

Update on the Joint Judicial Tribunal

August 2017

On 22 May 2017, the Tribunal met to hear a number of applications relating to alleged conflicts of jurisdiction in cases before both the Dubai Courts and DIFC Courts. Shortly afterwards, the Tribunal published the majority judgments, which are available on the DIFC Courts' website. The dissenting judgments of the DIFC Court judges on the Tribunal were referred to but not published.

Recap of the Tribunal's 2016 Judgments

The initial decisions of the Tribunal showed a preference for the general jurisdiction of the Dubai Courts in any real or potential conflict in proceedings before both court systems.

In Cassation 1/2016 the Tribunal decided that enforcement proceedings in the DIFC Courts of a Dubai International Arbitration Centre (DIAC) award were to give way to annulment proceedings in the Dubai Courts on the grounds that only one of the two courts should determine whether to annul or recognise the arbitral award, "*for the sake of justice and to avoid contradictory judgements*", despite assets of the award debtor being within the DIFC Court's jurisdiction. 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, presumably on the basis that the seat of the arbitration was Dubai rather than the DIFC or elsewhere (although it is important to note that the Tribunal did not explicitly say this). The Tribunal followed this approach in Cassation 2/2016, which involved another Dubai-seated arbitration brought to the DIFC for enforcement.

In both these cases the Tribunal took a different position to the orthodox arbitral position, which is that the courts of the seat of the arbitration usually have jurisdiction to set aside awards while the courts of the place in which enforcement is pursued usually have jurisdiction to hear enforcement proceedings in parallel. The Tribunal has also taken a different approach to the one adopted by the DIFC Court of Appeal in its well-known decision in *Meydan Group LLC v. Banyan Tree Corporate Pte Ltd* [2014] DIFC CA 005. In *Meydan*, the DIFC Court of Appeal upheld the DIFC Courts' jurisdiction under Article 42 of the DIFC Arbitration Law (1/2008) to recognise and enforce an arbitral award irrespective of the state or jurisdiction in which it was made, even though neither party was located in the DIFC or had assets there. Following the handing down of the initial Tribunal decisions, the *Meydan* enforcement order of the DIFC Courts was declared null by the Dubai Courts of First Instance in early 2017.

However, the Tribunal declined to allow jurisdictional challenges to the enforcement of foreign arbitral awards (Cassation 3/2016) and foreign judgments (Cassation 5/2016) by the DIFC Courts. In both of these cases, the judgment and award debtor had applied to the Tribunal as a tactic to stay enforcement proceedings before the DIFC Courts. The Tribunal rejected the defendants' applications after finding that there were no parallel proceedings before the Dubai Courts and so no real or potential conflicts of jurisdiction. The Tribunal left open which court would have been the appropriate forum had there been a parallel claim in the Dubai Courts.

Between these first two sets of cases lies a fifth case, Cassation 4/2016, which was released slightly later than the others. The appellant had previously lost jurisdictional challenges before the DIFC Court of First Instance and Court of Appeal when the respondent first brought their action in the DIFC for unpaid debts due under a loan. The appellant had claimed that the Sharjah Courts were the correct jurisdiction to hear the action even though the Sharjah Courts had themselves declined to exercise jurisdiction. Before the

DIFC Courts could issue immediate judgment on the claim, the appellant sought a declaration from the Tribunal that the Dubai Courts should hear the claim instead. The Tribunal noted that the appellant had previously conceded that the DIFC Courts should hear the dispute and rejected the application. The facts were unusual and the decision is something of an outlier, serving to show the way the Decree 19 process can be used to delay valid enforcement in the DIFC Courts.

The Tribunal's 2017 Judgments

In Cassation 1/2017, the appellant was again the losing party, this time in respect of an arbitral award issued under London International Maritime Arbitrators Association rules which the respondent had brought to the DIFC for enforcement. Unlike in the previous case the appellant brought before the Tribunal (Cassation 5/2016, see above), the appellant award debtor had filed a claim, referred to but not identified in the Tribunal judgment, in the Amicable Settlement of Disputes Centre. The Tribunal noted the Centre was "*an integral part*" of the Dubai Courts and, as such, found the Dubai Courts to be the "*competent courts*" for the dispute given "*the general principles of laws embodied in the procedural laws*" and the Dubai Courts' "*general jurisdiction*".

In short, this judgment extended the reasoning of Cassation 1/2016 and Cassation 2/2016 in two ways. Firstly, by referring to "*general principles*" and "*for the sake of justice and to avoid contradictory judgements*" the Tribunal applied the same logic to jurisdictional challenges against the enforcement of foreign arbitral awards by way of the DIFC Courts' conduit jurisdiction as it had applied to the enforcement of domestic arbitral awards in the first two Cassation judgments. Secondly, the Tribunal moved beyond basing its decision on whether or not Dubai is the seat of the arbitration. We are not directly told in the Tribunal judgment where the seat of the arbitration was, although the default under the LIMAA rules is England and the judgment notes the award was "*issued by arbitrators in London*".

The facts of Cassation 3/2017 were similar to Cassation 1/2016. The respondent claimant had a DIAC award it brought to the DIFC for enforcement against the appellant defendant. This time, however, the defendant did not have any assets in the DIFC. The appellant issued nullification proceedings in the Dubai Courts, and the Tribunal accordingly held that the Dubai Courts had sole jurisdiction over both the enforcement and nullification claims.

Likewise, the facts of Cassation 5/2017 were similar to Cassation 5/2016: the respondent claimant brought two English Court orders to the DIFC Courts for enforcement against the appellant defendant, which in turn had recognized two arbitral awards in the respondent's favour. The judgment debtor initially challenged the jurisdiction of the DIFC Courts to enforce the English orders but then waived its objections, leading to a DIFC Court order for enforcement. The judgment debtor applied to the Tribunal when the DIFC Courts ordered disclosure of its financial information. The Tribunal rejected the application as no parallel proceedings were before the Dubai Courts. It also declined to hear a challenge regarding the constitutionality of the jurisdictional gateway and enforcement provisions in the DIFC Judicial Authority Law (Dubai Law No.12 of 2004, as amended), finding the question of constitutionality to be one for the UAE Federal Supreme Court.

Conclusion

The 2017 decisions of the Tribunal show a continued preference for the general jurisdiction of the Dubai Courts in any real or potential conflict in proceedings before both court systems.

The creation of the Tribunal is to be welcomed as it can provide an initial judgment on whether proceedings should be brought in the Dubai Courts or the DIFC Courts, potentially streamlining litigation and avoiding unnecessary delays and costs later on. There is considerable comity between the two court systems. As the Tribunal has noted on several occasions, the New York Convention does not apply when parallel proceedings are underway in two courts of the Emirate of Dubai (i.e. the Dubai Courts and the DIFC Courts).

In the absence of the rules regarding appropriate jurisdiction promised in Article 2 of Decree 19 or more detail in the published judgments, the Tribunal's jurisprudence is still developing. The takeaway from the Cassation 1/2017 case is that the enforcement of foreign arbitral awards and judgments can now be halted in the DIFC Courts for no reason other than the existence of potentially conflicting proceedings in the Dubai Courts, including its Amicable Settlement of Disputes Centre, whether or not those proceedings are for annulment.

The numbering of the 2017 judgments indicates that there are at least two other Tribunal decisions yet to be published (Cassation 2/2017 and 4/2017). We await these with interest.

Al Tamimi & Company's DIFC litigation team regularly advises on jurisdictional matters, including the recognition and enforcement of foreign and domestic decisions. For further information please contact Rita Jaballah (r.jaballah@tamimi.com), Tarek Shrayh (t.shrayh@tamimi.com) or Peter Smith (p.smith@tamimi.com).