an asset-linked test, it may mean that the DIFC will no longer serve as a conduit jurisdiction for the enforcement of foreign arbitral awards and foreign judgments. For now, however, the DIFC’s status as a conduit jurisdiction for such foreign decisions remains intact.

The second category of decisions appears to effectively end the DIFC Courts’ status as a “conduit” jurisdiction for the enforcement of domestic arbitration awards. In *Daman Real Estate Capital Partners Limited v Oger Dubai LLC* (Cassation No. 1 of 2016) and a second case (Cassation No. 2 of 2016), the Tribunal decided that the DIFC Courts should “cease to entertain” the two claims seeking to ratify Dubai-seated arbitral awards. These decisions are at odds with the well-known DIFC Courts’ authority of *Banyan Tree v Meydan Group LLC*, in which a DIAC award seated in Dubai was recognised and enforced by the DIFC Courts despite the fact that neither party was located in the DIFC or had assets there.

In the *Daman* case, the award debtor had filed an application in the Dubai Courts seeking to have the DIAC award annulled. Annulment proceedings can only be brought in the courts of the seat of the arbitration. *Oger* then filed a claim in the DIFC Courts seeking to enforce the same award. The Tribunal determined that in the interests of due process and in order to avoid the risk of conflicting judgments, only one of the two sets of courts should hear both the enforcement claim and annulment application. The Tribunal added that on the basis of the “general principles embodied in the laws of the civil procedure”, the appropriate forum for the matter was the Dubai Courts, though no further clarification was provided.

The Tribunal observed that the New York Convention 1958 was irrelevant to the enforcement of domestic arbitral awards. This may have been in response to the fact that it is ordinarily possible to enforce an arbitral award in any number of jurisdictions under the New York Convention, while annulment proceedings are pending before the courts of the seat. The above reasons were also relied on in the second case determined by the Tribunal (Cassation No. 2 of 2016).

The three DIFC Court judges on the Tribunal in these latter cases agreed that both cases should be remitted to the Dubai Courts for determination of the annulment application, but dissented on the ruling that the DIFC Courts should cease from hearing the cases. Although the DIFC Court Judges’ reasoning is not included in either judgment, it may have been premised on a distinction between annulment proceedings on the one hand and enforcement proceedings on the other, a distinction which the

judgments ignore. A plausible interpretation of the DIFC Court Judges' dissent is that they were content for the annulment proceedings to run their course in the Dubai Courts and for the stay of proceedings in the DIFC Court to be maintained pending the final outcome of those annulment proceedings. However, on the assumption that the annulment application is ultimately dismissed, and the award recognised, in the Dubai Courts, the DIFC Court Judges can be assumed to have expected there to be further proceedings in the DIFC Courts regarding the arbitral award.

The decision in Daman is likely to create uncertainty in future because the Defendant is a DIFC entity with at least some of its assets probably located in the DIFC. As a result, if the Dubai Courts ultimately recognise the award by way of a Dubai Court order, then that order would probably need to be enforced in the DIFC Courts owing to their jurisdiction over assets within the DIFC. However, on its face, the judgment of the Tribunal has the effect of preventing the DIFC Courts from entertaining the case altogether, potentially leaving the award creditor with an unenforceable Dubai Court order. In such a scenario, the DIFC Courts would seem likely to interpret the Tribunal's decision as barring only the application for enforcement of the award, and not affecting their ability to deal with any application for enforcement of the Dubai Court order.

Although the reasoning in the Tribunal's decisions is limited, the following principles either appear in, or can be extrapolated from, them:

Where, in the case of a domestic arbitral award, the Dubai Courts are seised of an annulment application and the DIFC Courts are seised of an enforcement application, there is a "conflict of jurisdiction" for the purposes of the Decree.

In the event of such a conflict, only one of the two sets of courts should be entitled to determine any enforcement and annulment applications, and the other set of courts should refrain from so doing.

The supervisory courts, that is, the courts of the seat of the arbitration, are the appropriate courts to consider the enforcement of an award in cases where an annulment application is made.

One notable feature of the Daman case is the fact that the annulment proceedings in the Dubai Courts appear to have been commenced prior to the enforcement application in the DIFC Courts, with the Dubai Court of First Instance and Court of Appeal having determined that they did not have jurisdiction over the matter. An award debtor will often commence annulment proceedings once it becomes aware of enforcement proceedings initiated by the award creditor. However, there is nothing in the Tribunal's judgment to suggest that its decision would have been different had the annulment proceedings only been commenced after the enforcement claim. Had the Tribunal's reasoning included a court first seised analysis, it may have determined that the court first seised of an enforcement claim has jurisdiction over it, meaning that the outcome would have been different.

There is now uncertainty as to what happens to orders already issued by the DIFC Courts recognising and enforcing the awards in question. The Tribunal has stated that the DIFC Courts should cease from entertaining the two sets of proceedings. However, there is no ruling that previous orders issued by the DIFC Courts should be set aside. Accordingly, the DIFC Court in Daman, by Order of Justice Field dated 1 February 2017, has invited submissions to determine what happens to the DIFC Court orders.

Conclusion

Domestic award creditors who anticipate annulment proceedings are now more likely to bring enforcement proceedings in the courts where the arbitration was seated. This is a significant departure from the previous position, where award creditors seeking to enforce a Dubai-seated award were increasingly opting for the DIFC Courts, which are considered the more pro-arbitration of the two sets of courts. The Tribunal's initial decisions have effectively limited the jurisdiction of the DIFC Courts to deal with recognition and enforcement of domestic arbitral awards, but give rise to no such limitation with respect to foreign judgments and awards.