

THE DECLINE OF THE CONDUIT JURISDICTION OF THE DIFC COURTS

Introduction

A Judicial Tribunal was established last year pursuant to Dubai Decree No. 19 of 2016 (the Tribunal) to determine conflicts of jurisdiction between the DIFC Courts and the onshore Dubai Courts (the Dubai Courts). The Tribunal has jurisdiction to determine conflicts of jurisdiction where the DIFC Courts and the Dubai Courts have both: (i) not abandoned hearing the case; (ii) abandoned hearing the case; or (iii) rendered conflicting judgments on the case.

Much has been written about the composition and mechanics of the Tribunal, which we do not intend to repeat in this briefing. Rather, the focus of this briefing is on the decisions of the Tribunal to date and the implications of these decisions for the conduit jurisdiction of the DIFC Courts to enforce foreign and domestic arbitral awards and foreign judgments. In short, the effectiveness of that jurisdiction appears to be on the decline. However, there are steps that can be taken by the parties to ensure that their disputes continue to be heard by the DIFC Courts as examined in this briefing.

Jurisprudence of the Tribunal

Since its establishment, the Tribunal has issued eight publicly available decisions on conflicts of jurisdiction of which we are aware. As set out below, these decisions have significantly diminished the effectiveness of using the DIFC Court as a conduit jurisdiction to enforce domestic and foreign arbitral awards in the UAE. Whilst it remains to be seen how foreign judgments will be treated, having regard to the Tribunal's reasoning to date, we suspect that the Tribunal may take a similar approach to that taken in respect of foreign arbitral awards.

The decisions of the Tribunal are published on the DIFC Courts' website and are available here: <http://difccourts.ae/joint-judicial-committee-decisions/>.

Summary

Following eight publicly available Tribunal decisions, it seems that the effectiveness of the conduit jurisdiction of the DIFC Courts to enforce foreign and domestic arbitral awards and foreign judgments appears to be on the decline.

A concise summary of the effect of the Tribunal's decisions to date is set out below:

Enforcement of *onshore Dubai* arbitral awards (Dubai Awards) / annulment proceedings in respect of Dubai Awards.

In a series of cases, the Tribunal has decided that the Dubai Courts have jurisdiction where there are parallel enforcement proceedings in the DIFC Courts and annulment proceedings in the Dubai Courts in respect of a Dubai Award. Therefore, in the event of a conflict of jurisdiction in relation to a Dubai Award, the Dubai Courts will have jurisdiction to the exclusion of the DIFC Courts.

Enforcement of *foreign* arbitral awards.

In a recent decision, the Tribunal confirmed that the Dubai Courts had jurisdiction where there were parallel enforcement proceedings in the DIFC Courts in respect of a London arbitral award and a dispute regarding the same arbitral award in the Dubai Centre for the Amicable Settlement of Disputes (Centre). Therefore, in the event of a conflict of jurisdiction in relation to a foreign arbitral award, the Dubai Courts will have jurisdiction to the exclusion of the DIFC Courts.

For the purposes of determining whether or not there is a conflict of jurisdiction, the Dubai Courts include the Centre, which is considered to be part of the Dubai Courts.

However, there will be no conflict of jurisdiction unless there are parallel proceedings in both the Dubai Courts and the DIFC Courts in respect of the same foreign arbitral award.

Enforcement of foreign judgements.

As far as we are aware, the Tribunal has yet to determine a conflict of jurisdiction in respect of enforcement of a foreign judgment where there were proceedings on foot in both the DIFC Courts and the Dubai Courts.

The only decisions of the Tribunal to date concerned enforcement of a foreign judgment by the DIFC Courts in circumstances where there were no parallel proceedings in the Dubai Courts. The Tribunal therefore dismissed the petitions on the basis that there could be no conflict of jurisdiction in those cases.

The Tribunal also confirmed in one of these decisions that it does not have jurisdiction to examine the constitutionality of laws as this jurisdiction rests with the Federal Supreme Court under the UAE Constitution.

Jurisdiction over substantive claims involving DIFC Establishments (ie entities established, licensed, registered or authorised to carry on business or conduct any activity within the DIFC).

The Tribunal has yet to determine, as far as we are aware, whether the DIFC Courts will continue to have jurisdiction over all substantive claims (ie excluding enforcement proceedings) by or against DIFC Establishments (assuming that the parties have not agreed to confer jurisdiction on another court).

The jurisdiction of the DIFC Courts over DIFC Establishments has been confirmed in a series of decisions by the DIFC Court of Appeal; however, it remains to be seen how this jurisdiction will be treated by the Tribunal.

In the one decision of the Tribunal to date involving a substantive claim by a DIFC Establishment, the Tribunal decided that the DIFC Courts had jurisdiction because the other party had conceded that the DIFC Court had jurisdiction in the first instance (although that party had sought to withdraw this concession in the DIFC Court of Appeal).

Express "opt-in" to the jurisdiction of the DIFC Courts.

This issue has yet to be considered by the Tribunal as far as we are aware. However, we would be very surprised if the Tribunal did not uphold the jurisdiction of the DIFC Courts in these circumstances.

Our comment

Based on the decisions of the Tribunal thus far, the conduit jurisdiction of the DIFC Courts is unlikely to continue to be an effective means of enforcing Dubai Awards or foreign arbitral awards in the UAE.

If the parties wish to avail themselves of the benefits of enforcing an arbitral award via the DIFC Courts (which, absent a referral to the Tribunal, is generally a much faster and more predictable route to enforcement compared to lengthy ratification and annulment proceedings in the Dubai Courts) then we would recommend that the arbitration is seated in the DIFC in the first place. This should ensure that the DIFC Courts have jurisdiction over any enforcement proceedings in respect of that award (although this is yet to be confirmed by the Tribunal) and would minimise the risk of a successful referral to the Tribunal.

As to the enforcement of foreign judgments, the viability of the DIFC Courts' conduit jurisdiction to enforce foreign judgments remains to be clarified. As far as we are aware, the Tribunal has yet to consider a case where enforcement proceedings were on foot in the DIFC Courts at the same time as parallel proceedings in the Dubai Courts.

Again, if a party wishes to avail itself of the benefits of enforcing a foreign judgment in the DIFC Courts (in particular, in the absence of an enforcement Treaty the prospects of enforcing a foreign money judgment in the DIFC Courts are generally much higher than in the Dubai Courts) then we would recommend that the parties expressly confer jurisdiction on the DIFC Courts (as well as the relevant foreign courts) from the outset. Whilst the effect of such an "opt in" clause has yet to be considered by the Tribunal, this should place the party seeking to invoke the jurisdiction of the DIFC Courts in greater stead in the event of any referral of a conflict to the Tribunal.

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