

# The DIFC Courts stand firm on their status as a “host” jurisdiction for the recognition and enforcement of domestic non-DIFC awards

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By an order of late last year (ARB 002/2014 – *A v. B*, Order of Justice Sir David Steel of 16 December 2014), Justice Sir David Steel dismissed an application by an award debtor seeking a number of orders to avoid the recognition and enforcement of an award rendered by the Dubai International Arbitration Centre (DIAC) in Dubai, with reasons to follow. The DIFC Court of First Instance thus confirmed the DIFC Courts’ status as a host jurisdiction to hear applications for recognition and enforcement of domestic non-DIFC awards, i.e. awards rendered in mainland Dubai and hence outside the DIFC, even absent any geographic nexus to the DIFC. This essentially means that an award creditor who wishes to avoid the cumbersome domestic ratifications process within the meaning of Art. 215 of the UAE Civil Procedures Code (the “CPC”) and the at times unpredictable application of Art. 216 CPC, which contains a closed list of grounds for the nullification of a non-compliant arbitral award under the UAE Arbitration Chapter, may now resort to the DIFC Courts for an order of recognition and enforcement, which in turn will be binding on the Dubai execution judge by virtue of the regime of mutual recognition in place between the Dubai and DIFC courts and in particular Art. 7 of DIFC Law No. 12 of 2004 as amended by DIFC Law No. 16 of 2011 (the “Judicial Authority Law”). The Dubai Court of First Instance’s recent findings stay firmly in line with the previous approach taken by the DIFC Courts in the *Banyan Tree* case (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 and [my previous blog](#)), the first case of its kind.

This case brings to the fore an increasingly familiar theme, which is the award debtor’s continued resistance to have any actions for the recognition and enforcement of domestic Dubai (non-DIFC) awards heard by the DIFC Courts regardless of whether or not there is a geographic nexus with the DIFC. The award debtor with assets in mainland Dubai essentially contests the proper jurisdiction of the DIFC Courts to hear such applications. In response, the DIFC Courts have consistently rejected arguments of *forum non conveniens*, finding in favour of the proper jurisdiction of the DIFC Courts even absent any assets of the award debtor in the DIFC. More specifically, in the present case, the award debtor also commenced parallel proceedings for the nullification of the disputed award before the mainland Dubai courts on the basis that (i) the arbitration was premature (for want of compliance with contractually-stipulated conditions precedent), (ii) the witnesses failed to testify on oath, (iii) the award was rendered after the contractually prevailing time-limit, and (iv) the award improperly made provision for legal costs. This claim was contradicted by the evidence on record and hence dismissed

by the Dubai courts as “*factually and legally groundless*” on 5 November 2014 (see Redacted Reasons, para. 25). Subsequently, the award debtor filed an appeal, which raises largely the same issues and is as such unlikely to succeed (*ibid.*, para. 27).

This being said, in response to the award creditor’s filing for an order for ratification and enforcement before DIFC Courts, the award debtor advanced a number of applications seeking the following orders:

(i) An order in the form of a declaration to the effect that the DIFC Courts lack jurisdiction to hear the application for recognition and enforcement, in particular because Art. 5(A)(1) of the Judicial Authority Law had not been engaged or if the DIFC Courts had proper jurisdiction, an order not to exercise that jurisdiction;

(ii) in the event that the DIFC Courts decided to exercise their jurisdiction, an order staying the present proceedings pending the outcome of:

(1) the nullification proceedings initiated by the award debtor before the Dubai courts;

(2) the DIFC Court of Appeal’s anticipated ruling in *Banyan Tree* (which was still pending at that time); and/or

(3) the USC’s ruling on the issue of which court – that of the DIFC or that of Dubai – would have proper jurisdiction following a petition by the award debtor or the DIFC Court upon the award debtor’s request to that effect.

Given the similarity of the disputed matters with those discussed in the *Banyan Tree* case, the Parties and the DIFC Court decided to adjourn the proceedings until after the DIFC Court’s hearing in *Banyan Tree*. In the result, as stated by way of introduction and taking account of the outcome in *Banyan Tree*, Justice Sir David Steel rejected the award debtor’s application with reasons to follow.

Earlier this year, Justice Sir David Steel provided the anticipated more detailed reasoning for his Order of 16 December 2014 in Case ARB 002/2014 (see Redacted Reasons of 22nd January 2015 for the Order of Justice Sir David Steel dated 16 December 2014). Most importantly, Justice Sir David Steel pronounced himself on (i) the question of the DIFC Courts’ proper jurisdiction and (ii) the award debtor’s application for adjournment of the proceedings until completion of the appeal proceedings before the Dubai courts. As regards the former, the award debtor argued that (*ibid.*, para. 20):

(1) The DIFC Courts were only empowered to hear an application for recognition and enforcement of an award provided the presence of assets of the award debtor’s in the DIFC.

(2) As a consequence, the disputed award required separate ratification before the Dubai Courts.

(3) Any circumvention of the above requirements by virtue of Art. 42(4) of the DIFC Arbitration Law, which provides for awards ratified within the DIFC to be enforced outside the DIFC pursuant to the Judicial Authority Law, or Art. 7 of the Judicial Authority Law, which establishes a regime of mutual recognition between the Dubai and DIFC courts, violated the scope of powers conferred upon the Emirate of Dubai in respect of Finance Free Zones under Federal Law No. 99 of 1971 and Federal Law No. 8 of 2004 (Regarding

the Financial Free Zones).

(4) In any event the award creditor should not be allowed to forum shop.

(5) The award creditor's manoeuvre in the instant reference was a waste of costs.

(6) This in turn should prompt a referral to the USC.

Justice Sir David Steel's reflection on these arguments is admirable in its conciseness and consistency with the DIFC Courts' previous approach to defining their proper jurisdiction in similar circumstances and deserves citation in full (see Redacted Reasons, paras 21-24):

21. I regret to say that I cannot accept any step in this argument. It is not for this Court to embark on an analysis of its jurisdictional competence to enforce awards. No application to refer matters to the USC is made. In any event no question of constitutional conflict arises at this stage: see *X1 v. Y* ARB 001 2014 [, on which see [my previous blog](#)]. I of course agree that the Court can only order recognition and enforcement within the DIFC. But the DIFC Court has exclusive jurisdiction and no other forum is available to obtain such an order. Likewise the Dubai courts can only order recognition within Dubai. But no question of forum shopping arises. Applications can be made to both courts.

22. I also accept that it is not apparent that the Defendant has any assets within the DIFC against which enforcement could be made. But in this regard I repeat a passage from the judgment in *Banyan* which, in my view, is equally applicable here:

*"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 say a freezing order or an oral examination) for obtaining details of any assets that are or become available."*

23. Even allowing for the fact that the main (perhaps only) purpose of the application is to make use of the machinery for execution within Dubai as furnished by Article 7 of Law 12 of 2004, the suggestion that those provisions are unconstitutional is not open before me.

24. It is also accepted that the public interest (and indeed compliance with the overriding objective) is not best served where there is a risk of inconsistent decisions. It is open to the Defendant to resist enforcement in the DIFC only by reference to the permitted grounds of challenge under the Arbitration Law (which match the terms of the New York Convention). But the Courts of the seat of the arbitration were the Courts of Dubai. It is on this basis that it is said that the Court should decline jurisdiction where the only courts with power to annul the award are the Courts of Dubai. But even in the event of annulment, recognition in the DIFC is not barred.

On the latter issue of adjournment, Justice Sir David Steel held in equally self-explanatory terms:

31. The last point taken by the Defendant is to invite the Court to adjourn the recognition and enforcement application pending the outcome of the appeal to the Dubai Courts pursuant to Article 42(2) of the Arbitration Law. In this regard I was reminded of the judgment of Gross J in *IPCO (Nigeria) Ltd. v. Nigerian National Petroleum Corp* [2005] EWHC 726 (QB) where he considered the relevant criteria for such an application:

*“...the Act does not furnish a threshold test in respect of the grant of an adjournment and the power to order the provision of security in the exercise of the court’s discretion under s.103(5). In my judgment, it would be wrong to read a fetter into this understandably wide discretion (echoing, as it does, Art. VI of the New York Convention). Ordinarily, a number of considerations are likely to be relevant: (i) whether the application before the court in the country of origin is brought bona fide and not simply by way of delaying tactics; (ii) whether the application before the court in the country of origin has at least a real (i.e., realistic) prospect of success (the test in this jurisdiction for resisting summary judgment); (iii) the extent of the delay occasioned by an adjournment and any resulting prejudice. Beyond such matters, it is probably unwise to generalise; all must depend on the circumstances of the individual case.”*

32. The present case is at the bottom end of any sliding scale in regard to these considerations. The appeal in the Dubai Courts borders on the hopeless. It is clearly a device to delay matters and given the technical and unmeritorious nature of the challenge (further exemplified by the sort of points taken in the present application) is redolent of want of good faith. As regards delay I have received no assistance save that a further appeal to the Court of Cassation is contemplated. Any such delay and enhanced cost is clearly prejudicial.

33. In my judgment an adjournment is not appropriate. If I had considered otherwise I would have ordered security to be posted for the full amount of the award but perhaps surprisingly the Claimant did not press for this alternative. From the Defendant’s perspective that might be regarded as a welcome relief.

Justice Sir David Steel’s words leave no doubt that the DIFC Courts will pursue and enforce with rigour the wide scope of the DIFC’s jurisdiction and be little impressed with arguments of unconstitutionality that award debtors have come to play as a wild card into the game of enforcement of domestic awards between the DIFC and Dubai courts. Constitutionally speaking, the DIFC Courts form part of the judicial system of the Emirate of Dubai. Like brothers and sisters, the Dubai and DIFC courts are part of the same family of courts: Their respective actions benefit from a regime of mutual recognition, which takes the shape of the Judicial Authority Law and in particular its Article 7. For the avoidance of doubt, all relevant laws pertaining to the constitution of the DIFC and the DIFC Courts have been adopted by the Ruler of Dubai, who in his legislative function is bound by the UAE Constitution: therefore, any of the legislation constitutive of the DIFC and the DIFC Courts must *prima facie* be regarded as compliant with the UAE Constitution. The execution of DIFC Court orders for the recognition and enforcement of domestic non-DIFC awards by the Dubai execution judge within the meaning of Art. 7(3) of the Judicial Authority Law should therefore be little controversial.