

Is the Oasis now a Mirage? Dwindling scope of the DIFC Courts’ ‘conduit jurisdiction’

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[Recent decisions of the Judicial Tribunal and the Dubai Court of First Instance limit the scope of the DIFC Courts’ ‘conduit jurisdiction’.](#)

Background

The DIFC Courts interact with the Dubai Courts on the basis of DIFC Law No. 12 of 2004, as amended, and the 2009 Protocol of Enforcement between DIFC Courts and Dubai Courts. The Law and the Protocol guarantee mutual recognition and enforcement of court decisions rendered in the two jurisdictions, including decisions ratifying arbitration awards. The DIFC Courts have over the years adopted an expansive approach to their jurisdiction, declaring themselves competent to entertain matters with little or no connection to the DIFC, such as in the *Banyan Tree Corporate Pte Ltd. v. Meydan Group LLC* case. They have also held that they could be used as a ‘conduit’ to enforce foreign and domestic (onshore) arbitration awards (which would have been recognized by the DIFC Courts) in onshore Dubai. The use of the DIFC Courts in this manner exacerbated the possibility of a conflict of jurisdiction between the Dubai and DIFC Courts. Decree 19 of 2016 therefore established the Judicial Tribunal for the Courts of Dubai and the DIFC Courts (“**Judicial Tribunal**”) to decide upon conflicts of jurisdiction and judgments between the Dubai and DIFC Courts.

The Judicial Tribunal and the Dubai Court of First Instance have recently rendered several decisions in which they have addressed the jurisdictional interplay between the Dubai and DIFC Courts where a party seeks enforcement of an award or a judgment in the DIFC. These decisions undermine the DIFC Courts’ conduit jurisdiction for onshore awards, but not for foreign awards and judgments.

The recent Decisions of the Judicial Tribunal and the Dubai Court of First Instance

The outcome of the recent decisions of the Judicial Tribunal and the Dubai Court of First Instance differs depending on whether a party seeks enforcement of an award which was rendered in onshore Dubai or which was issued abroad, and whether the DIFC judgment will only be used as a conduit for enforcement in Dubai.

(1) Annulment of awards rendered in Dubai where enforcement is also sought in the DIFC

In *Daman Real Capital Partners Company LLC v. Oger Dubai LLC*, the DIFC Courts proceeded to enforce an award rendered in Dubai, while annulment proceedings were pending before the Courts of Dubai. The dispute was related to a project located in the DIFC. Daman referred the matter to the Judicial Tribunal. The Judicial Tribunal held that only one court “should determine to annul or recognize” the award at issue, and the Dubai Courts were the competent courts to “entertain” this case. Thus, the case was “remitted for trial” by the Dubai Courts, and the DIFC Courts were directed to “cease from entertaining” the matter.

(2) Enforcement of awards rendered in Dubai whereby the DIFC only used as conduit for enforcement in Dubai

Dubai Waterfront LLC v. Chenshan Liu dealt with a similar situation whereby one party sought enforcement in the DIFC of an award rendered in Dubai, while annulment proceedings were pending before the Dubai Courts. The difference with the *Daman* case was that Dubai Waterfront LLC was an onshore company with no link to the DIFC and no assets were located therein. Consistent with the decision in *Daman*, the Judicial Tribunal remitted the case to the Dubai Courts and ordered the DIFC Courts to “cease from entertaining” the matter.

The DIFC Courts’ conduit jurisdiction in respect of Dubai-based awards has recently come under further attack. The Dubai Court of First Instance in a decision dated 15 February 2017 nullified several of the DIFC Courts’ decisions in the *Banyan Tree Corporate Pte Ltd. v. Meydan Group LLC* matter. The Dubai Court found that the DIFC Courts lacked jurisdiction for the recognition and enforcement of the arbitral award in the *Banyan Tree* case as it there was no nexus with the DIFC.

(3) Enforcement of foreign awards and judgments

Gulf Navigation Holding PJSC v. DNB Bank ASA and Marine Logistics Solutions LLC v. Wadi Woraya LLC concerned the use of the DIFC Courts’ jurisdiction to enforce foreign awards and judgments. In both cases, the defendants had no connection with or assets in the DIFC; the sole purpose of the DIFC proceedings was to use the recognition of the foreign award and judgment by the DIFC Courts for execution in onshore Dubai. The Judicial Tribunal ruled that, as there were no parallel proceedings in the Dubai Courts, there was no case of conflicting jurisdiction between the Dubai Courts and the DIFC Courts. It therefore ruled in favour of the DIFC Courts’ jurisdiction.

Conclusion

The recent decisions in *Daman*, *Dubai Waterfront* and *Banyan Tree* have undermined the DIFC Courts’ conduit jurisdiction in respect of onshore awards. Arguably, the decision in *Daman* did not involve the DIFC’s conduit jurisdiction, as Oger was only seeking the enforcement of the relevant award in the DIFC. While the Judicial Tribunal’s decision as regards the annulment of the award is understandable, its position regarding the issue of enforcement could be questioned given that the underlying project was located in the DIFC and *Daman* was a company licensed in the DIFC. However, in *Dubai Waterfront* and *Banyan Tree*, the Judicial Tribunal and the Dubai Court of First Instance ruled in favour of the jurisdiction of the Dubai Courts in a situation where there was no nexus with or assets in the DIFC.

On the other hand, there appears to be no change regarding the DIFC Courts’ conduit jurisdiction in relation to the recognition of foreign awards and court judgments, as long as there are no parallel proceedings in the Dubai courts. Recalcitrant parties could, however, contrive such parallel proceedings before the Dubai Courts to delay the enforcement of an adverse foreign award or judgment. It is unclear how the Judicial Tribunal would decide in such a situation. Notably, the Dubai Courts in *Daman* had concluded themselves that they did not have jurisdiction to consider the matter, yet, this did not prevent the Judicial Tribunal from ruling in favour of the Dubai Courts. It is possible, though, that in a situation involving a foreign award and the application of the New York Convention, the Judicial Tribunal would reach a different conclusion.

The conduit jurisdiction of the DIFC is not the only area where changes have recently occurred in Dubai in respect of arbitration proceedings. Another example is the recent amendment of Article 257 of the UAE Penal Code. Under the new provision, any arbitrators (and experts, etc.) who issue biased decisions or opinions (“in contravention of the requirements of the duty of neutrality and integrity”) in arbitration proceedings taking place in the UAE can now be subject to criminal liability. The new article’s wording is both vague and broad. The words “integrity” and “neutrality” are not defined in UAE criminal law, and the law’s application is not limited to instances of intentional or conscious bias. Fears have thus arisen that this article could be used by unscrupulous parties to put pressure on arbitrators and / or to delay the outcome of arbitral proceedings. This development in Dubai stands in contrast to other countries in the region that strive to create a more arbitration-friendly environment, such as Qatar that recently enacted a modernized arbitration law.

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