Three new decisions shed light on the Judicial Tribunal's approach to the DIFC Court's conduit jurisdiction. Although two of the decisions follow the Judicial Tribunal's previous approach, the other, Cassation No. 1 of 2017 (JT), may have highly significant consequences for enforcing foreign-seated arbitral awards in Dubai.

Following our recent reporting of the first five decisions of the Judicial Tribunal established by Decree No. 19 of 2016 (the "Decree"), including the contentious first decision in Daman v Oger (please click here) as well as the shock decision of the Dubai Court in Banyan Tree (please click here), there has been much conjecture concerning a new phase of perceived rivalry between the Courts of the DIFC and of Dubai; and the Judicial Tribunal's impact on the conduit jurisdiction.

How we got here

- On 9 June 2016, Decree No. 19 of 2016 established the Judicial Tribunal, set up to rule on potential conflicts of jurisdiction and conflicting judgments as between the Dubai and DIFC Courts.
- Its first decision was Daman Real Capital Partners Company LLC v. Oger Dubai LLC Cassation No. 1 of 2016 (JT). This cast doubt on whether onshore seated awards can be enforced in the DIFC without risk of DIFC Court being ordered to cease from entertaining, even in cases where the dispute relates to assets in the DIFC and there is no intention to employ the conduit jurisdiction. Subsequently followed in Dubai Waterfront LLC v Chenshan Liu, Cassation No. 2 of 2016 (JT).
- For all practical purposes, the decision in Daman v Oger overturned the DIFC Court's decision in Banyan Tree (notwithstanding the Dubai Court's subsequent attempt to do exactly that).
- However, the Judicial Tribunal appeared to distinguish between enforcement of onshore Dubai seated awards and foreign-seated awards being enforced under the New York Convention.

The Judicial Tribunal's decision in Daman v Oger is worth revisiting briefly. The Judicial Tribunal decided that, because there were annulment proceedings before the Dubai Courts and enforcement proceedings before the DIFC Courts, there was a conflict of jurisdiction and, therefore, "only one of the two courts should determine to annul or recognize the…arbitral award".

Applying the more conventional approach, the courts of the seat virtually always have exclusive jurisdiction to hear applications to have arbitral awards set aside, while the courts in the jurisdiction in which enforcement is sought will
virtually always have exclusive jurisdiction to hear enforcement proceedings. Therefore, despite often operating in parallel, the two jurisdictions are entirely separate and independent from each other. There is, in practice, no conflict, and therefore no grounds for the Judicial Tribunal to make any determination.

At the time concerns were also expressed as to whether, rather than introduce much needed certainty, the Judicial Tribunal had instead offered recalcitrant award debtors a further opportunity to frustrate the enforcement of arbitral awards and overseas judgments in the DIFC and/or Dubai.

Recent decisions of the Judicial Tribunal

In brief:

1. Cassation No. 3 of 2017 (JT) relates to enforcement of an arbitral award in the DIFC (as a conduit jurisdiction) and follows the decision in *Daman v Oger*.

2. Cassation No. 1 of 2017 (JT) is potentially highly significant and relates to the enforcement of a London seated arbitral award in the DIFC, using the conduit jurisdiction. Despite acknowledging that the award was seated overseas and being enforced in DIFC under the New York Convention, the Judicial Tribunal ordered the DIFC Courts to cease from entertaining. This decision appears to endanger enforcement of foreign seated awards in the DIFC.

3. Cassation No. 5 of 2017 (JT) relates to enforcement of an overseas judgment in the DIFC and follows the Judicial Tribunal's previous decision in this regard, ruling in favour of the DIFC Courts.

We review each of the decisions in details in turn below:

In Cassation No. 3 of 2017 (JT), the Judicial Tribunal followed its earlier decisions in *Daman v Oger* and *Dubai Waterfront*. The essential facts are similar. Following issue of an onshore DIAC award against it, the award debtor commenced annulment proceedings in the Dubai Courts followed by the award creditor commencing enforcement proceedings in the DIFC. Again, the Judicial Tribunal held that "there is a conflict of jurisdiction between the two courts since there are two cases adjudicated before them concerning one arbitral award". Accordingly, Judicial Tribunal decided that because the "Dubai Courts have the general jurisdiction", the "Dubai Courts are the competent courts to entertain this case".

In Cassation No. 1 of 2017 (JT), although the Judicial Tribunal reached the same conclusion, the facts differ significantly, instead relating to an overseas London-seated institutional arbitral award. While the party seeking enforcement successfully applied for the foreign-seated award to be recognised and enforced in the DIFC Courts, the award debtor (a party with experience appearing before the Judicial Tribunal) filed a case with the Centre for Amicable Settlement of Disputes (the "Centre") in Dubai. It is not clear which application was filed first. In its surprising decision, the Judicial Tribunal held that, because the Centre was attached to and supervised by the Dubai Courts, it was "an integrated part of the Dubai Courts". Therefore, the Judicial Tribunal held that there was a positive conflict and "According to the general principles of laws embodied in the procedural laws and since Dubai Courts have the general jurisdiction, and then they are the competent courts to entertain this case".

The decision is unexpected for a number of reasons. Vitally, it related to a foreign award. As in *Daman v Oger*, the Judicial Tribunal appeared to draw a distinction between a UAE Award and the application of the New York Convention, stating "It goes without saying that this case is not similar to cases… in which the courts apply the provisions of New York Convention 1958 because the courts are in one Emirate, viz, Dubai Emirate". In this case, however, the award enforced in the DIFC was "issued by arbitrators in London" and was therefore enforced in the DIFC under the New York Convention. The decision is also notable as the Judicial Tribunal held that a referral to the Centre, owing to its close affiliation with the Dubai Courts, would constitute a positive conflict.

In Cassation No. 5 of 2017 (JT) can be addressed very succinctly, as the application was misconceived. In early 2016 the DIFC Court had decided to recognise, and enforce, two foreign judgments.
applicant now sought to challenge that decision but there was no Dubai Court proceeding underway. The Judicial Tribunal explained that its role applied if both the Dubai and DIFC Courts were hearing a case, if both declined to hear a case or if they gave conflicting decisions. The Judicial tribunal said "the Appellant has filed a single lawsuit before DIFC courts and obtained a final and decisive judgment" and there was no "indication that the Appellant has filed a lawsuit before Dubai Courts on the same matter".

Spotting the trend in the Judicial Tribunal's approach

In Cassation Nos. 1 and 3, the Judicial Tribunal's central reasoning appears to be that the Dubai Courts have "general jurisdiction", as opposed to the special, carve-out jurisdiction of the DIFC Court. Where the Judicial Tribunal has previously decided in the DIFC Court's favour, the stated basis for these decisions has tended to be either a party's submission to the DIFC or the absence of onshore Dubai proceedings, rather than any positive affirmation of the DIFC Court's jurisdiction to hear such claims. Accordingly, it seems that where there is a conflict between the DIFC and Dubai Courts, the Judicial Tribunal is likely to decide in favour of the Dubai Courts.

Conclusion

We do not yet have "the rules and regulations required to avoid any positive or negative conflict of jurisdiction", expected pursuant to Article 2(3) of the Decree. However, the recent Judicial Tribunal decisions do set out an approach which is broadly consistent, and broadly favours the jurisdiction of the Courts of Dubai.

Commentators have suggested that the Judicial Tribunal is applying a 'first seised' approach, that is to say, the Judicial Tribunal favours the court in which proceedings are first commenced. However, there is no indication of such an approach in the Judicial Tribunal's latest judgments, and in cases such as Cassation No. 1, the Judicial Tribunal does not even indicate the order in which proceeding commenced. Instead, it would appear that the Judicial Tribunal's judgments are based the Dubai Courts being deemed to be the 'natural' courts of jurisdiction: thus the DIFC Courts will only have jurisdiction subject to certain conditions, for example, the award or judgment debtor's submission to the DIFC or the absence of Dubai Court proceedings.

Accordingly, wherever there are proceedings before the Dubai Court, and the parties have not already conceded that the DIFC Courts have jurisdiction, it is probable that the Judicial Tribunal will order the DIFC Courts to cease from entertaining the matter.

Such decisions are cause for concern as they appear to pave the way for parties seeking to frustrate enforcement to contrive a Dubai Court connection, whether spurious or not, in order to commence parallel proceedings and subsequently apply to the Judicial Tribunal. More concerning, following Daman v Oger and the restrictions apparently imposed on the Banyan Tree jurisdiction, Cassation No. 1 may herald a similar approach in relation to overseas arbitral awards. However, without the express guidance envisaged under Article 2(3) of the Decree, uncertainty remains.

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