

Daman v. Oger: The First Decision of the Dubai-DIFC Judicial Committee (Part 1)

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Earlier this year, the Dubai-DIFC Judicial Committee established by the Ruler of Dubai by virtue of Decree No. (19) of 2016 (also known as the “Judicial Tribunal” or the “Joint Judicial Committee”) rendered its first decision (see Cassation No. 1/2016 (JT) – Daman Real Capital Partners Company LLC v. Oger Dubai LLC, hearing of 19 December 2016, published by the Judicial Tribunal in both English and Arabic). In a previous blog (see <http://kluwerarbitrationblog.com/2016/11/29/ruler-of-dubai-establishes-new-judicial-committee-to-resolve-conflicts-of-jurisdiction-between-the-on-and-offshore-dubai-courts-will-it-undermine-the-difc-courts-acquired-status-as-a-conduit/>), I explored the background and rationale behind the establishment of the Joint Judicial Committee. Suffice it to recall for present purposes that the Committee has been established to resolve conflicts of jurisdiction between the onshore Dubai and the offshore DIFC Courts. In this context, it is important to note that in particular the creeping jurisdiction of the DIFC Courts as a host or conduit jurisdiction for the enforcement of domestic arbitral awards rendered onshore for onward execution against assets of award debtors in mainland Dubai has given rise to concerns of jurisdictional conflict with the onshore Dubai courts (see, e.g., ARB 003/2013 – Banyan Tree Corporate Pte Ltd v. Meydan Group LLC, ruling of the DIFC Court of First Instance of 2nd April 2015). Daman v. Oger is the very first case that has come before the Joint Judicial Committee and as such has prompted the Committee to test its competences under Decree No. (19) of 2016.

By way of background, on this occasion, the Joint Judicial Committee sat in a panel of six judges, three from the DIFC Courts (Dr. Michael Hwang, Chief Justice of the DIFC Courts; Omar Juma Al Muhairi, DIFC Court of Appeal; and Sir David Steel, DIFC Court of First Instance) and the remaining three from the onshore Dubai Courts (Dr. Ali Ibrahim Al Imam, Chief Justice of the Dubai Court of Cassation; Essa Mohammed Sharif, Dubai Court of Appeal; and Jassim Baqer, Chief Justice of the Dubai Court of First Instance), Dr. Al Imam serving as the Committee’s President and hence having the casting vote. The Tribunal was asked to decide which of the two courts, the DIFC Courts or the onshore Dubai Courts, had proper jurisdiction to hear the case. The case, in turn, concerned two parallel actions before the two courts, namely (i) an application for annulment of an underlying DIAC award rendered in mainland Dubai as the seat of the arbitration before the onshore Dubai Courts in their capacity as the curial courts and (ii) an application for the recognition and enforcement of that award before the DIFC Courts for onward execution in the DIFC. Importantly, the action for annulment before the onshore Dubai Courts was served first and as such preceded the action for recognition and enforcement before the DIFC Courts. This gave rise to a concern of conflicting outcomes from the process before the onshore Dubai Courts and that before the DIFC Courts, hence creating a potential conflict of

jurisdiction between the onshore Dubai and the offshore DIFC Courts. Importantly, the instant case does not appear to concern the situation where the DIFC Courts serve in their role as a host or conduit jurisdiction in the archetypical sense of that term given that the award debtor and its assets are understood to have been present in the DIFC at all material times (in other words, the question of the DIFC Courts' competence to order enforcement for onward execution before onshore Dubai Courts in mainland Dubai in an otherwise purely onshore context did not arise in the present circumstances). The natural consequence of this is - in the words of the Joint Judicial Committee that - bar the reference of the merits of the original dispute to arbitration - the DIFC Courts "would [have] be[en] alone the competent courts to entertain the case since the building concerning the dispute (Daman Tower) together with the appellant company [i.e. the award debtor] are located and licensed in the DIFC." (see p. 3, ruling of the Joint Judicial Tribunal in Cassation No. 1/2016 (JT); read together with Art. 5, Judicial Authority Law).

It is worth mentioning that the DIFC Courts had progressed on a prolonged trajectory of procedural measures against the award debtor, including the imposition of a freezing order, a winding-up order and an order to cease trading in order to safeguard the execution of the DIFC Courts' order for enforcement against an award debtor that had by and large ceased to be a going concern. In addition, pending a decision on cassation from the Dubai Court of Cassation, the DIFC Courts signaled their disposition to suspend the DIFC enforcement proceedings subject to the timely provision of security for costs by Daman, the award debtor. For the avoidance of doubt, the annulment proceedings before the onshore Dubai Courts are presently still pending cassation. Following the findings of the Dubai Court of First Instance, the Dubai Court of Appeal dismissed Daman's application for annulment, rejecting concerns that (i) the DIAC Tribunal lacked jurisdiction, (ii) the underlying building contract had been signed without authority, (iii) a pre-arbitral condition precedent had not been satisfied, and that (iv) expert witnesses had wrongly been excluded from the hearing of fact witnesses.

Against this background, the Joint Judicial Committee held in pertinent part as follows:

"Doubtless the case before the Dubai Courts is still pending awaiting decision of the Court of Cassation. Thus the conflict with regards to jurisdiction between the two courts still exists. This conflict should not be resolved by permitting both courts to entertain the case. Pursuant to Article 4 of the Decree No. 19/2016 and for the sake of justice and to avoid contradictory judgements [sic] only one of the two courts should determine to annul or recognize the aforementioned arbitral award.

According to the general principles of law embodied in the procedural laws/Dubai Courts are the competent courts to entertain this case. There is no similarity between this case and the case when it's [sic] sought to enforce or annul a foreign arbitral award in several jurisdictions pursuant to the New York [C]onvention 1958.

Therefore, the cassation should be allowed and judgement [sic] entered accordingly."

(see pp. 3-4, ruling of the Joint Judicial Tribunal in Cassation No. 1/2016 (JT))

The Judicial Committee then decided that "1. [t]he case is to be remitted for trial by Dubai Courts" and that "2. DIFC courts should cease from entertaining the case" (see p. 4, ruling of the Joint Judicial Tribunal in Cassation No. 1/2016 (JT)), costs to be borne by Oger, the award creditor.

It is apparent from the Committee's findings that in order to prevent a potential conflict of jurisdiction that may arise from contradictory outcomes of the prospective decision of the Dubai Court of Cassation and the DIFC Courts' order to enforce, the Joint Judicial Committee relied on a first-seized rule, according preferential jurisdiction to the onshore Dubai Courts, which were seized in an action for annulment of the subject award before the application for ratification and enforcement being filed

with the DIFC Courts. This is an easy way to manage two potentially competing courts of competent jurisdiction for related actions that may produce conflicting outcomes in the event of the courts being seized in parallel. The natural implication of this is that had the DIFC Courts been seized first, the Dubai Courts – as opposed to the offshore counterparts – would have had to desist from entertaining the action. This said, there is an argument for saying that in this latter instance, the award debtor would have been deprived of its statutory right to challenge the award pursuant to Art. 216 of the UAE Arbitration Chapter, onshore Dubai being the seat of the arbitration and hence the natural place for challenging the award. The obvious counterargument is that an award debtor will be able to mount a defense of nullification in response to an application for enforcement under Article 44 of the DIFC Arbitration Law (and hence be given a fair hearing on nullification). In this context, it is important to recall the controversy inherent in this counterargument, which in part has been dismissed in previous constitutional and public policy challenges of the DIFC Courts' role as a conduit jurisdiction (see <http://kluwerarbitrationblog.com/2015/07/22/difc-court-of-first-instance-dismisses-application-for-referral-to-usc-of-purported-constitutional-conflict-between-uae-civil-procedures-code-and-dubai-judicial-authority-law-and-difc-arbitration-law/> and <http://kluwerarbitrationblog.com/2015/09/05/host-jurisdiction-status-of-difc-courts-not-contrary-to-uae-public-policy/>). Nevertheless, it would be prudent to introduce amendments to the UAE Arbitration Chapter prescribing a time-limit of e.g. three months for challenging an arbitral award after issuance, failing which the award will be considered good for enforcement by the competent courts, including the DIFC Courts. This will allow an award debtor of a domestic award rendered in mainland Dubai sufficient time to apply for nullification before the onshore Dubai Courts in satisfaction of its rights of defense under Article 216. Further, in order to deal with the wider problem of conflicts of jurisdiction between the Dubai and the DIFC Courts, it may be advisable to amend Article 7 of the Judicial Authority Law, which establishes a regime of free movement of judgments, orders and ratified awards between the onshore Dubai and offshore DIFC Courts, to include a first-seized rule in the terms contemplated above. In any event, the Joint Judicial Committee leaves no doubt that at a domestic level, there cannot be a solution à la New York Convention, which allows contradictory outcomes of nullification and enforcement of the same award in different jurisdictions.

Further, the Judicial Committee's decision inviting the DIFC Courts to "cease from entertaining the case" may not have as far-reaching implications as may appear at first sight. In the given context, the meaning of these words may not require more than a temporary suspension of the DIFC enforcement proceedings (including all ancillary actions) pending a final ruling on nullification by the Dubai Court of Cassation. This, in any event, would make perfect sense in that should the Dubai Court of Cassation affirm the Dubai Court of Appeal's rejection of the award debtor's challenge of the subject award, the DIFC Courts' will be the natural forum for the enforcement and execution of that award and will as such resume enforcement jurisdiction. This reading would also accommodate the three DIFC Court judges' dissent on the "second point of the judgment" (see p. 4, ruling of the Joint Judicial Tribunal in Cassation No. 1/2016 (JT)) requiring the DIFC Courts to cease to entertain the case. This reading further finds support in the binary wording of the Joint Judicial Committee when concluding that only one of the two courts, i.e. the onshore Dubai and the offshore DIFC Courts, should determine to annul "or" (as opposed to "and") recognize the subject award, implying the involvement of two separate jurisdictions for annulment on the one hand and enforcement on the other. In this sense also, there is no reason to believe that the Judicial Committee's decision jeopardises the DIFC's acquired status as a conduit jurisdiction.

Finally, in his Order of 1st February 2017 (see Claim No. CFI 013/2016 – Oger Dubai LLC v. Daman Real Estate Capital Partners), Sir Richard Field of DIFC Court of First Instance, having reviewed the decision of the Joint Judicial Committee, ordered further written submissions from the Parties in order to determine whether in the light of that decision, the DIFC Courts had any jurisdiction to "retain or modify the orders it has previously made supplemental to [Oger's] enforcement application" (ibid,

para. 1), essentially sharing the above reading of the decision of the Joint Judicial Committee. Further reporting will follow once Sir Richard Field has rendered a decision on the subject.



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