

# Kluwer Arbitration Blog

## DIFC Court Confirms its Jurisdiction to Recognise and Enforce Foreign and Domestic Arbitral Awards – But Do Problems Lie Ahead?

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In two recent decisions, *Banyan Tree v. Meydan Group LLC* (Case No. ARB 003-2013) and *X1 and X2 v. Y1 and Y2* (Case No. ARB 002-2013), the DIFC Court of First Instance (H.E. Justice Omar Al Muhairi and Sir John Chadwick respectively) confirmed its jurisdiction to recognise and enforce within the DIFC arbitral awards rendered outside the DIFC. The decisions themselves are not particularly surprising given the law was clear on this point. However, both debtors had assets in onshore Dubai and neither had assets in the DIFC and while that is no reason for the DIFC Courts to refuse jurisdiction or indeed to refuse to enforce the awards in the DIFC, it does raise the question as to why the creditors did not immediately seek recognition and enforcement in the Dubai courts.

### Background

The United Arab Emirates (UAE) is a civil law state made up of seven Emirates (of which Abu Dhabi and Dubai are the two largest). There are a number of federal laws that apply to each Emirate and also laws at the specific level of each Emirate. There is no separate arbitration law in the UAE and instead rules relating to arbitration are contained within the UAE Civil Procedure Code (UAE Federal Law No 11 of 1992).

Within Dubai (and a number of the other Emirates), the Government has established Free Zones, one of which is the Dubai International Financial Centre (DIFC) which was established in 2004. Most Free Zones are still subject to and governed by UAE law, albeit there are certain regulations applicable to certain Free Zones. However, the DIFC is different to the other Free Zones in Dubai and it is an autonomous jurisdiction. It has its own laws based on principles of common law as well as its own courts with judges taken from a number of leading common law jurisdictions; it is sometimes referred to as a “common law island in a civil law ocean”. The DIFC also has its own Arbitration Law which is based largely on the UNICTRAL Model Law (DIFC Law No. 1 of 2008). Court decisions and arbitral awards from the DIFC should be enforced in Dubai (and *vice versa*) pursuant to a 2009 Memorandum of Understanding between the Dubai Courts and the DIFC Courts and Dubai Law No. 16 of 2011. The Dubai Courts also should not review the merits of a DIFC Court judgment or arbitral award prior to its enforcement in Dubai (and *vice versa*).

The jurisdiction of the DIFC Courts is set out in the DIFC Judicial Authority Law (Law No. 12 of 2004). Of particular relevance in the *Banyan Tree* and *X v. Y* cases was Article 5(A)(1)(e) which

provides that the DIFC Court of First Instance shall have exclusive jurisdiction to hear and determine “Any claim or action over which the [DIFC] Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations”.

In terms of enforcement of foreign arbitral awards, the UAE is a signatory to the New York Convention and DIFC law provides that any international treaty binding on the UAE should be applied in the DIFC.<sup>1)</sup> The DIFC Arbitration Law also provides that the DIFC Courts should recognise or enforce arbitral awards “irrespective of the State or jurisdiction” (Article 42 of the DIFC Arbitration Law) unless certain circumstances exist – these circumstances effectively mirror Article V of the New York Convention, although none were relevant in the context of *Banyan Tree* or *X v. Y*.

In both *Banyan Tree* and *X v. Y*, the DIFC Court of First Instance was asked to consider whether it had jurisdiction to hear an application for an order seeking recognition and enforcement of an arbitral award. In *X v. Y*, the claimants were award creditors incorporated outside Dubai who sought an order recognising and granting leave to enforce a foreign arbitral award obtained in their favour against award debtors incorporated outside the DIFC in mainland Dubai (no details are provided in the judgment of the seat of the arbitration or the institutional rules, if any, used). In *Banyan Tree*, the claimant was an award creditor incorporated in Singapore who sought an order for recognition and enforcement of a domestic award from the Dubai International Arbitration Centre (DIAC) against the Dubai based Meydan Group.

As set out above, Article 5(A)(1)(e) of the Judicial Authority Law provides that the DIFC Courts have jurisdiction over any claim in accordance with DIFC Laws and DIFC Regulations. The claimants in both cases argued that Article 42 of the DIFC Arbitration Law (also summarised above) gives the DIFC Courts jurisdiction to recognise and enforce arbitral awards “irrespective of the State or jurisdiction” and therefore the DIFC Court had jurisdiction in relation to enforcement of arbitral awards not seated in the DIFC whether domestic (i.e. from Dubai – *Banyan Tree*) or abroad (i.e. from outside the UAE – *X v. Y*).

In both cases, the defendants objected to the DIFC Court’s jurisdiction and argued that the Dubai Courts were in fact the proper venue for the claims. The main argument raised by the defendants was that the UAE Civil Procedure Code provides that jurisdiction shall be vested in the court within whose area the defendant has his domicile unless the law provides otherwise or the court in whose area the agreement was made or was performed (Article 31(1) and (3) of the Civil Procedure Code). The defendants asserted that the DIFC Courts were established as a carve out to the federal civil legal system and that in order to establish jurisdiction within the DIFC Courts, a claimant must show that some special requirement has been met in order to trump the general jurisdiction of the Dubai Courts. In particular, the defendants asserted that Article 42 of the DIFC Arbitration Law did not seek to confer jurisdiction on the DIFC Courts to the exclusion of the Dubai Courts and therefore it was not relevant to determine whether the claimants’ cases fell within Article 5(A)(1)(e) of the Judicial Authority law and thus whether the claimants could avail themselves of the gateway into the DIFC Courts.

The defendants also noted that the effect of the position advanced by the claimants was that the Dubai Courts would be deprived altogether of any jurisdiction which they may have in respect of the recognition and enforcement of foreign awards pursuant to Article 31 of the UAE Civil Procedure Code and asserted that such a position was “wholly absurd”. Moreover, given that neither claimant had assets in the DIFC, it was plain that the claimants were seeking recognition

and enforcement of the awards with the sole purpose of taking the DIFC Court Order to the Dubai/UAE Courts and in doing so the claimants were seeking to usurp the Dubai Court's recognition and enforcement jurisdiction. The defendants therefore asked the DIFC Court to establish the limits of its jurisdiction under the DIFC Arbitration Law.

## Decision

In rejecting the arguments put forward by the defendants, Sir John Chadwick (in *X v. Y*) and H.E. Justice Omar Al Muhairi (in *Banyan Tree*) held that:

1. Article 42 of the DIFC Arbitration Law is the gateway by which the DIFC Courts have jurisdiction pursuant to Article 5(1)(A)(e) of the Judicial Authority Law to hear and determine cases concerning the enforcement of arbitral awards not seated in the DIFC. Article 31 of the UAE Civil Procedure Code is irrelevant to the question of jurisdiction of the DIFC Courts given the DIFC is an autonomous jurisdiction and, in the current circumstances, the scope and application of the DIFC Court's jurisdiction is provided for in other statutes.

2. However, it is important to recognise that Article 42 of the DIFC Arbitration Law provides that arbitral awards shall be recognised as binding within the DIFC only. Enforcement of the award within the Emirate of Dubai (but outside the DIFC) is a matter for the Dubai Courts. In particular, Article 7 of the Judicial Authority Law makes it clear that the legislator did not contemplate that there could be circumstances in which recognition of an arbitral award by the DIFC Court could trigger enforcement proceedings through the Dubai Courts and against assets in Dubai (but outside the DIFC) without the need for separate recognition of the award by the Dubai Courts; and *vice versa*.

3. The defendants in *X v Y* referred to the observations of Lord Donaldson in the English Court of Appeal in *Rossell v. Oriental* [1990] 1 WLR 1387 which points to the principle that a court should not permit its enforcement functions to extend to assets that are not situated within its jurisdiction, in particular when it is being used merely as an enforcement agency under a convention or an Act of Parliament to enforce in support of another jurisdiction. The DIFC Court acknowledged that *Rossell* may be relevant when the DIFC Court was considering whether it should make an order for enforcement, but it was not relevant in relation to the question of whether the DIFC Court had jurisdiction to make such an order. Further, there is no requirement in Article 5(A)(1)(e) of the Judicial Authority Law for there to be a connection with the DIFC in order for the DIFC Courts to hear an application for recognition and enforcement of an award.

4. The Court also confirmed that the doctrine of *forum non conveniens* only applies in the DIFC where the alternative court is a foreign court (as opposed to a UAE court), following a line of previous DIFC Court judgments that have considered this same point.<sup>2)</sup>

5. Finally, in *Banyan Tree*, the Court confirmed that the New York Convention is not applicable to the enforcement or recognition of UAE awards in the DIFC as these are considered domestic awards.

## Comment

Based on the language of the Judicial Authority Law and the DIFC Arbitration Law, neither decision is surprising. The law clearly provides that the DIFC Courts have the power and the

jurisdiction to enforce arbitral awards irrespective of the state or jurisdiction of the award and these decisions confirm this. *X v. Y* also confirms that a foreign award can be enforced in the DIFC by the DIFC Courts pursuant to the New York Convention without first having to seek ratification of the award in the Dubai Courts, although again this not surprising given that DIFC law expressly provides that international treaties binding on the UAE should be applied in Dubai.

However, given that both award debtors had assets in Dubai and neither had assets in the DIFC, one must ask the question why the creditors did not seek enforcement directly in Dubai? As both judgments made clear, the DIFC Courts only have jurisdiction to make an order in relation to the DIFC and therefore if the creditors want to get their money they will have to take any DIFC Order to the Dubai Courts. However, if the Claimants succeed in the merits of their enforcement application before the DIFC Courts, the claimants will be able to take a DIFC Court Order for enforcement in Dubai rather than the underlying arbitral awards (albeit the DIFC Court Order will, of course, be in relation to the awards). As set out above, the Judicial Authority Law provides that the Dubai Courts do not have discretion or jurisdiction to review the merits of a DIFC Court judgment or arbitral award and therefore perhaps the claimants are of the view that this process will be relatively quick as opposed to the “usual” process for ratification of awards in the Dubai Courts which can sometimes be time consuming and can (although it should not) involve a review of the merits of the underlying dispute.

Overall, therefore, while it is helpful that the DIFC Courts have confirmed that they have jurisdiction to enforce both domestic and foreign arbitral awards in the DIFC without the award creditors having first to apply to the Dubai Courts, these decisions are unlikely to be the end of this matter. First, they are both only decisions on jurisdiction and therefore the DIFC Court must now turn to the merits of each application (assuming there is no appeal to the jurisdiction decisions), although the fact a creditor does not have assets in a jurisdiction should not in and of itself be a reason to refuse recognition and enforcement. If the creditors get through the merits stage, they will then need to try and take the awards to onshore Dubai via the Dubai Courts. As noted above, the Dubai Courts should not look at the merits of the underlying DIFC Court decision, although it will be interesting to see how the Dubai Courts respond if they form the view that the underlying enforcement application is one that they should have heard in the first place. The *Banyan Tree* and *X v. Y* cases are ones that arbitration practitioners with an interest in Dubai and the DIFC (particularly the interplay between the DIFC and Dubai Courts) should track with interest as they develop.

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## References

?1 Article 42(1) of the DIFC Arbitration Law and Article 24(2) of DIFC Law No. 10 of 2004

*Al Khorafi v. Bank Sarasin-Alpen Ltd* (2011-12) DIFC. C.L.R. 9; *Corinth Piepworks SA v. Barclays*

?2 *Bank plc* (2011-12) DIFC. C.L.R. 6; *Allianz Risk Transfer AG v. Al Ain Ahlia Insurance Co.*, 2013 Unreported.

This entry was posted on Wednesday, June 25th, 2014 at 12:06 am and is filed under [DIFC, Dubai, Enforcement, Recognition and enforcement of arbitral award](#)

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