



DUBAI WORLD TRIBUNAL - NAKHEEL CLAIMS

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The Ruler of Dubai, His Highness Sheikh Mohammed Bin Rashed Al Makhtoum, Vice President and Prime Minister of UAE, issued (Dubai) Decree 57 of 2009 to establish the Dubai World Tribunal related to the settlement of the financial position of Dubai World and its subsidiaries. This stipulated that any claims by or against Dubai World and its subsidiaries were to be decided by a three-man Tribunal.

The Tribunal issued its first Practice Direction on 30 March 2010 clarifying that it will respect and enforce arbitration agreements. The effect of this Practice Direction is that counterparties who agreed to arbitration clauses in their contracts with Nakheel (and related Dubai World entities) are not entitled to commence their proceedings before the Tribunal. The correct procedure is to initiate the contractual arbitration proceedings and then to apply to the Tribunal for the enforcement of any arbitration award.

Dubai World and its subsidiaries have been undergoing significant restructuring. One of the key Dubai World subsidiaries (now a former

subsidiary) involved in this restructuring is the real estate developer Nakheel. Earlier this year, the Dubai Government indicated that Nakheel would be split off from the Dubai World group to come under the wing of the Dubai Government. Little detail was available regarding this proposed transfer.

At the time, this raised immediate questions relating to the current and future cases before the Tribunal. Firstly, would the Tribunal continue to have jurisdiction over existing claims involving Nakheel? How will future claims against Nakheel be dealt with? If a party had commenced arbitration proceedings against Nakheel before it was transferred to the Government, would the Tribunal retain jurisdiction over the enforcement of that arbitration award or would an arbitration award need to be enforced before the Dubai courts?

On 22 September 2011, the Tribunal issued Practice Direction 3 of 2011. In this Practice Direction the Tribunal confirms that it has been informed (details of the notification were not



mentioned in the Practice Direction) that Nakheel PJSC and certain of its subsidiaries and affiliates ceased to be subsidiaries of Dubai World with effect from 23 August 2011.

The Tribunal acknowledged that, given this development, issues of jurisdiction of the Tribunal may arise in proceedings brought by or against Nakheel and those subsidiaries and affiliates. The Tribunal went on to say in the Practice Direction that it will reconsider its jurisdiction over Nakheel and certain of its subsidiaries and affiliates in respect of projected and existing proceedings upon an application by a party to the Tribunal to review this issue. Further, the Tribunal's Registry has been instructed to raise the issue of jurisdiction with any intended Claimant at the outset of any proceedings. The Tribunal also confirmed that, pending any determination over its jurisdiction, the Tribunal continues to exercise jurisdiction over any proceedings commenced before 23 August 2011.

The practical impact of this Practice Direction and the fact that Nakheel has ceased to be a Dubai World subsidiary may have wide ranging effects. It is likely that at some stage the Tribunal will be asked to decide on its jurisdiction over existing and projected claims by or against Nakheel and certain subsidiaries and affiliates. This will be on the basis of an application by Nakheel or an opposing party either seeking the Tribunal to retain jurisdiction or rule that it does not have jurisdiction.

Such an application may be activated by a desire of one of the parties to have its dispute resolved by the Dubai Courts rather than by the Tribunal. If such an application is successful, the party who had sought to have the case heard before the Tribunal will have wasted time and costs in litigating its claim/defence before the Tribunal.

In respect of projected proceedings, the parties at least have the opportunity to air these issues before significant costs are incurred. In deciding whether to challenge jurisdiction, the parties should consider the dispute resolution clause in their contracts since this would be the fall back position if the Tribunal decides that it does not have jurisdiction over the projected proceedings.

It is expected that the enforcement of arbitration awards is likely to be simpler and quicker before the Tribunal than before the Dubai Courts. Therefore, if a party has commenced arbitration proceedings having contemplated that those arbitration proceedings would be enforced by the Tribunal, it may still seek to pursue enforcement before the Tribunal despite the change in Nakheel's corporate status. It is anticipated that Nakheel would resist such a step. If a losing party wished to adopt an obstructive approach it could argue that the Tribunal does not have jurisdiction and that the arbitration award must be enforced before the Dubai Courts.

A important further procedural issue also arises. If Nakheel and the specified entities are now part of the Dubai Government, the question arises as to whether a potential Claimant must apply to the Director General of the Department of Legal Affairs for the Government of Dubai pursuant to Government Claim Law No. 3 of 1996 (as amended) and the law establishing the Department of Legal Affairs for the Government of Dubai Law No. 32 of 2008. This would add a further layer in the dispute resolution process which Claimants must consider.

In addition, there is a potential final hurdle at the time of enforcement of any judgment against Government assets, since this can only be effected with the approval of the Dubai Government.

There were suggestions that the Ruler of Dubai would issue a separate Decree confirming the Tribunal's jurisdiction over Nakheel claims. This appears unlikely now although such a Decree would certainly resolve much of the above uncertainty.

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