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DIFC Court of First Instance dismisses application for referral to USC of purported constitutional conflict between UAE Civil Procedures Code and Dubai Judicial Authority Law and DIFC Arbitration Law

Gordon Blanke (Blanke Arbitration LLC) · Wednesday, July 22nd, 2015

By Order of 5 January 2014 (see Case ARB 001/2014 – (1) X1 (2) X2 v. (1) Y, Order of the Dubai Court of First Instance), H.E. Justice Ali Al Madhani, one of the UAE-national resident judges of the DIFC Courts, dismissed an application by an award debtor for an order referring a purported conflict between (i) the UAE Civil Procedures Code (the “CPC”), (ii) DIFC Law No. 12 of 2004 as amended by DIFC Law No. 16 of 2011 (the “Judicial Authority Law”) and (iii) DIFC Law No. 1 of 2008 as amended (the “DIFC Arbitration Law”) in relation to the recognition and enforcement of foreign awards before the DIFC Courts to the Union Supreme Court of the United Arab Emirates, in shorthand the USC, pursuant to Arts 99(3), 121 and 151 of the UAE Constitution. Read together, these Articles empower Emirati courts to refer to the USC questions of constitutionality, including in particular questions concerning compliance of local Emirati and DIFC laws with the UAE Constitution. In addition, Art. 58 of Federal Law No. 10 of 1973 (as amended by Federal Law No. 26 of 1992) relating to the USC, also known as the USC Law, allows the suspension of ongoing proceedings on the merits before the referring court pending a constitutionality investigation by the USC.

In the present proceedings, the issue of constitutionality arose from an application by an award creditor, who had no connection with the DIFC, for an order against an award debtor, a company incorporated and domiciled in mainland Dubai (without any assets in the DIFC), for an order from the DIFC Courts for the recognition and enforcement of a foreign award by virtue of the combined application of Art. 5(A)(1)(e) of the Judicial Authority Law, which confers exclusive jurisdiction on the DIFC Court of First Instance to “*hear and determine [...] any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and Regulations*”, and Arts 42 and 43 of the DIFC Arbitration Law. In the award debtor’s submission, these Articles were not reconcilable with Art. 31(1) CPC, which designated as the proper forum for all civil and commercial actions the court of the defendant’s (here: the award debtor’s) domicile, i.e. the courts of mainland Dubai. The award debtor further argued on the basis of a combined reading of Arts 235 and 236 CPC that enforcement of a foreign award had to follow the usual procedures for bringing a claim before the Dubai courts and more specifically the ratification process envisaged under Art. 215 CPC. This process, in turn, would have to comply with the procedural requirements of domestic civil litigation, including as to service, pleadings, evidence, language of the proceedings and translation of all non-Arabic documents into Arabic, the official language of the

Dubai courts (and the award debtor's native language). According to the award debtor, Arts. 42 and 43 of the DIFC Arbitration Law, which allowed the DIFC Courts to recognise and enforce any award "*irrespective of the State or jurisdiction in which it was made*", violated the basic rule of Art. 31(1) CPC. In addition, Art. 7(3) of the Judicial Authority Law imposed an obligation on the execution judge of the Dubai courts to execute a DIFC order for enforcement of a DIFC ratified award. In this context, so the award debtor, the recognition process before the DIFC Courts should not be mistaken for the domestic ratification process as it prevailed before the Dubai courts. Ultimately, this would lead to DIFC legislation producing effects outside the DIFC contrary to Art. 7(3) of Federal Law No. 8 of 2004, which empowers the Emirates – in pursuit and within the limits of the objective of establishing financial free zones – to issue legislation necessary for the proper functioning and operation of free zones.

In response to the award debtor's application, the award creditor argued that Art. 121 of the UAE Constitution exempted free zones from the application of federal civil and commercial laws otherwise applicable in the UAE and mainland Dubai; in other words, those laws did not find application in the DIFC. Further, by virtue of Art. 1 CPC, the federal civil procedure laws would not apply where an Emirate had retained its local judicial powers, such as for the purposes of creating a financial free zone. In any event, so the award creditor, the domestic ratification rules did not apply to the case at hand given that the present award was a foreign award which required enforcement by reference to any international enforcement instruments that were in place (e.g. the New York Convention, as confirmed by the Dubai Court of Cassation's ruling in Case No. 132/2012 – *Airmec v. Maxtel*, in the terms reported in [my previous blog](#) on the subject-matter) or otherwise or on the basis of reciprocity in application of Arts 235 and 236 read together with Art. 212(4) CPC. We remind in this context that Art. 236 applies *mutatis mutandis* the regime of reciprocal enforcement of foreign court judgments to the enforcement of foreign arbitral awards.

Rendering the decision in the Order, Justice Al Madhani concurred that "*the DIFC regime [was] not exempted from the jurisdiction of the USC when it [came] to the Constitutionality Examination, including the fact that the DIFC Court [was] a UAE Court that [could] refer a matter to the USC if requested to do so, and then [had to] comply with the decision of the USC rendered in that connection.*" (Order, para. 44) In the Justice's view, pursuant to Art. 55 of the USC Law, the DIFC Court had capacity to consider the merits of the application and determine whether the purported conflict of constitutionality fell within the jurisdiction of the USC. In doing so, in reliance on Case No. 1/34 Constitutional of June 2008, the Court "*ha[d] authority to evaluate whether the pleading of non-constitutionality [was] serious or not*" (Order, para. 47) According to the Justice, on the basis of this case law, "*the party pleading a challenge of non-constitutionality of a certain law [had to] plead before the Court to a certain level of seriousness, and that [...] should be the same level as would be pleaded before the USC [...] and] the judge considering the challenge would have to be convinced to the same level as the USC.*" (Order, para. 48)

Turning to the prospects of the constitutionality examination in the present case, Justice Madhani found as follows:

- (i) Given that by virtue of Art. 3(2) of Federal Law No. 8 of 2004, the rules of the CPC were not applicable in the DIFC, "*there [could] be no conflict between an applicable rule and an inapplicable one*" (Order, para. 51).
- (ii) "*[...] it [was] public policy in the whole of the UAE not to apply the CPC within*

the DIFC [...] [thus] there [were] no conflicts as long as the said Dubai and DIFC laws appl[ie]d within the Centre (DIFC)” (Order, para. 53).

(iii) *“[...] if the outcome of the DIFC Courts proceedings would result in conflict with the law or public policy of other or foreign courts’ jurisdiction (or [was] expected to in any way) then it [was] for that Court according to its rules to decide whether to enforce the decision of the DIFC Court or not for legitimate reason” (Order, para. 55).*

In his findings, Justice Madhani cited with approval the DIFC Courts’ ruling in Case ARB 002/2013, in which Deputy Chief Justice Sir John Chadwick had held that it was clear from Art. 7 of the Judicial Authority Law that the legislator did envisage circumstances in which *“recognition of a foreign arbitral award by the DIFC Court could trigger enforcement proceedings, through the Dubai Courts, against assets in the Emirate of Dubai (but outside the DIFC) without the need for separate recognition of the award by the Courts of Dubai; and vice versa.”* (Order, para. 57) According to Justice Madhani, *“[the] Dubai Courts [were] still free to have their say should a dispute or challenge similar to the one at hand be raised before them”* (Order, para. 58). Justice Madhani further found that a stay of the DIFC Court proceedings pending a potential constitutionality examination before the USC *“would [...] affect the [award creditor’s] right to the recognition and enforcement of any assets of the [award debtor] which might be eventually found within the DIFC.”* (Order, para. 60) Against this background, the Justice concluded that the award debtor had failed to establish that there was any constitutional conflict between the referred laws that merited referral to the USC for determination.

The present case brings to mind the DIFC Court of First Instance’s ruling in Case ARB 002/2013 – (1) X1, (2) X2 v. (1) Y1, (2) Y2, in which Chief Justice Sir John Chadwick confirmed the DIFC Courts’ jurisdiction to recognise and enforce foreign arbitral awards even absent any assets of the award debtor in the DIFC (for contemporaneous reporting, see [my previous blog](#)). That case remained unappealed at the time and therefore became final and binding even without being heard on appeal. The present dismissal by Justice Madhani of the award debtor’s application for referral of the purported constitutional conflict to the USC remains aligned with Sir David’s previous findings in ARB 002/2013. Essentially, all DIFC judges – whether of national civil law or foreign common law origin – appear to be agreed that Art. 7 of the Judicial Authority Law operates as a regime of mutual recognition between the members of the Dubai family of courts, which comprises both the courts of mainland Dubai and those of the DIFC. The purported issue of constitutionality is a non-issue given the close constitutional alignment between the mainland Dubai and DIFC Courts. The DIFC Courts being a creation of the Ruler of Dubai within the framework of the powers accorded to each Emirate by virtue of the federal legislation on the establishment of free zones and free zones within that meaning enjoying their own independent legislative and judicial powers by way of express carve-out from the UAE Constitution, there can hardly be a good argument for unconstitutionality of the mutual recognition regime in place between the Dubai and DIFC Courts under Art. 7 of the Judicial Authority Law. To the contrary, this regime is built on the mutual trust between two sets of courts of the same family of courts, in recognition of which it does not even allow for a review on the merits, not to mention a public policy review on part of the execution judge of the enforcing court. The DIFC Courts have been established to offer an additional procedural choice to litigants who wish to resolve disputes in the Emirate of Dubai. Choice of the DIFC as the preferred forum for the resolution of disputes is as constitutional as recourse to the Dubai courts given that the DIFC Courts form an integral part of the Dubai judicial

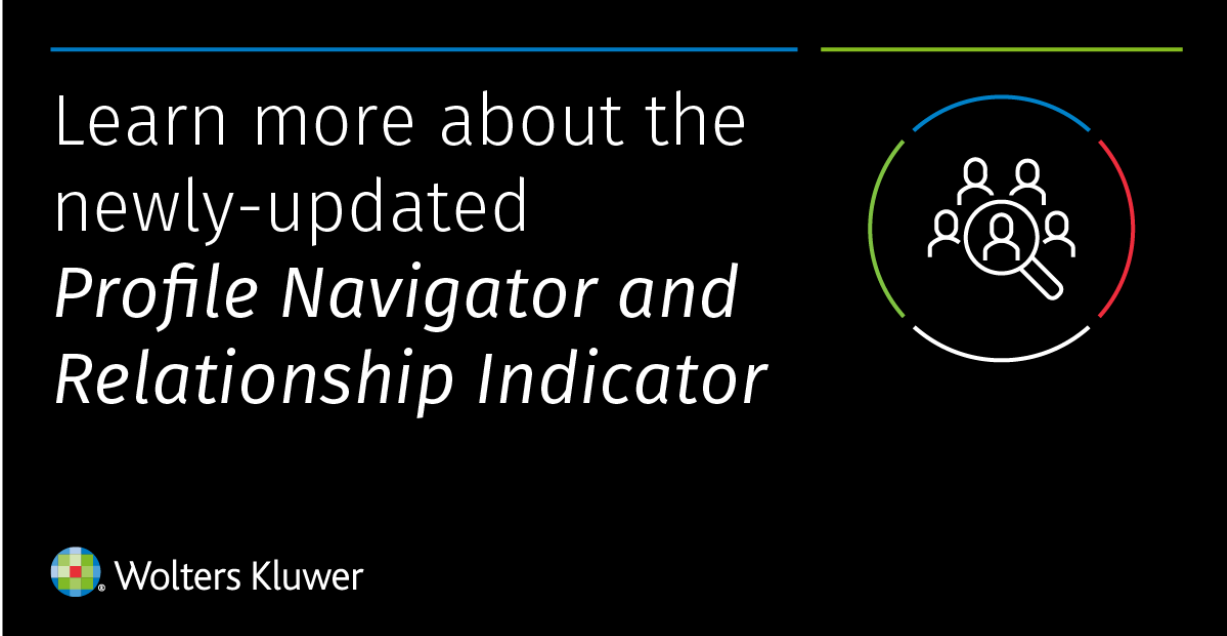
system. In the round, it is encouraging to see that the DIFC Courts stand firm in the rejection of any constitutional concerns that award debtors raise in relation to the proper jurisdictional competences of the DIFC Courts. To be sure, with the passage of time, the intended role of the DIFC Courts and their proper interaction with the Dubai courts will become better known through litigious practice and as such increasingly acceptable as an alternative form of mainstream dispute resolution within the Emirate of Dubai and the wider UAE.

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