

THE DIFC'S CONDUIT JURISDICTION UNDER ATTACK? THE DUBAI COURT ATTEMPTS TO REVERSE BANYAN TREE

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Legal Briefings - By **Caroline Kehoe, Stuart Paterson, Robert Stephen and Joseph Bentley**

Following on from our reporting on the controversial first decision of the Judicial Tribunal in *Daman Real Capital Partners Company LLC v. Oger Dubai LLC*, Cassation No. 1 of 2016 (JT) (click [here](#)), there has been significant commentary on the possible implications for the DIFC's status as a conduit jurisdiction, particularly in connection with the enforceability in the DIFC of Dubai-seated arbitral awards, commonly referred to as the '*Banyan Tree*' jurisdiction.

Since *Oger v Daman*, there has been a spate of further developments, with the Judicial Tribunal issuing four recent judgments, one of which followed *Oger v Daman* and an extraordinary recent decision of the Dubai Court of the First Instance, which attempts to reverse DIFC Court authority. Together, these developments appear to represent the long awaited response to what the Dubai Courts see as the DIFC Court's jurisdiction creep and encroachment into its natural jurisdiction.

Recent decisions of the Judicial Tribunal

In its second decision, *Dubai Waterfront LLC v Chenshan Liu*, Cassation No. 2 of 2016 (JT), the Judicial Tribunal followed *Oger v Daman*, ordering that the Dubai Courts are competent and the DIFC Courts should "cease from entertaining" the matter because "the case should be decided by one of the two courts and not by both of them". Once again, the DIFC Court members dissented. However, unlike *Daman v Oger*, where there was no intention to enforce the onshore award in Dubai under the Judicial Authority Law, the decision in *Dubai Waterfront* represents an attempt to use the *Banyan Tree* jurisdiction. Together, these decisions have made it clear that, where there are proceedings before the Dubai Courts, for example, an application to annul an award seated in Dubai, the DIFC Courts will not be permitted to hear enforcement proceedings. As noted, these decisions contradict the usual legal position that the courts of the seat have exclusive jurisdiction to hear applications to have arbitral awards seated there set aside, while the courts in which enforcement is sought have exclusive jurisdiction to hear an application to enforce. There is, in reality, no conflict, although the enforcing courts have a discretion which they can exercise, to avoid the risk of an orphaned enforcement order – that is, an enforcement order where the underlying award has been annulled.

In its other decisions, for various reasons, the Judicial Tribunal ruled that the DIFC Court was the court of competence. In *Marine Logistics Solutions LLC and other v Wadi Woraya LLC and others* Cassation No. 3 of 2016 (JT), the Judicial Tribunal dismissed the application which related to enforcement of a London-seated arbitral award under the NY Convention on the basis that there were no parallel proceedings in the Dubai Courts. Similarly, in *Gulf Navigation Holding PJSC v DNB Bank ASA*, Cassation No. 5 of 2016 (JT) (we previously reported on the DIFC's seminal decision in *DNB Bank* relating to enforcement of overseas judgments [here](#)), the Judicial Tribunal again rejected the application on the grounds that there were no proceedings before the Dubai Courts, and therefore no conflict to be resolved. In *IGPL v Standard Chartered Bank*, Cassation No. 4 of 2016 (JT), the Judicial Tribunal remitted the case to the DIFC Court, ordering that the Dubai Court "cease from entertaining the case", because the judgment debtor had already made a concession that the DIFC Court had jurisdiction.

Aside from *Dubai Waterfront*, the other decisions of the Judicial Tribunal are encouraging. The Judicial Tribunal maintained the DIFC Court's jurisdiction in the context of enforcement of NY Convention awards and overseas judgments. However, the stated basis for these decisions was the absence of onshore Dubai proceedings, rather than a positive affirmation of the DIFC Court's jurisdiction to hear such claims. Therefore, despite the positive signs, it remains to be seen how the Judicial Tribunal will decide in cases involving, for example, enforcement of an NY Convention award, where the award debtor situated in Dubai has contrived grounds to file parallel proceedings before the Dubai Courts.

Banyan Tree Corporate Pte Ltd. v. Meydan Group LLC, Case No. 1619 of 2016

Although the Judicial Tribunal's decisions in *Oger v Daman* and *Dubai Waterfront* foreshadow the demise of the *Banyan Tree* jurisdiction, creating a situation where award debtors in onshore seated arbitration are in effect encouraged to commence annulment proceedings, following Dubai Court of First Instance (Case No. 1619 of 2016), that position now appears to be assured.

In this decision, the Dubai Court of First Instance, presumably encouraged by the Judicial Tribunal's recent decisions, purported to nullify several of the DIFC Court's decisions in *Banyan Tree* on the grounds that, in ruling to enforce against an onshore Dubai based entity, the DIFC Court had exceeded its "exceptional" jurisdiction, encroaching on that of the Dubai Courts and its decisions should therefore be cancelled and rendered void.

This decision is alarming in several respects. First, the Dubai Court's decision effectively rules on the extent of the DIFC Court's jurisdiction and therefore not only exceeds its own jurisdiction but also usurps the stated jurisdiction of the Judicial Tribunal under Decree No. 19 of 2016.

Second, and more importantly, the reasoning behind the decision in *Banyan Tree* is of significant potential consequence. In summary, the Dubai Court held that they are the courts of natural and residual jurisdiction in Dubai and any case involving Dubai-based parties which falls outside of the DIFC Court's jurisdiction automatically falls within that of the Dubai Courts. In contrast, the DIFC Court's jurisdiction is exceptional and is limited to cases with a connection to the DIFC or where the parties have opted in. The DIFC Court will therefore have exceeded its jurisdiction if it grants orders in circumstances other than these. If the DIFC Court exceeds its jurisdiction, its judgments should be considered void.

Surprisingly, the Dubai Court appears to have overlooked the Judicial Authority Law (Dubai Law No. 12 of 2004) (as amended), a law issued by the Ruler of Dubai which sits on the statute books of onshore Dubai. Under the Judicial Authority Law, the DIFC Court has exclusive jurisdiction to hear "any application or claim over which the Courts have a power of review in accordance with the Centre's Laws and Regulations", regardless of whether there are assets in the DIFC or any other connection. This is the very foundation of the conduit jurisdiction for enforcement of overseas judgments and arbitral awards seated outside of the DIFC.

Although a first instance judgment and therefore likely to be subject to appeal, if this decision is followed, it could pave the way for the conduit jurisdiction to be abolished in its entirety.

Practice Direction No. 1 of 2017 and IPCO

In what could be seen as a related measure, the DIFC Court issued Practice Direction No. 1 of 2017 which provides that, if an award debtor elects to resist the enforcement of an arbitral award against it (whether under the NY Convention or otherwise), the presiding DIFC Court judge should consider the merits of such a challenge "when deciding whether to require the defendant to an arbitration claim to pay the amount of the award into Court first, as security pursuant to Article 44(2) Arbitration Law (DIFC Law No.1 of 2008)". Accordingly, if the presiding judge considers the challenge to be spurious or unmeritorious, the award debtor may be ordered to pay the full amount of the award as security.

In addition, when exercising its discretion as to what costs order to make in respect of "*unsuccessful applications to Court relating to arbitration*", particularly ones obviously without merit, the DIFC Court should consider whether to grant costs on an indemnity basis. The intention is clearly to make award and judgment debtors think carefully before making the type of guerrilla applications that are familiar to all practitioners in Dubai.

However, the position regarding payment of security before challenging the enforcement of an arbitral award has recently been dealt a blow by the English Supreme Court's decision on 1 March 2017 in *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2017] UKSC 16.

In brief, the Supreme Court held that the purpose of Article IV of the NY Convention, on which Section 103(5) of the UK Arbitration Act 1996 and Article 44(2) of the DIFC Arbitration Law are based, was not to make "*resisting enforcement on properly arguable grounds*" conditional on paying security, thereby providing undue support to award creditors and making justified challenges to enforcement of awards more difficult.

No doubt in an attempt to discourage dilatory or frustrating tactics, the DIFC Court has been strident in ordering award debtors to post security before permitting a stay in its proceedings, on the basis that Article 44(2) of the DIFC Arbitration Law is virtually identical to Section 103(5) of the Arbitration Act 1996. In its decision in *Oger v Daman*, the DIFC Court relied on the Court of Appeal decision in *IPCO*, in which the English Court ordered that the award debtor post security before continuing its annulment proceedings, to require that Daman as award debtor post security in the form of 50% of the award value as the price for stay in the DIFC Court enforcement proceedings. The award debtor's overlooked obligation to pay security before the DIFC Court ceased from entertaining the matter also provided one of the grounds for the DIFC Court members' dissent in Cassation No. 1 of 2016 (JT). However, with the Supreme Court now revising its interpretation of the Section 103(5), and restricting the circumstances in which security may be ordered, it now remains to be seen whether the DIFC Court will maintain its stance.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



STUART PATERSON

MANAGING PARTNER,
MIDDLE EAST AND
HEAD OF MIDDLE
EAST DISPUTE
RESOLUTION , DUBAI
+ 971 4 428 6308
stuart.paterson@hsf.com

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