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Host jurisdiction status of DIFC Courts not contrary to UAE public policy

Gordon Blanke (Blanke Arbitration LLC) · Saturday, September 5th, 2015

A recent ruling of the Dubai International Financial Centre (DIFC) Court of First Instance (see Case No. XX - (1) X1 (2) X2 v. (1) Y1 (2) Y2, ruling of the DIFC Court of First Instance of 29 July 2015) brings into relief the question as to whether the role of the DIFC Courts as a host or conduit jurisdiction for the recognition and enforcement of foreign arbitral awards absent any geographic nexus with the DIFC is compatible with UAE public policy. Variations of the theme, such as the constitutionality of the regime of mutual recognition under Article 7 of the Judicial Authority Law (the “JAL”), have been the subject of other recent jurisprudence of the DIFC Courts (see e.g. Case ARB 001/2014 - (1) X1 (2) X2 v. (1) Y, Order of the Dubai Court of First Instance of 5 January 2015; and [my previous blog](#)). In the present instance, the DIFC Court was asked to make an order pursuant to Articles 42(1) and 43 of DIFC Law No. 1 of 2008 (the “DIFC Arbitration Law”), for recognition of and leave to enforce a foreign award rendered under the London Maritime Arbitration Association (LMAA) Rules in London. In the defendant’s submission, such an order for recognition and enforcement should be refused as contrary to UAE public policy for the following reasons: (i) the defendant’s absence or the absence of any of the defendant’s assets from the DIFC; (ii) the motivation behind commencing proceedings before the DIFC Courts being the automatic enforcement before the Dubai courts without a further review on the merits by the Dubai execution judge; and (iii) the premeditated circumvention of the procedure for enforcement prevailing before the onshore Dubai courts under the prevailing provisions of the UAE Civil Procedures Code.

Before examining whether the interplay between Articles 42 and 43 of the DIFC Arbitration on the one hand and Article 7 JAL on the other complied with UAE public policy, Justice Sir Anthony Colman, the judge issuing the DIFC Court’s ruling, set out the manner in which the legislative mechanism underlying those Articles was intended to operate: By virtue of Article 42(1) read together with Article 43(1) of the DIFC Arbitration Law, the DIFC Courts had to recognise foreign awards by issuing an order to that effect. Once such an order would have been obtained, in reliance on Article 7(2) JAL, “[the foreign] award, like a DIFC Court judgment, [could] be taken to an ‘executive judge’ of the non-DIFC Dubai Court, which [meant] a judge designated to exercise powers to order execution of orders, for the purpose of enforcement in non-DIFC Dubai” (ruling of the DIFC Court of First Instance, at para. 42), subject to compliance with a number of requirements: (i) the ratified (read: recognised,

“ratification” and “recognition” being synonymous for the purposes of Article 7 JAL pursuant to Article 42(4) of the DIFC Arbitration Law) award being “*appropriate for enforcement*”; (ii) the ratified (read: recognised) award being translated into Arabic; and (iii) the executive Dubai Court judge not having jurisdiction to review the merits of the ratified award. Justice Colman emphasised that the regime of mutual recognition under Article 7 JAL was also intended to apply to situations where an award debtor did not hold any assets in the DIFC, but only in mainland Dubai. In the Justice’s words: “*In particular, there is no suggestion that Article 7(2) can only operate in a case where ‘the subject of execution’ is both in the DIFC and in non-DIFC Dubai. Consequently, Article 7(2) expressly contemplates orders for execution of awards recognised by the DIFC Court where the only subject of execution is in non-DIFC Dubai.*” (ruling of the DIFC Court of First Instance, at para. 42). Justice Colman then confirmed that the location of assets of the award debtor was equally not a relevant threshold criterion for the DIFC Courts’ proper jurisdiction to recognise and enforce foreign arbitral awards under the 1958 New York Convention (on the recognition and enforcement of foreign arbitral awards) (the “NYC” or “New York Convention”) or the DIFC Arbitration Law. According to him, there were good reasons for this:

“In the modern world of highly mobile financial resources it may be essential for an arbitration creditor to be in a position to levy execution on an arbitration debtor’s assets introduced into a jurisdiction subsequent to the making of an order. Bank accounts may exist but at any point of time may have little or no credit balance. In Article 7(2) of JAL the words ‘should the subject of execution fall outside the Centre’ do not import a requirement that it has to be proved to the executive judge that any particular asset of the arbitration debtor is located in non-DIFC Dubai; they merely identify the circumstance that the arbitration creditor requires an order for execution to be made and available upon some (undefined) subject matter in non-DIFC Dubai. The entitlement to such an order is to be determined by the intrinsic characteristics of the arbitration award and of the arbitration from which it arose. If the arbitration creditor has chosen to obtain an order for enforcement in a state where no assets turn out to be currently available for execution, that is his misfortune and not the concern of the judge making the order for recognition.” (ruling of the DIFC Court of First Instance, at para. 44)

Justice Colman also left no doubt that in the application of Article 7(2) JAL more specifically, there was little room for the Dubai execution judge to refuse enforcement of a DIFC ratified award:

“The effect of Article 7 [JAL] is therefore that once an order for recognition and enforcement in respect of property in non-DIFC Dubai lands on the executive judge’s table, he or she is bound to enforce it, provided that the pre-conditions specified in Article 7(2)(a) and (b) [JAL] are satisfied. ‘Appropriate for enforcement’ means that it articulates a

remedy which can be the subject of enforcement, such as a specified money sum or defined prohibited conduct if the prohibition is lawful. What the executive judge is not permitted to do is to review the merits of the award or order. His jurisdiction is thus confined to confirming execution except where the requirements of Article 7(2)(a) and (b) [JAL] are not satisfied. The only requirements which could thus present a challenge to execution at that stage would be that the award was final, appropriate for enforcement and had been translated into Arabic. Consideration of the grounds for refusing recognition or enforcement as prescribed in Article 44(1)(a) and (b) [of the DIFC Arbitration Law] would not be open before the non-DIFC executive judge: it cannot have been the legislative purpose of the JAL that it would be open to that executive judge to second guess the DIFC judge's decision to order recognition and enforcement. An arbitration creditor who has selected the DIFC Court as its port of entry into [the] UAE for enforcement purposes can thus only be met at one stage of the procedure - in the DIFC Court - by a challenge based on non-compliance with Article V2(b) of the New York Convention as expressed in Article 44(1) of the DIFC Arbitration Law." (ruling of the DIFC Court of First Instance, at para. 43)

The wording of Justice Colman supports the idea that the DIFC and the Dubai Courts are members of the same family of courts. Constitutionally speaking, the DIFC Courts form part of the Dubai court system, originating in decrees of the Ruler of Dubai (see e.g. Dubai Law No. 12 of 2004 establishing the DIFC Courts). Against this background, Justice Colman concluded compellingly as follows:

"Finally, in relation to the legislative structure consisting of the DIFC Arbitration Law and JAL, these are laws binding to the extent of their scope not only in the DIFC but also in the UAE generally. Thus, they have the force of law to the extent of their scope throughout Dubai. Indeed JAL expressly prescribes the limitations on the jurisdiction of the executive judge of the non-Dubai court. Accordingly, the structure for the recognition and enforcement of awards in both the DIFC and the non-DIFC Dubai courts is part of the legislative machinery of [the] UAE." (ruling of the DIFC Court of First Instance, at para. 45)

With this in mind, as I have expressed elsewhere before, the regime of mutual recognition under Article 7 JAL is based on a relationship of trust between the DIFC and Dubai judiciary, which in turn dispenses with any requirement for a revision on the merits or the need for a public policy exception in relation to DIFC ratified awards filed for enforcement before DIFC Courts and vice versa: Essentially, in this sense, Article 7 JAL is to facilitate and promote the free movement of awards between the offshore DIFC and mainland Dubai. Importantly, the *raison d'être* of Article 7 JAL was perfectly summarised by Dr. Habib Al Mulla in his expert testimony before the DIFC Courts in the following terms:

“Article 7 of the JAL establishes a regime of mutual recognition between the DIFC and Dubai Courts, which is intended to facilitate the free movement of judgments, decisions and orders between the Dubai and DIFC Courts and vice versa. This regime is based upon a statutory relationship between the two courts, which in turn finds its origin in both the DIFC and Dubai Courts belonging to the same family of courts, namely the Dubai Courts. This is supported by the fact that both courts have been established by decrees of the Ruler of Dubai and render their rulings in the name of the Ruler of Dubai. In other words, the DIFC Courts form part of the legal system of the Emirate of Dubai and as such ultimately qualify as a Dubai Court. With this in mind, it is the Ruler of Dubai, who is the fountain of powers in the Emirate, who has ordained the co-existence of the two sets of courts in the same Emirate.” (ruling of the DIFC Court of First Instance, at para. 53)

Moving on to the question of UAE public policy, Justice Colman’s analysis departed from the premise that given the UAE’s membership of the NYC, Article 44(1)(b) of the DIFC Arbitration Law, which required refusal of the recognition and enforcement of an award “*if the enforcement of the award would be contrary to the public policy of the UAE*”, had to be construed as consistent with the public policy exception under the NYC (see Article V2(b), NYC; and ruling of the DIFC Court of First Instance, at para. 40). With this in mind, the DIFC Court heard evidence on the matter of UAE public policy from the mentioned Dr. Al Mulla and Mr. James Whelan. Justice Colman did not accept Mr. Whelan’s position that the enforcement of an award through the DIFC Courts against an award debtor that was properly domiciled in mainland Dubai and did not have any assets in the DIFC was procedurally prejudiced and that an application for enforcement to the DIFC Courts ran counter to the award debtor’s legitimate expectation to be sued in the Arabic language in his home jurisdiction in accordance with the prevailing rules on jurisdiction of the UAE Civil Procedures Code and was hence in violation of prevailing public policy. Instead, following extensive citation from Justice Sir David Steel’s findings in *Meydan Group v. Banyan Tree Corporate* (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](#) on the subject-matter) and in reliance on H.E. Justice Al Madhani’s proposition in *X v. Y* (see Case No. ARB-001/2014, Order of the DIFC Court of First Instance of 5 January 2015; and [my previous blog](#) on the subject-matter) to the effect that “*it is public policy in the whole of the UAE not to apply the CPC [i.e. the UAE Civil Procedures Code] within the DIFC*”, Justice Colman concluded - essentially adopting the view taken by Dr. Al Mulla - that the DIFC Courts’ exercise of their role as a host jurisdiction within the presently prevailing circumstances was not in violation of UAE public policy: In actual fact, in light of the Dubai Court’s impressive recent track record of pro-NYC enforcement (see most recently Case No. 434/2014 - *Al Reyami Group LLC v. BTI Befestigungstechnik GmbH & Co KG*, ruling of the Dubai Court of Cassation of 23rd November 2014; and [my previous blog](#)) and given the congruity between the wording of Articles 44(1)(b) of the DIFC Arbitration Law and Article V2(b) of the NYC, both the DIFC and the Dubai Courts were subject to the application of the same public policy concept in the enforcement proceedings before them. Provisions of the UAE Civil Procedures Code in relation to domestic enforcement did hence not come into play. In

Justice Colman's own words:

"[...] in adopting the course of recognition which they did the Claimants were doing no more than the enacted procedure of the Emirate permitted. The locale of assets or domicile in the place of application (DIFC) was not mandatory under the Arbitration Law or the JAL and the unavailability of the CPC Procedure was a necessary consequence of the operation of the JAL. The extent to which that latter consequence would be procedurally prejudicial would indeed be minimal, given that the expert evidence indicates that the non-DIFC Dubai Courts would confine their investigation of the award to those same matters under Article V.2(b) of the New York Convention which the DIFC must consider in deciding whether to order recognition." (ruling of the DIFC Court of First Instance, at para. 59)

In any event, so Justice Colman, the present challenge was not properly grounded on a public policy argument:

"Moreover, in the present case the public order or public policy defence is grounded not on any intrinsic characteristic of the award itself or on any alleged procedural defect in the course of the arbitration or the conduct of the arbitrators. Instead, it is founded on an allegation of impermissible use by the arbitration creditor of [an] available recognition and enforcement procedure in respect of a pre-existing award. In my judgment, this is not a public policy complaint within Article V2(b) of the Convention but rather an objection to the deployment of the procedural mechanism of enforcement in the country of domicile of the arbitration debtor, namely the UAE. It is therefore an objection which falls outside the scope of challenges permissible upon applications for recognition or enforcement under Article 44(1) of the DIFC Arbitration Law. The words 'Recognition or enforcement...may be refused by the DIFC Court only...' (emphasis added) leave absolutely no doubt that it is impermissible for a DIFC Court to refuse recognition or enforcement on any ground other than the grounds listed in Article 44(1)(a) and (b). Given that those grounds are intended precisely to replicate the grounds set out in Article V2(b) of the Convention, for if there were additional or wider grounds, UAE would be in breach of the Convention, the DIFC Court is precluded from refusing recognition or enforcement by according a meaning to Article 44(1)(b)(vii) which is wider than Article V2(b) of the Convention. For the reasons which I have given, none of the grounds relied upon can be characterised as contrary to the public policy of the UAE within the meaning of Article 44(1)(b)(vii) of the DIFC Arbitration Law." (ruling of the DIFC Court of First Instance, at para. 62)

Upon further reflection, it would by now appear firmly established that the regime of

mutual recognition in the terms of Article 7 JAL is fully enforceable, at least from the point of view of the DIFC Courts. In response to a number of recent challenges, these have consistently held that on the basis of Article 7 JAL read together with Article 42 of the DIFC Arbitration Law the DIFC Courts may serve as a host or conduit jurisdiction for the enforcement of foreign awards even absent any geographic nexus with the DIFC (bar the application for recognition and enforcement). As I have discussed in previous blogs on this site, this means that award creditors have a choice whether to enforce international awards against Dubai-based award debtors through the DIFC Courts or the Courts in mainland Dubai (irrespective of the location of the award debtor's assets in non-DIFC Dubai). This being said, to the extent that the Dubai Courts' pro-NYC enforcement practice has consolidated over the past five years, the welcome role of the DIFC Courts as a host jurisdiction for the enforcement of international awards in Dubai may be diminishing in importance. Nevertheless, award creditors wishing to enforce a domestic non-DIFC award in mainland Dubai may be able to circumvent the more cumbersome process of ratification on the basis of Article 216 of the UAE Civil Procedures Code by recourse to the DIFC Courts and in reliance on Article 7 JAL (see ARB 002/2014 - *A v. B*, Order of Justice Sir David Steel of 16 December 2014; and [my previous blog](#) on the subject-matter).

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