

DIFC Court of First Instance supports enforcement of foreign ICC award against a non-DIFC award debtor

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By Order of 11 May 2015 (unpublished) in Case No. ARB 005/2014 – A v. B, Justice Sir David Steel of the Dubai International Financial Centre (DIFC) Court of First Instance dismissed an application made by an award debtor to set aside an order granted by the DIFC Court on 8 January 2015 (unpublished) for the recognition and enforcement of an International Chamber of Commerce (ICC) arbitration award issued in Paris, France, on 6 May 2014 (the “Enforcement Order”), with reasons to follow. In the terms of the application (see Application Notice ARB-005-2014/1, dated 28 January 2015, unpublished), the award debtor sought either the setting aside of the Enforcement Order or an adjournment of the proceedings before the DIFC Court pending the outcome of an action for nullification of the award brought by the award debtor before the Court of Appeal in Paris. Undeterred by the award debtor’s application, Justice Sir David Steel lent unreserved support to the enforcement of the ICC award, embracing the reputation of the DIFC Courts as an arbitration-friendly jurisdiction. The DIFC Court has now published the reasons for Justice Sir David Steel’s Order of 11 May 2015 (see ARB 005/2014 – A v. B, Redacted Amended Reasons for the Order of Justice Sir David Steel dated 11 May 2015, Ruling of the DIFC Court of 26 July 2015). These throw some light on Sir

David's motivations in supporting the Enforcement Order without reservation.

By way of background, the award creditor is a US company specialised in the sale and lease of commercial aircraft engines whereas the award debtor is a company registered in mainland Dubai, i.e. outside the DIFC, and engages in commercial air cargo carriage. A dispute arose between the parties over the quality of engines delivered by the claimant, the award creditor, to the defendant, the award debtor, as a result of which the latter withheld part payment. The arbitrator appointed to resolve the dispute found in favour of the claimant, ordering the defendant to pay US\$600,000 plus costs. Importantly, the arbitrator rendered the award only eight months after closure of the arbitral proceedings. On this basis, the award debtor challenged the award for violation of public policy before the French courts. Simultaneously, the award debtor applied for the enforcement proceedings before the DIFC Courts to be adjourned pursuant to Article 44(2) of DIFC Law No. 1 of 2008, the DIFC Arbitration Law, which allows the suspension of DIFC supervisory court proceedings pending an action for challenge before the courts of the originating jurisdiction.

According to Sir David, in considering the application for adjournment under Article 44(2) of the DIFC Arbitration Law, “[t]he threshold question has to be whether as a matter of first impression the award is valid or invalid” (see ARB 005/2014 - A v. B, Redacted Amended Reasons for the Order of Justice Sir David Steel dated 11 May 2015, Order of the DIFC Court of 26 July 2015, with reference to the test articulated in *Soleh Boneh v. Uganda Government* [1993] 2 Lloyd’s Rep. 208). Applied to the facts at hand, Sir David found that “there [was] no realistic prospect of making good [the] contention” that the award violated public policy for being issued out of time and that therefore, “the award should be treated as manifestly valid” (see ARB 005/2014 - A v. B, Redacted Amended Reasons for the Order of Justice Sir David Steel dated 11 May 2015, Order of the DIFC Court of 26 July 2015, at para. 8). In Sir David’s judgment, firstly, delay on part of the arbitrator did not come within the ambit of the international concept of public policy and secondly, as recorded in the text of the award itself, the time-limit of the award had been extended by the ICC in accordance with Article 30 of the ICC Rules, without any objection from the defendant (see *ibid.*). Sir David also rejected a secondary challenge of the award of *infra petita*, according to which the arbitrator failed to consider a counterclaim brought by the defendant for US\$ 40,000 for attempted repairs to a defective engine. Being requested to determine the validity of this

counterclaim, the arbitrator found that it was neither particularized nor evidentially substantiated. According to Sir David: *“It is difficult to see how that view was mistaken. But even if he [i.e. the arbitrator] may have been wrong, no legal principles are involved let alone justifying a challenge to a validity of the award”* (*ibid.*, at para 9).

In the light of the foregoing and taking into account in particular (i) the lack of any realistic prospect of success of the challenge before the Paris Court of Appeal, (ii) *“the clear impression derived from the late emergence of the grounds of challenge that it is not pursued bona fide but simply as a delaying tactic”*, and (iii) the anticipated time for the French challenge proceedings to complete, Sir David ordered immediate enforcement of the award (*ibid.*, at para. 11, relying on factors identified in *IPLO (Nigeria) Ltd. v. Nigerian National Petroleum Corporation* [2005] 2 Lloyd’s Rep. 326).

Sir David’s resolute approach to the recognition and enforcement of foreign awards in the DIFC is to be commended. Albeit not clear from the text of Sir David’s reasoning, there is reason to believe that the instant ICC award qualified for recognition and enforcement under the 1958 New York Convention (on the recognition and enforcement of foreign arbitral awards), which is binding on the DIFC Courts in the terms of Article 42(1) of the DIFC Arbitration Law. In addition, the present enforcement incidence brings to mind the current debate on the role of the DIFC as a host jurisdiction for the enforcement of foreign awards in mainland Dubai: To the extent that the award debtor is a Dubai-seated company without any connections to nor assets in the DIFC, the present is yet another example of the DIFC Courts’ support for the enforcement of foreign awards in mainland Dubai through the offshore jurisdiction of the DIFC even absent any nexus to the DIFC (for further discussion, see in particular my previous blog).