

Kluwer Arbitration Blog

The Dubai-DIFC Judicial Committee and DIFC Conduit Jurisdiction: A Sequel in Four Parts – The DIFC Courts under Siege (Part 2)

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In a blog earlier this year, I reported in some detail on the Dubai-DIFC Judicial Committee's first decision in *Daman v. Oger* (see Cassation No. 1/2016 (JT) – *Daman Real Capital Partners Company LLC v. Oger Dubai LLC*, hearing of 19 December 2016, published by the JT in both English and Arabic). By way of reminder, the Dubai-DIFC Judicial Committee (or simply the "Judicial Tribunal" or "JT") was established by the Ruler of Dubai by virtue of Decree No. (19) of 2016 in order to resolve conflicts of jurisdiction between the onshore Dubai and the offshore DIFC Courts (see <https://kluwarbitrationblog.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/>). The regular reader of this Blog will remember that in particular the creeping jurisdiction of the DIFC Courts as a 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* concerned two parallel actions: (i) an application for annulment of a 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 offshore DIFC. The JT found in favour of the Dubai Courts' proper jurisdiction and ordered the DIFC Courts to cease from entertaining the case. I concluded in my previous blog on the subject that the JT's decision was likely based on a "first-seized" rule given that the application for annulment before the onshore Dubai Courts had been filed first and had hence preceded the application for recognition and enforcement before the offshore DIFC Courts. In that sense, apart from the absence of a desire to execute the subject DIAC award onshore, there was no risk that the findings of the JT in *Daman v. Oger* would pose a threat to the acquired status of the DIFC Courts to serve as a conduit jurisdiction for the recognition and enforcement of domestic non-DIFC awards for onward execution in mainland Dubai.

Since its decision in *Daman v. Oger*, the JT has dealt with two further arbitration-specific applications that are variations of the theme. In the first one (see Cassation No. 2/2016 (JT) – *Dubai Water Front LLC v. Chenshan Liu*, hearing of 19 December 2016, published by the JT in both English and Arabic), the JT adopted the same reasoning as it had done in *Daman v. Oger*, the

only difference being that the subject award was intended for onward execution onshore. Like in *Daman v. Oger*, the DIFC Courts were invited to “cease from entertaining the case”. However, unlike in *Daman v. Oger*, an application for annulment was made to the Dubai Courts only after the award creditor had instigated proceedings for recognition and enforcement before the DIFC Courts. In other words, on this occasion, the JT appears to have ignored the “first-seized” rule, which gave rise to hope in *Daman v. Oger* that the DIFC Courts’ acquired status of a conduit jurisdiction remained unaffected by the decisions of the JT. Unsurprisingly, the three DIFC Court members of the JT (Chief Justice Michael Hwang, Omar Al Muhairi and Sir David Steel) did not hesitate to dissent. The DIFC Court members’ dissent is explained by Deputy Chief Justice Sir David Steel’s findings in the related enforcement proceedings before the DIFC Courts in the following terms:

“Nobody is challenging or could challenge that the Dubai Courts are the Court of the seat, but the suggestion that the Dubai International Financial Centre has no jurisdiction hits the buffers at the start namely that only the DIFC Courts have jurisdiction to consider the enforcement of the award in the DIFC. It has exclusive jurisdiction. It is somewhat unfortunate that the proposition as regards the Arbitration Law is set out without reference to the decision in *Banyan Tree* [...]” (*Giacinta v. Gillam LLC* [2016] DIFC ARB 004, para. 23)

In other words, Sir David relied on the acquired status of the DIFC Courts as a conduit jurisdiction in the terms defined in *Banyan Tree* and hence recognised the DIFC Courts’ competence to recognise and enforce a domestic non-DIFC award for onward execution onshore. Sir David further clarified that “[t]he Dubai Courts are the court of the seat and thus the Dubai Courts clearly have jurisdiction to determine an application to annul the award.” (*Giacinta v. Gillam LLC* [2016] DIFC ARB 004, para. 15) The DIFC Courts, in turn, “have exclusive jurisdiction in respect of the enforcement of awards within the DIFC: no question of their jurisdiction can arise.” (*ibid.*)

In the second case (see Cassation No. 3/2016 (JT) – *Main Logistics Solutions LLC and other v. Wadi Woraya LLC and others*, hearing of 19 December 2016, published by the JT in both English and Arabic), dealing with a DIFC enforcement action in relation to a foreign award rendered in London, the JT found that there was no conflict under Art. 4 of Decree No. (19) of 2016 as no application (for annulment of the subject award) had as yet been made to the onshore Dubai Courts. The JT therefore dismissed the case. In other words, the award debtor’s application before the JT was premature and could hence not be entertained. The JT found likewise in a later decision (see Cassation No. 5/2016 (JT) – *Gulf Navigation Holding PJSC v. DNB Bank ASA*, hearing of 19 December 2016, published by the JT in both English and Arabic) albeit in relation to the enforcement of a foreign judgment, clarifying that for the jurisdiction of the JT to be triggered, there had to be a positive (both courts seizing jurisdiction or issuing conflicting judgments) or a negative (both courts abandoning jurisdiction) conflict of jurisdiction.

The JT’s most recent decisions in the terms discussed above give reasoned concern that the DIFC Courts are under siege, evidently deprived of their own liberty to define their proper jurisdiction within the meaning of the Judicial Authority Law as amended (Dubai Law No. 12 of 2004 in respect of The Judicial Authority at Dubai International Financial Centre as amended (by Dubai Law No. 16 of 2011)). More specifically, even though initially protected from hostile attacks on their acquired status as a conduit jurisdiction, the DIFC Courts are now under threat to lose that status, in particular in the light of the JT’s decision in *Dubai Water Front*. That said, the reasoning of the JT’s decisions is extremely sparse and there remains leeway for recent developments to fall back into line with what was believed to have been the status quo. It is to be hoped that future

decisions on the subject will put onto a firm footing the JT's approach to the division of jurisdiction between the onshore Dubai and the offshore DIFC Courts in the recognition and enforcement of non-DIFC awards. **In this context, it is important to repeat** that the formalisation of a first-seized rule by making it a firm part of the regime of mutual recognition under Art. 7 of the Judicial Authority Law as amended would assist the resolution of any pending and future jurisdictional conflicts between the two courts. As demonstrated on repeated occasion elsewhere (see my various previous blogs on the subject), the conduit jurisdiction status of the DIFC Courts complies with the UAE Constitution and is not contrary to UAE public policy; nor does it violate the jurisdictional gateways under Art. 5(A)(1) of the Judicial Authority Law as amended read together with Art.42(1) of the DIFC Arbitration Law.

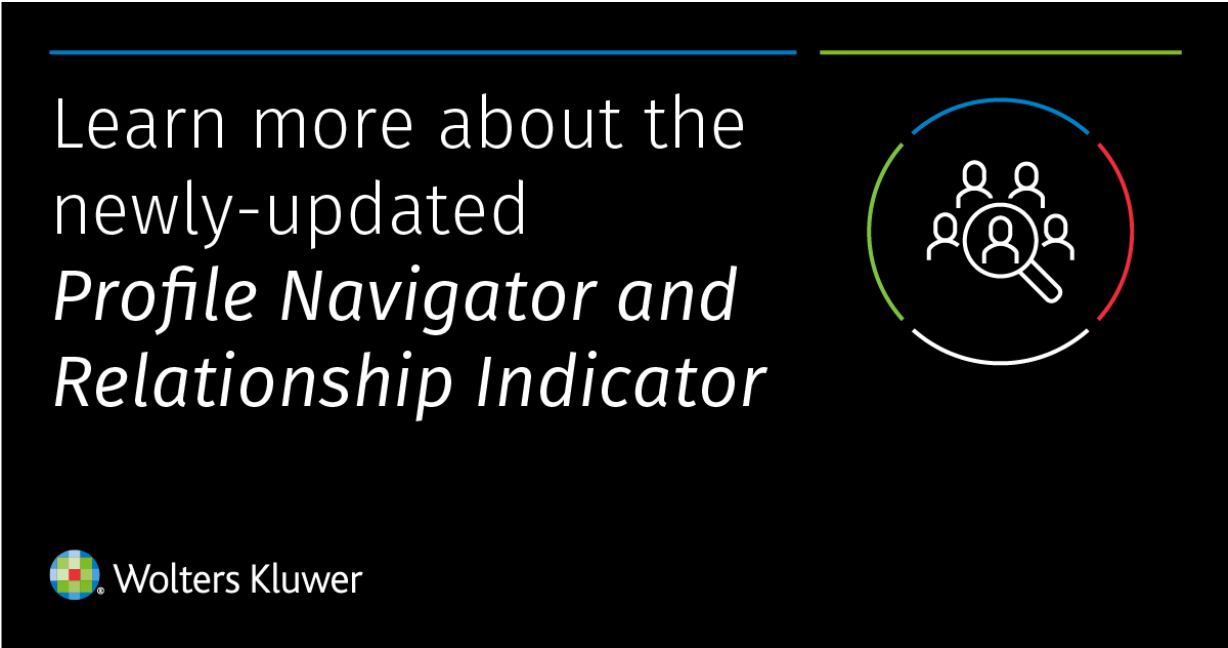
In any event, given the inherent powers of the JT and the status of the JT's decisions (JT decisions being non-appealable, see Art. 7, Decree No. (19) of 2016), little can presently be done other than ... wait ... for a cavalry to the rescue!

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