

FURTHER DEVELOPMENT OF THE JUDICIAL TRIBUNAL JURISPRUDENCE

The Judicial Tribunal established 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) is now in its third year and continues to develop its jurisprudence.

In July 2017 (*The Decline of the conduit jurisdiction of the DIFC Courts*) and December 2018 (*The Judicial Tribunal Decisions - Emerging Trends*), we considered the remit of the Tribunal, its impact on the conduit jurisdiction of the DIFC Courts and a number of trends emerging from the Tribunal's jurisprudence. Our analysis concluded that, although the possibility of using the DIFC Courts as a conduit to enforce arbitral awards and judgments onshore in Dubai had been significantly limited by the Tribunal's decisions, such decisions had confirmed the DIFC Courts' jurisdiction over DIFC Licensed Establishments and the application of the principle of res judicata in respect of referrals to the Tribunal.

The Tribunal has issued four further decisions to date in 2019,¹ all of which serve to build upon its existing jurisprudence. In one of the recent decisions² the Tribunal considered the effect of an express "opt-in" to the DIFC Courts' jurisdiction. As we anticipated, the Tribunal determined that such a clause operates as an express concession to the DIFC Courts jurisdiction that cannot be waived, and therefore confirmed that the DIFC Courts have exclusive jurisdiction where there is an express "opt-in" of this nature. This will no doubt be a welcome decision for contracting parties keen to secure the DIFC Courts' jurisdiction.

In another, potentially significant ruling, the Tribunal appeared to conclude that both the DIFC Courts and the Dubai Courts had grounds for jurisdiction and allocated jurisdiction to the DIFC Courts on the basis that (1) the DIFC Courts had already issued a judgment (unlike the Dubai Courts) which had been enforced in the Dubai Courts; and (2) no prejudice would be caused to the appellant.³ Although the Tribunal's reasoning is not entirely clear, this decision also suggests that a principle of allocating jurisdiction to the Court that first gives judgment might be applied (it is well known that the principle of court first seised is not applicable to conflicts between the Dubai Courts and DIFC Courts).

In a similar vein, in Cassation Nos. 3&4 2019, the Tribunal - when allocating jurisdiction to the DIFC Courts - seemed to place weight on the fact that the question of jurisdiction had already been determined by the DIFC Court of

Key issues

- The Tribunal has issued a further four decisions in 2019
- The Tribunal has confirmed the jurisdiction of the DIFC Courts where the parties have expressly "opted-in"
- Emergence of a possible new principled basis for allocation of jurisdiction, including allocating jurisdiction to the court which first gives judgment and considering the harm, if any, suffered by the appellant party
- A robust approach is being taken to frivolous referrals to the Tribunal.

¹ Cassation No.5 of 2018, Cassation No.1/2019, Cassation No.2/2019 and Cassation Nos.3&4/2019.

² Cassation No.1/2019.

³ Cassation No.5/2018.

First Instance. This is an area where we can expect the Tribunal's jurisprudence to develop further.

In Cassation No. 2 of 2019, the Tribunal noted that the party asserting the DIFC Courts' jurisdiction had consistently failed to challenge the Dubai Courts' jurisdiction in all applications. While not the decisive factor in the decision, it is a reminder that a party challenging a court's jurisdiction should maintain the challenge at every step of the process.

It is also apparent that the developing tactic of using the Tribunal to delay and disrupt proceedings has not gone unnoticed. In one of the recent decisions, the Tribunal went so far as to refer to the apparent conflict of jurisdiction as "*an artificial dispute created...solely for the purpose of avoiding or at least delaying resolution of the merits of the claim*". This is a robust recognition of one of the key procedural concerns faced by parties seeking to resolve their dispute in the DIFC Courts and Dubai Courts, and makes clear, in no uncertain terms, that the Tribunal is alive to this issue and willing to confront it.

Please see the next page for an updated table setting out the key trends in the Tribunal's jurisprudence (updates in **blue**).

No.	Type of Conflict	Tribunal's Decision & Comment
Enforcement of Arbitral Awards		
1.	Dubai seated arbitral awards – DIFC Courts recognised the arbitral award but award debtor sought to annul the award before onshore Dubai Courts. (Cassation No.1/2016 - <i>Daman Real Capital Partners Company LLC v Oger Dubai LLC</i> ; Cassation No.2/2016 - <i>Dubai Waterfront LLC v Chenshan Liu</i> and Cassation No.3/2017 - <i>Ramadan Mousa Mishmish v Sweet Homes Real Estate LLC</i> .)	<i>Dubai Courts have jurisdiction to the exclusion of DIFC Courts.</i> A minority comprising the DIFC Court judges dissented, noting that both courts had jurisdiction. DIFC Courts have exclusive jurisdiction to recognise and enforce an arbitral award within the DIFC, which is distinct from annulment of an arbitral award for which the Dubai Courts have exclusive jurisdiction as the supervisory courts of the arbitral seat. As set out in item 2 below, there may be an exception to the general rule where the parties have selected DIFC-LCIA Rules.
2.	Dubai seated award rendered under DIFC-LCIA Rules – The award creditor commenced enforcement proceedings in the DIFC Court while the award debtor applied to the Dubai Courts to annul the award. (Cassation No.1/2018 - <i>Sinbad-Marine-Inc.-LLC-v-Essam-Al-Tamimi</i> .)	<i>DIFC Courts have jurisdiction to enforce and recognise the award.</i> This decision deviates from the line of cases noted in item 1 above (i.e. in the sense that the selection of the DIFC-LCIA Rules seemed to trump the selection of a Dubai seat). Both the majority and minority decisions confirmed the DIFC Courts had jurisdiction but differed in their reasoning. The majority decision was premised on the fact that the DIFC-LCIA is based in the DIFC. The minority opinion disagreed with this reasoning, but their reasons are yet to be published. It will be interesting to see if the Judicial Tribunal continues to apply the majority reasoning in future cases.
3.	DIFC seated arbitral award – Award creditor sought recognition and enforcement of the award from both DIFC Courts and onshore Dubai Courts. The DIFC Court of First Instance refused to set aside the award for which a decision was not appealed. (Cassation No.6/2017 - <i>Assas Investments Limited v Fius Capital Limited</i> .)	<i>DIFC Courts and Dubai Courts have jurisdiction to enforce the award.</i> There was held to be no conflict in this case as the parallel enforcement proceedings were in respect of different assets and therefore both courts had jurisdiction in the respective proceedings. The Tribunal confirmed that parties can pursue enforcement of arbitration awards simultaneously in multiple jurisdictions (including DIFC and Dubai) and this is unlikely to result in a conflict of jurisdiction.
4.	Foreign seated arbitral award – Award creditor sought recognition of foreign award from DIFC Courts, but debtor commenced proceedings before the Amicable Settlement of Disputes Centre of the Dubai Courts (Cassation No.1/2017 - <i>Gulf Navigation Holding P.S.C v Jinhai Heavy Industry Co. Limited</i>)	<i>Dubai Courts have jurisdiction to the exclusion of the DIFC Courts.</i>
Enforcement of Foreign Judgments		
5.	Foreign Judgments – Award creditor sought recognition of foreign court judgment from DIFC Courts who recognised it, but debtor commenced parallel proceedings in the onshore Dubai Courts claiming that Dubai Courts have exclusive jurisdiction (Cassation No. 4/2017 - <i>Endofa DMCC v D'Amico Shipping</i> and Cassation No.3/2018	<i>Dubai Courts have jurisdiction to the exclusion of the DIFC Courts.</i> In Cassation 4 of 2017, the tribunal noted that: (a) Timing of parallel proceedings was irrelevant to their decision so long as both proceedings were commenced before the Tribunal issued its decision. A party could

C H A N C E

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	- <i>Farkehad Teimar Bely Akhmedov v (1) Tatiana Mikhailovna Akhmedova (2) Straight Establishment</i>	<p>therefore start a claim in the Dubai Courts quite late and still be able to refer the conflict to the Tribunal.</p> <p>(b) Any concession to a court's jurisdiction must be express and in writing. An appearance before the DIFC Court stating that a party intends to defend all the claims is not a concession.</p>
Licensed DIFC Establishments		
6.	Where a DIFC Establishment is involved – The DIFC Courts found they had exclusive jurisdiction over a case involving a DIFC Establishment. The other party commenced proceedings against the DIFC Establishment before the Dubai Courts (Cassation No.2/2018 – (1) <i>Re-Point-Ventures-FZ-Co</i> , (2) <i>Jai-Narain-Gupta</i> , (3) <i>Mayur-Kumar-Gupta</i> , (4) <i>Saroj-Gupta v Tavira-Securities-Limited</i> and <i>Cassation Nos.3 and 4/2019 Ahmed Mohamed Ramadan Al Rafii v (1) Commercial Bank of Dubai, (2) Totura Restaurant and Rest (LLC)</i> , (3) <i>Sheikha Rania Hamad Mubarak Hamad Al Khalifa</i> and (4) <i>Ali bin Abdullah bin Ali Seidani and Sheikha Rania Hamad Mubarak Hamad Al Khalifa v Commercial Bank of Dubai</i>)	<p>DIFC Courts have exclusive jurisdiction.</p> <p>The Tribunal held that the DIFC Courts have exclusive jurisdiction where one of the parties is a Licensed DIFC Establishment.</p> <p>In Cassation No.2/2018 it was confirmed that the DIFC Courts will have exclusive jurisdiction even if the claim arose from events which occurred before it had been registered in the DIFC.</p> <p>In Cassation Nos.3 and 4/2019 it was confirmed that the DIFC Courts had exclusive jurisdiction over disputes arising from a loan agreement and a related guarantee (that was specific to the loan) given the interconnection of the two agreements, where the borrower was a Licensed DIFC Establishment and relevant activities had taken place within the DIFC.</p>
No express jurisdiction clause		
7.	Negotiations in DIFC - The agreement concluded between the parties contained no express jurisdiction clause but the respondent party argued that the DIFC Courts should have jurisdiction since negotiations of the relevant agreement took place "in the vicinity of the DIFC". (Cassation No.2/2019 - <i>Tabarak Investment LLC v (1) Khaldoon Rashid Al Tabri and (2) Zeina Khaldoon Al Tambri</i>)	<p>The Tribunal held on the fact that the Dubai Courts have jurisdiction. The agreement in question contained no jurisdiction clause and a subsequent related agreement between the parties expressly provided for the Dubai Courts' jurisdiction "in any dispute connected or related" to it.</p> <p>It was also noted in this case that the party asserting the DIFC Courts' jurisdiction had failed to challenge the Dubai Courts' jurisdiction. There may therefore be an increased risk of the Judicial Tribunal finding that such a party has submitted to that court's jurisdiction where a party fails to challenge the relevant Court's jurisdiction at every step.</p>
Express "Opt-In" to the DIFC Courts jurisdiction		
8.	A dispute had arisen in relation to an agreement which contained an express opt-in clause providing for the exclusive jurisdiction of the DIFC Courts. (Cassation No.1/2019 - <i>Oman Insurance Company PS v Globemed Gulf Healthcare Solutions L.L.C.</i>)	The Tribunal held that the DIFC Courts have jurisdiction. The Tribunal noted that the appellant had expressly conceded to the DIFC Courts' jurisdiction through its entry into the agreement containing the jurisdiction clause and should be bound by the concession. The Tribunal also remarked on the appellant's failure to challenge the DIFC Courts' jurisdiction through the mechanism provided for in the DIFC Court rules.

CONTACTS



James Abbott
Partner

T +971 4503 2608
E james.abbott@cliffordchance.com



Paul Coates
Partner

T +971 4503 2684
E paul.coates@cliffordchance.com



Arun Visweswaran
Senior Associate

T +971 4503 2748
E arun.visweswaran@cliffordchance.com



Victoria Hambly
Associate

T +971 4503 2679
E victoria.hambly@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, Level 15, Burj Daman, Dubai International Financial Centre, P.O. Box 9380, Dubai, United Arab Emirates

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