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DIFC Court of Appeal confirms the DIFC's status as host jurisdiction for recognition of domestic awards

Gordon Blanke (Blanke Arbitration LLC) · Tuesday, November 11th, 2014

In a recent ruling of the DIFC Court of Appeal (see Case CA-005-2-14, ruling of the DIFC Court of Appeal of 3rd November 2014), Justice Sir David Steel affirmed the previous ruling of the DIFC Court of First Instance in *Banyan Tree v. Meydan Group LLC* (see Case No. ARB 003/2013 – *Banyan Tree Corporate PTE LTD v. Meydan Group LLC*, ruling of the DIFC Court of First Instance of 27 May 2014 and my previous blog). As a result, it can now be taken as established (at least pending onward enforcement before the Dubai Courts) that the (offshore) DIFC Courts do have competence to hear actions for the ratification of domestic (onshore) Dubai awards (in the present case an award rendered under the auspices of the Dubai International Arbitration Centre (DIAC)) even in the absence of any geographic nexus with the DIFC, not even the presence within it of assets belonging to the award debtor. In this context, it is worth mentioning that the DIFC Court of First Instance's analogical findings in relation to the ratification and enforcement of foreign awards rendered outside the UAE in Case No. ARB 002/2013 (see Case No. ARB 002/2013 – (1) X1, (2) X2 v. (1) Y1, (2) Y2, ruling of the DIFC Court of First Instance, undated, 2014 and [my previous blog](#)) equally stand affirmed, no appeal having been mounted by the award debtor within the prescribed time-limit.

By way of background, a brief reminder of the facts: Banyan Tree Corporate PTE LTD (“Banyan”), an award creditor incorporated in Singapore, sought from the DIFC Courts an order for recognition and enforcement of a DIAC award against the UAE-based Meydan Group LLC (“Meydan”), the award debtor. Meydan objected to the DIFC Courts' jurisdiction and competence to hear applications for recognition and leave to enforce of awards not rendered in the DIFC. To the best of anyone's knowledge, the parties' relationship was devoid of any geographic link with the DIFC, it not even being certain whether Meydan may have any assets there.

In his ruling, Justice Sir David Steel categorically rejected any purported requirements for *in personam* or subject-matter jurisdiction of the DIFC Courts by analogy to requirements under the prevailing UAE federal law to hear an action for recognition and enforcement of an onshore Dubai award. To the contrary, Sir David Steel confirmed that “[o]n the face of it [Article 42 of the DIFC Arbitration Law (see DIFC Law No. 1 of 2008 as amended)] imposes an obligation on the DIFC court to recognise and to enforce an award irrespective of the state or jurisdiction in which it was made.” (see Case CA-005-2-14, para. 14) According to Sir David Steel,

“[t]he DIFC (and its Court) is in effect exempted from the Commercial and Civil

laws of the Union [i.e. the UAE]. The State of Dubai is afforded freedom under [Federal] Law 8 of 2004 to promulgate appropriate legislation. DIFC Law No. 10 of 2004 included jurisdiction in respect of any application over which the DIFC court has jurisdiction by virtue of DIFC laws and regulations. These included the enforcement of the arbitration awards both by virtue of Article 7 of Law No. 12 of 2004 and Art. 11 of DIFC Law No. 1 of 2008 (Arbitration Law).” (see Case CA-005-2-14, para. 27)

In this context, Sir David Steel confirmed that once service had properly been effected in compliance with the Judicial Authority Law as amended (see Dubai Law No. 12 of 2004 as amended by Dubai Law No. 16 of 2011), “*the court must recognize the award*” subject to the exhaustive grounds for refusal set out in Article 44 of the DIFC Arbitration Law (see Case CA-005-2-14, para. 32). In addition, Sir David Steel noted that

“[t]he absence of assets in the jurisdiction may be relevant consideration to the exercise of discretion to grant execution. But even then a judgment creditor is entitled to levy execution against assets which come into the jurisdiction after the judgment is entered or which did not even exist at the time. Furthermore an enforcement order alone may be of value in the tracing of assets by, for example, oral examination [...]. In any event, it is clear that there is no barrier to enforcement given the absence of assets within the jurisdiction. [...]” (see Case CA-005-2-14, para. 33)

Justice Sir David Steel equally rejected an argument of *forum non conveniens*, emphasising that in reliance on Article 42 of the DIFC Arbitration Law “[t]he DIFC Courts ha[d] exclusive jurisdiction and [that] thus the point fail[ed] in limine.” (see Case CA-005-2-14, para. 39) Consequently, Sir David Steel concluded that “*the judge [at first instance] was quite correct to conclude that Article 5(A)(1)(E) of the Judicial Authority Law acted as the gateway by which Article 42 of the [DIFC] Arbitration Law conferred jurisdiction on the DIFC Courts to recognise the award as binding within the DIFC. That jurisdiction is not circumscribed by any requirements for in personam or subject matter connection with the DIFC.*” (see Case CA-005-2-14, para. 37)

Finally, Justice Sir David Steel rejected an argument of abuse of process in the following, self-explanatory terms:

“43. It is right to say that there is no evidence that Meydan has assets within the DIFC (or otherwise within the jurisdiction of the DIFC Courts). But there is no basis for asserting that the application for enforcement within the DIFC has no independent purpose. I do not understand it to be accepted that no such assets exist or alternatively that no such assets (whether they currently exist or not) may come within the jurisdiction following an order for enforcement. In any event an order for enforcement would enable Banyan to engage the court’s machinery (in the form of saying a freezing order or an oral examination) for obtaining details of any assets that are or become available.

44. It is also right to say that by virtue of Article 7 of the Judicial Authority Law and

the Protocol of Jurisdiction between the DIFC Court and the Dubai Courts [i.e. the Dubai DIFC Protocol No. 999 of 2009], Banyan is enabled to present a DIFC order for enforcement to an execution judge of the Dubai Courts without that judge being enabled to consider the merits of the underlying order. But it is difficult to classify the use of that machinery as an abuse, not least before that machinery is even invoked. [...] If in due course the matter is left to be raised before the courts of Dubai (which are the courts of the seat) the question whether the bar on considering the merits of the DIFC order before the execution judge would also inhibit the Dubai courts from ruling on a challenge to the validity of the underlying award is a matter for the Dubai courts and is a matter on which we have heard no argument.”

Ultimately, Sir David Steel concluded, quoting H.E. Omar Al Muahiri of the DIFC Court of First Instance with approval:

“I reject the submission [...] that it cannot have been the intention of the Dubai legislator in promulgating the Judicial Authority Law to allow the DIFC Courts to be used as a conduit jurisdiction for enforcement of an arbitration award against assets in Dubai (outside the DIFC) in circumstances where the owner of those assets has a legitimate expectation that such enforcement action can only properly be brought in the Dubai Courts. It seems to me plain, from the provisions in Article 7 of the Judicial Authority Law, that the legislator did contemplate that there could be circumstances in which recognition of a foreign arbitral award by the DIFC Court could trigger enforcement proceedings, through the Dubai Courts, against assets in the Emirate of Dubai (but outside the DIFC) without the need for separate recognition of the award by the Courts of Dubai; and vice versa.” (see Case CA-005-2-14, para. 49)

Importantly, both Justice Roger Giles and H.E. Justice Ali Al Madhani, one of the two UAE local DIFC-resident judges, fully concurred in Justice Sir David Steel’s ruling. In this context, it is also worth reminding that the Court of First Instance ruling in the present case was originally handed down by H.E. Justice Omar Al Muahiri, the other DIFC-resident judge of UAE origin. Given the local pedigree of the DIFC Courts’ rulings, it is hard to believe that the Dubai Courts would not lend their full support and carry through with any enforcement actions within the strict (permissive) terms of Article 7 of the Judicial Authority Law as amended.

This being said, there is some residual concern that in a follow-on enforcement action, the Dubai Courts may seek to rely upon a public policy argument to the effect that *in personam* and/or subject-matter jurisdiction, which in turn is a question of public policy under UAE law and may therefore be raised *ex officio* by the Dubai Courts in actions before them (see e.g. Case No. 14 of 2013 – *Canal de Jonglei*, ruling of the Dubai Court of Cassation of 18 August 2013 and [my related blog](#)), would have properly rested with the Dubai Courts. In my preliminary view, this argument lacks merit given that in the express terms of Article 7(3)(c) of the Judicial Authority Law as amended, “*the [Dubai Court] execution judge may not reconsider the merits of the judgment, decision or order [including a DIFC Court order ratifying an arbitral award]*”, which in turn is not subject to a public policy exception. It is hence arguable that if the Dubai Courts were to rely upon a public policy argument to refuse enforcement of a DIFC ratified award, they would be in

violation of their obligations under Article 7(3)(c) of the Judicial Authority Law as amended. It is further arguable that the Judicial Authority Law as amended does not provide for a public policy exception expressly because if it did, it would violate the regime of mutual trust and recognition of judgments, decisions and orders and hence their intended free movement between the Dubai and DIFC Courts and vice versa in the terms laid down in Article 7 of the Judicial Authority Law as amended. It would also be questionable to what extent contracting parties could ever be empowered to contract into the jurisdiction of the DIFC Courts by virtue of Article 5(A)(2) of the Judicial Authority Law as amended if the Dubai Courts on the other hand retained a valid objection of public policy on the basis of their purported *in personam* and/or subject-matter jurisdiction. To invoke a public policy argument of that nature would simply defeat the very purpose of the codified regime of mutual co-operation in the execution of judgments, decisions and orders between the Dubai and DIFC Courts in the terms of Article 7 of the Judicial Authority Law as amended. In other words, in my view, it must be understood that the Judicial Authority Law (having been adopted by the Ruler of Dubai) expressly limited any ground for recourse by the Dubai and DIFC Courts on the basis of public policy, giving preference to a regime of trust and mutual recognition in the enforcement of judgments, decisions and orders emanating from the respectively other court. This would, in my humble submission, also find support in the fact that constitutionally speaking, the DIFC Courts form part of the legal system of the Emirate of Dubai and as such ultimately qualify as a Dubai Court.

This being said, only time will tell the manner in which the Dubai Courts will ultimately exercise their jurisdiction and lend or not support to the natural consequences of the recent ruling of the DIFC Court of Appeal.

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