A CONSTRAINT ON THE CONDUIT JURISDICTION? THE JUDICIAL TRIBUNAL ORDERS THE DIFC COURT TO "CEASE FROM ENTERTAINING" ENFORCEMENT PROCEEDINGS

As reported in our previous article (click here), on 9 June 2016, H. H. Ruler of Dubai issued Dubai Decree No. 19 of 2016 (the "Decree"), establishing the Judicial Tribunal for the Dubai Courts and DIFC Courts (the "Judicial Tribunal"). Since the enactment of the Decree, there has been considerable uncertainty as to the procedure and, more importantly, the role that the Judicial Tribunal, instituted with the express intention of ruling on both conflicts of jurisdiction and conflicting judgments as between the Dubai and DIFC Court, is set to play in Dubai's judicial landscape.

What appears to be the Judicial Tribunal's first decision, cited as Cassation No. 1/2016 (JT), offers an insight into the procedure and likely impact of the Judicial Tribunal. Remarkably, although the relevant property, the Daman Tower, and the Defendant were both in the DIFC, and despite a lengthy procedural history in the DIFC Courts (including a enforcement order, a freezing injunction and a winding-up petition), the Judicial Tribunal ruled (with all three of the DIFC Court judges present dissenting) that the case be remitted to the Dubai Courts and that DIFC Court should "cease from entertaining the case". As it stands, this decision is certain to have a significant effect, diminishing the DIFC's status as a conduit jurisdiction.

1. Background

On 13 August 2015, the Claimant, Oger Dubai LLC ("Oger"), filed an application in the DIFC Court of First Instance for recognition and enforcement of a Dubai seated DIAC award issued on 16 July 2015 with a value of USD 266,494,203, in which the decision was finally rendered on 30 December 2015. Prior to that decision, on 29 July 2015, the award debtor, Daman Real Capital Partners Company LLC ("Daman"), had applied to the Dubai Courts seeking annulment of the award. That application was subsequently dismissed on 27 January 2016. Daman also sought to appeal the DIFC Court's enforcement order which, once refused, was the subject of a further application seeking permission to re-open the dismissal of its appeal.
As a result of these dilatory tactics, on 26 September 2015, Oger successfully obtained a freezing order against Daman based on Congentrà principles (as previously endorsed in the DIFC Courts in Bocimar International N.V. v Emirates Trading Agency LLC reported on here) under which the party’s conduct, which includes advancing a case that is clearly unsustainable or taking steps to frustrate and delay the judicial process, may constitute viable grounds for establishing real risk of dissipation of assets.

On 16 June 2016, following further attempts by Daman to have the award annulled in the Dubai Courts (rejected by the Dubai Court of Appeal on 8 June 2016), in a milestone decision, Oger successfully obtained a winding-up petition against Daman under the DIFC Insolvency Law (DIFC Law No. 3 of 2009).

Notwithstanding this, Daman filed an application to have the (then unconstituted) Judicial Tribunal determine whether there was a conflict of jurisdiction between the DIFC and Dubai Courts and which court was competent, citing the Dubai Court proceedings as evidence of a conflict. On 28 July 2016, the DIFC Court issued what was then a surprising judgment, in which it granted a stay of the DIFC winding-up order until such time as the Judicial Tribunal made its decision on jurisdiction.

2. The Judicial Tribunal’s decision

The decision provides a glimpse at the Judicial Tribunal’s procedure: for example, the judgment was rendered in dual-text Arabic and English but without detailed reasoning although the dissenting opinion is in Arabic only and it is apparent that the Judicial Tribunal is at least prepared to entertain submissions from the party resisting the application as Oger submitted a "memorandum of defence", something not expressly catered for in the Decree. It is also notable that the Judicial Tribunal comprised six judicial offices and was therefore not constituted in accordance with Article 1 of the Decree which requires it to comprise seven.

The Judicial Tribunal held that, due to the fact that proceedings were pending before the Dubai Courts, there was a conflict of jurisdiction and “only one of the two courts should determine to annul or recognize the...arbitral award”. It ordered that the case be remitted for trial by the Dubai Courts and despite objections to this second point in the judgment from all three DIFC Court judges sitting on the Judicial Tribunal, further ordered that the DIFC Courts should “cease from entertaining the case”.

The judgment also notes (presumably on the basis that the case concerns enforcement of a domestic award) that “There is no similarity between this case and the case when it’s sought to enforce or annul a foreign arbitral award in several jurisdictions pursuant to New York convention 1958”. The Judicial Tribunal’s decision, rejecting the jurisdiction of the DIFC Courts entirely from these proceedings is remarkable, particularly in circumstances where (i) the underlying dispute concerns DIFC property and a DIFC establishment; (ii) the DIFC Courts had already handed down several interim orders (as well as making an order for recognition and enforcement the award in the DIFC); and (iii) the Dubai Courts had twice rejected applications for annulment on the grounds that it did not have jurisdiction (although this is debatable given onshore Dubai was the seat of arbitration). The Judicial Tribunal itself acknowledged that, had the dispute been referred to the DIFC Courts rather than to arbitration, "those courts would be alone the competent courts to entertain the case since the building concerning the dispute (Daman Tower) together with the appellant are located and licensed in the DIFC”.

3. The DIFC Court judges’ dissenting opinion

On 25 January 2017, the DIFC Court judges sitting on the Judicial Tribunal, Chief Justice Hwang, Deputy Chief Justice Sir David Steel and H.E. Justice Omar Al Muhairi, issued their dissenting opinion (which interestingly is only issued in Arabic). In this opinion, the DIFC Court judges stated that, while the DIFC Courts have always respected that the court with competence to annul an award rendered in onshore Dubai is the Dubai Court, the DIFC Courts have exclusive jurisdiction to hear applications to enforce those arbitral awards within the DIFC. Accordingly, both courts have separate but concurrent jurisdiction to determine certain issues relating to the award, be it annulment in Dubai or enforcement in the DIFC. In particular, the DIFC Court judges were concerned that the decision to suspend proceedings before the DIFC Court was taken before Daman provided security, as ordered by the DIFC

1 There were three DIFC Court judges on the panel of six, with voting weighted in favour of the Dubai Courts and the final casting vote given to the President of the Dubai Court of Cassation.
Court, and stated that the decision to suspend procedures before the DIFC Court should only have been made by the Judicial Tribunal on condition of such security being given.

4. Conclusion

The decision of the Judicial Tribunal is significant for businesses with an entity or assets in the UAE and arguably represents a damaging setback for the status of the DIFC as a conduit jurisdiction. Subject to review of further decisions, a referral to the Judicial Tribunal now appears to provide another forum through which award debtors can seek to frustrate and delay satisfaction of awards. The Judicial Tribunal based its decision on the fact that the Dubai Court of Cassation has yet to hear the appeal on the validity of the award which, it reasoned, meant there must be a conflict of jurisdiction which it decided in favour of the Dubai Courts. What is perhaps most surprising is not necessarily that it decided in favour of the Dubai Courts, but that it held that the DIFC Court must relinquish jurisdiction entirely, in effect constraining the DIFC Court and preventing it from making any further interim orders in support of the award.

It was hoped that the introduction of the Decree would assist in regulating the position between the DIFC Court and the Dubai Courts and provide welcome certainty. Although that may still be the case, the Judicial Tribunal’s decision is for now a source of concern as it is almost certain to encourage other award debtors to employ similar tactics with the aim of thwarting enforcement of arbitral awards in the DIFC Courts (and then into Dubai under the reciprocal enforcement mechanisms). Given the potential implication for the DIFC’s much touted position as a conduit jurisdiction, practitioners and parties alike will await and monitor closely the upcoming decisions of the Judicial Tribunal.

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