Kluwer Arbitration Blog

ARB 003/2013: The DIFC Court of First Instance's Sequel in Banyan v. Meydan

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Attentive readers of this Blog will remember that the Court of Appeal of the Dubai International Financial Centre (DIFC) adopted a ruling in the latter half of last year confirming its status as a "host" or "intermediate" – or, in the Court's own words, "conduit" – jurisdiction for the enforcement of domestic arbitration awards rendered in mainland Dubai (i.e. outside the DIFC) even absent any geographic nexus with the DIFC (see Case CA-005-2-14, ruling of the DIFC Court of Appeal of 3rd November 2014 and my previous blog reporting on these developments). By way of reminder, Banyan Tree Corporate Pte Ltd, a company incorporated in Singapore and specialising in the management and operation of tourist resorts, ("Banyan") applied to the DIFC Courts for the recognition and enforcement of a DIAC arbitration award it had obtained in its favour against Meydan Group LLC, a UAE-incorporated company engaged in real estate development, ("Meydan") for the premature termination by Meydan of a hotel management agreement with Banyan. Despite the fact that Meydan was not known to have any assets in the DIFC, the DIFC Court of First Instance (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) and the DIFC Court of Appeal confirmed that the DIFC Courts were competent to hear Banyan's application for recognition and enforcement in reliance on Arts 5(A)(e) of DIFC Law No. 12 of 2004 as amended by DIFC Law No. 16 of 2011, the Judicial Authority Law, read together with Arts 42, 43 and 44 of DIFC Law No. 1 of 2008 as amended, the DIFC Arbitration Law.

Following the DIFC Court of Appeal's confirmation of the DIFC Courts' proper jurisdiction, Meydan chose to absent itself from the further proceedings. Instead, it instigated nullification proceedings for the invalidity of the disputed award before the (mainland) Dubai courts on the basis that (i) the disputed award was issued out of time; (ii) the Sole Arbitrator had failed to hold a preliminary meeting with the Parties in person (rather than by telephone conference); and (iii) the application for recognition and enforcement before the DIFC Courts constituted an abuse of process/ a violation of UAE public policy in that (1) the Dubai courts were the more appropriate forum (forum non conveniens) and in that (2) there was an inherent conflict between the DIFC laws and the UAE Civil Procedures Code (CPC) in terms of the determination of the proper forum (see Cases No. 211/2014, ruling of the Dubai Court of Appeal). The Dubai courts are reported to have dismissed Meydan's various claims of invalidity, although a final appeal is – to the best of this commentator's knowledge – presently pending before the Dubai Court of Cassation.

In a ruling of earlier this year (see ARB 003/2013 – *Banyan Tree Corporate Pte Ltd v. Meydan*

Group LLC, ruling of the DIFC Court of First Instance of 2nd April 2015), the DIFC Court of First Instance found *in absentia* that the disputed DIAC award was to be recognised as binding within the DIFC in accordance with Article 42(1) of the DIFC Arbitration Law and as a result ordered the recognition of the award (see ARB 003/2013 – *Banyan Tree Corporate Pte Ltd v. Meydan Group LLC*, Order of the DIFC Court of First Instance of 8 April 2015). In confirmation of these findings, H.E. Justice Omar Al Muhairi, one of the two UAE-national resident judges of the DIFC Courts rendering the ruling of the DIFC Court of First Instance, tested the applicability of the various grounds for refusing recognition and enforcement listed at Article 44 of the DIFC Arbitration Law, which in turn are modeled on Article V of the 1958 New York Convention (on the recognition and enforcement of foreign arbitral awards), to the case in hand. Justice Al Muhairi rejected the various grounds of refusal in the following terms:

> (i) *The invalidity of the arbitration agreement* (Art. 44(1)(a)(i)) – Meydan had never advanced any arguments as to the invalidity of the arbitration agreement: Meydan's argument of invalidity in the nullification proceedings before the Dubai courts was directed at the award only.
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> (ii) *Failure to afford a fair hearing and over-/under-performance of the arbitrator's mandate* (Art. 44(1)(a)(ii) and (iii)) – There was no evidence that Meydan had not been afforded a fair hearing. Further, Meydan had never raised any argument as to the Sole Arbitrator's performance of his mandate *infra* or *extra petita*.
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> (iii) *The arbitration procedure violating the governing arbitration agreement or curial laws* (Art. 44(1)(a)(iv) – There was no need for the Sole Arbitrator to hold a preliminary meeting in accordance with Art. 22 of the DIAC Rules (and Art. 208(1) CPC) as such a meeting had already been held by a previously appointed arbitrator whom the Sole Arbitrator replaced.
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> (iv) *The award not yet having become binding or having been set aside by the curial court* ((Art. 44(1)(a)(v)) – There was evidence from DIAC on record before the DIFC Courts to the effect that the time-limit for the arbitration had not expired at the time the award was issued. Further, the nullification proceedings before the Dubai courts had so far remained unsuccessful (so the disputed award had not yet been set aside).
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> (v) *UAE public policy defense* (Art. 44(1)(b)(vii)) – The threshold for the UAE public policy defense was *"high and far from being met in the present circumstances"* (see ruling of the DIFC Court of First Instance of 2nd April 2015, para. 43). In support, Justice Al Muhariri relied upon the 2012 Digest of Case Law on the UNCITRAL Model Law (the DIFC Arbitration Law being modeled on the Model Law): *"The public policy defence should be applied only if the arbitral award fundamentally offended the most basic and explicit principles of justice and fairness in the enforcement State, or evidences intolerable ignorance or corruption on part of the arbitral tribunal. Courts have also stated that to refuse to enforce an award on the ground that it violates public policy, the award must either be contrary to the essential morality of the State in question, or disclose errors that affect the basic principles of public and economic life. Not every infringement of mandatory law amounts to a violation of public policy. Occasionally it was also required that the*

> *violation of public policy must be obvious."* (*ibid.*, para. 31)

The DIFC Court of First Instance's approach to the recognition and enforcement in the DIFC of domestic awards rendered in mainland Dubai (even absent any geographic nexus to the DIFC) is straightforward and encouraging. The DIFC Courts have apparently remained undeterred by challenges mounted by award debtors that have contested recourse to the DIFC Courts in the given circumstances as a circumvention of the proper jurisdiction of the Dubai courts. This being said, despite the initial positive signs from the Dubai Court of Appeal in support of the DIFC Courts' findings, it remains to be seen whether the Dubai Court of Cassation will chime with the approach of the DIFC Court of First Instance and ultimately support the execution of the DIFC Courts' order for recognition and enforcement of domestic awards rendered in mainland Dubai. To say the least, Justice Al Muhairi being a former judge of the courts of mainland Dubai, his reasoning in Banyan will hopefully hold sway with the UAE-national bench and its Egyptian offspring.

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