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Arbitration Awards in On-Shore Dubai
By Mischa Balen

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Using the DIFC’s Off-Shore Jurisdiction to Enforce Arbitration Awards in On-Shore Dubai

Mischa Balen

1. Introduction

The Dubai International Financial Centre (DIFC) is an independent, common law jurisdiction separate from the rest of Dubai which is governed by a Civil Code. The DIFC is a financial free zone and is referred to herein as “off-shore”, in contrast to mainland “on-shore” Dubai: to borrow a colourful local phrase, the DIFC is “a common law island floating in a civil law sea”. An award creditor seeking to enforce an arbitration award against assets located in on-shore Dubai as opposed to enforcing an award against assets located in the off-shore DIFC will need to rely on the local Dubai courts for enforcement.

The distinction between on-shore and off-shore enforcement proceedings is important because the Dubai courts may refuse to enforce an on-shore arbitration award on a number of grounds, including on the basis that there has been a procedural irregularity in the substantial arbitration proceedings themselves. The procedure and the relevant grounds are set out in arts 203–218 of the UAE Civil Procedure Code (CPC). One of the better-known cases in which the Dubai courts declined to enforce an on-shore arbitral award was the decision in *International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai*.¹ The arbitrator’s failure to swear witnesses in accordance with UAE law was held to be an “invalidity ... in the ruling or in the procedures” justifying a refusal to enforce.

If the award debtor has assets within the jurisdiction of the DIFC the award creditor can pursue enforcement proceedings in the DIFC courts. If the award debtor has assets in off-shore Dubai the award creditor can seek recognition of its award in the DIFC courts followed by enforcement in the local Dubai courts. Article 42(1) of the DIFC Arbitration Law 2008 provides in part that:

“An arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognised as binding within the DIFC and, upon application in writing to the DIFC Court, shall be enforced subject to the provisions of this Article and of Articles 43 and 44.”

Articles 43 and 44 set out a similar regime to the New York Convention in respect of arbitration awards for which recognition is sought in the DIFC, with limited grounds on which the debtor is entitled to resist recognition, including if the DIFC court finds that “the enforcement of the award would be contrary to the public policy of the UAE” (art.44(1)(b)).

An arbitral award recognised by the DIFC court can (subject to certain procedural formalities) be enforced in the local Dubai courts without further review. In particular, art.7(3) of the Judicial Authority Law (JAL) provides that the local courts do not enjoy jurisdiction to review the merits of any judgment, award or order of the DIFC courts. The DIFC courts Enforcement Department statistics state that, as of July 2014, there were 61 enforcement actions between the DIFC and local Dubai courts between 2008 and 2014, all of which were successful.² The procedure for enforcing off-shore arbitral awards is therefore well established and relatively straightforward.

¹ *International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai*, Civil Cassation Appeal No.322/3004 11 April 2005. The arbitration was seated at the Dubai Chamber of Commerce and Industry.

² H. Quinlan, S. Stevens and N. Roberts, “Enforcing arbitration awards in the UAE”, Practical Law Company Practice Note.

This article asks whether an award creditor can adopt the same “creditor-friendly” off-shore arbitral award enforcement process in order to enforce an on-shore arbitral award against assets held in on-shore Dubai, rather than having to follow the Dubai courts’ ratification process as set out in the CPC. In other words, can an award creditor in an on-shore arbitral award apply for recognition of their award in the DIFC courts and then take advantage of art.7 of the JAL to enforce judgment through the local Dubai courts, “thus circumventing the ratification process in the Dubai courts”?³ This is particularly advantageous to award-creditors because of the cumbersome procedural requirements of domestic civil litigation: “directing the enforcement process through the DIFC courts is commonly believed to forestall any of the residual procedural uncertainties that enforcement before the mainland Dubai courts may entail”,⁴ not to mention anecdotal evidence concerning the languid movement of cases seized by the local Dubai courts.

2. Recognition of On-Shore Arbitral Awards in the DIFC Courts

The decision which first raised the possibility of an award creditor adopting this course of action was *Banyan Tree Corporate Pte Ltd v Meydan Group LLC*⁵ in which Sir David Steel held that the DIFC court enjoyed jurisdiction to recognise and enforce an on-shore arbitration award even though the parties did not have any geographical connection with the DIFC and the debtor did not have any assets within the DIFC’s jurisdiction against which enforcement could be made. As set out above, art.42 of the DIFC Arbitration Law 2008 “imposes an obligation on the DIFC court to recognise and to enforce an award irrespective of the state or jurisdiction in which it was made”, subject to the limited grounds for refusal set out in art.44.

Further colour was given to the decision in *Banyan* by the DIFC Court of First Instance in *XX (1) X1 (2) X2 v (1) Y1 (2) Y2*.⁶ Colman J granted recognition and leave to enforce a London-seated arbitral award notwithstanding the award debtor’s submission that the absence of any geographical nexus with the DIFC meant enforcement would be contrary to public policy, specifically

“the choice by the arbitration creditor of a ‘port of entry’ into UAE which provided for a route to execution by way of consideration by the DIFC court of the matters covered by Article V of the New York Convention rather than route to execution by way of a non-DIFC Dubai Court applying the CPC procedure in relation to the same Article V matters,”

which meant that “The applicable procedure would thus not be that of the arbitration debtor’s place of residence or, in the case of a company, of domicile”. The effect of the award creditor’s choice was to deprive the award debtor of a number of specific procedural benefits which would have been available to it in the local Dubai courts, including the application of UAE and Dubai rules of evidence and conduct of the proceedings in Arabic.⁷

Colman J held that the public policy objection was not grounded 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” but was instead “founded on an allegation of

³ S. Tannous and S. Bono, “United Arab Emirates” in International Comparative Legal Guides, *International Arbitration 2015*, <http://www.iclg.co.uk/practice-areas/international-arbitration/international-arbitration-2015/united-arab-emirates> [Accessed 24 June 2016].

⁴ G. Blanke, “Enforcement of foreign judgments v. enforcement of foreign awards: The limits of the DIFC Courts’ role as a host jurisdiction,” *Kluwer Arbitration Blog*, 10 August 2015, <http://kluwerarbitrationblog.com/2015/08/10/enforcement-of-foreign-judgments-v-enforcement-of-foreign-awards-the-limits-of-the-difc-courts-role-as-a-host-jurisdiction/> [Accessed 12 July 2016].

⁵ *Banyan Tree Corporate Pte Ltd v Meydan Group LLC* Case ARB 003/2013 judgment 2 April 2015, <http://difccourts.ae/arb-0032013-banyan-tree-corporate-pte-ltd-v-meydan-group-llc-4/> [Accessed 20 June 2016].

⁶ *XX (1) X1 (2) X2 v (1) Y1 (2) Y2* judgment 29 July 2015, <http://difccourts.ae/xx-1-x1-2-x2-v-1-y1-2-y2/> [Accessed 24 June 2016].

⁷ *XX (1) X1 (2) X2* judgment 29 July 2015 at [45].

impermissible use by the arbitration creditor of available recognition and enforcement procedure in respect of a pre-existing award". This was

“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.”

Colman J held that arts 42(1) and 43(1) of the DIFC Arbitration Law 2008 obliged the DIFC courts to recognise foreign awards. Once recognition had been obtained the claimant could enforce the order in the local Dubai courts pursuant to art.7(3) of the JAL without further review: “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.”

Importantly for present purposes, Colman J explained the constitutional framework which delineated the relationship between the DIFC courts and the Dubai courts:

“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.”(Emphasis added.)

Nor was it contrary to UAE public policy (and thus art.44(1)(b) of the Arbitration Law 2008) to enforce the award “in adopting the course of recognition which they did the Claimants were doing no more than the enacted procedure of the Emirate permitted”. It was not necessary for the defendant to have assets in the jurisdiction in question (i.e. the DIFC): the DIFC Arbitration Law 2008 applied in the DIFC to the exclusion of arts 203–218 of the CPC and was legitimately open to the award creditor as a means of recovering the debt.

Although the decision concerned a foreign arbitral award it follows from Colman J's explanation of the constitutional relationship between the DIFC courts and the Dubai courts and the regime of “free movement of judgments” that an award creditor under an on-shore arbitration should be entitled to secure the recognition of their award through the DIFC courts (even in the absence of a geographical nexus with the DIFC's jurisdiction) and should as a consequence be able to enforce their award in the Dubai courts through art.7 of the JAL rather than having to rely on the relevant provisions of the CPC.

This is supported by a further decision of the DIFC courts including first, *A v B*.⁸ In *A v B*, Sir David Steel considered an application for a declaration by an award debtor that the DIFC courts lacked jurisdiction to hear an application for recognition and enforcement (in case there were any assets within the DIFC's jurisdiction) of an award produced by the Dubai International Arbitration Centre (DIAC), i.e. an on-shore arbitral award. Sir David Steel dismissed the application and confirmed the DIFC courts' jurisdiction to hear applications for the recognition and enforcement of awards rendered in mainland Dubai

⁸ *A v B* Case ARB 002/2014, judgment 22 January 2015, <http://difccourts.ae/arb-0022014-a-v-b/> [Accessed 24 June 2016].

without any geographical link to the DIFC itself. He explained that the DIFC courts and Dubai courts had separate but complementary jurisdictions. That being so, applications could legitimately be made to both courts and “no question of forum shopping arises”. He cited his previous decision in *Banyan Tree Corporate Pte Ltd v Meydan Group LLC*.⁹ These cases accordingly support the use of the DIFC’s off-shore jurisdiction to enforce awards in on-shore Dubai.

What remains to be seen, however, is how the local Dubai courts would react when faced with arbitration enforcement proceedings under art.7 of the JAL in respect of an on-shore arbitral award recognised by the DIFC courts. Article 7 of the JAL does not include a public policy exception to enforcement so it is difficult to see how the Dubai courts could rely on public policy to refuse enforcement of a DIFC-recognised award in respect of an on-shore arbitration, even if it were a naked attempt to circumvent the local Dubai courts’ ratification process. In any case, according at least to the DIFC courts, it is not contrary to public policy to apply for the recognition of either a foreign arbitral award or an on-shore arbitral award in the DIFC courts through the mechanism provided in arts 42 and 43 of the DIFC Arbitration Law.

This raises the prospect that the Dubai courts may consider the constitutionality of those provisions which enable award creditors to circumvent arts 202–218 of the CPC. In *(1) X1 (2) X2 v (1) Y*,¹⁰ the defendant (who was domiciled in on-shore Dubai) resisted the recognition and enforcement of a foreign arbitral award in the DIFC court by requesting a reference to the Union Supreme Court of the UAE, citing a conflict between arts 42 and 43 of the DIFC Arbitration Law and art.31(1) of the CPC, which designates the proper forum for all civil and commercial actions as the court of the defendant’s domicile (in this case, on-shore Dubai). This argument was rejected. Madhani J reasoned that it was the UAE’s public policy not to apply the CPC within the DIFC and that the purported constitutional conflict did not in fact exist, noting the consequence that

“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”.

This logic applies equally to on-shore arbitration awards. As Gordon Blanke has commented:

“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”.¹¹

Madhani J also noted however that

“if the outcome of the DIFC Courts’ proceedings would result in conflict with the law or public policy of other or foreign courts’ jurisdiction ... 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.”

The local Dubai courts were “free to have their say should a dispute or challenge similar to the one at hand be raised before them”. Questions of constitutionality are questions of

⁹ *Banyan Tree Case ARB 003/2013 judgment 2 April 2015.*

¹⁰ *XX (1) X1 (2) X2 judgment 29 July 2015.*

¹¹ G. Blanke, “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,” *Kluwer Arbitration Blog*, 22 July 2015, <http://kluwerarbitrationblog.com/2015/07/22/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/> [Accessed 12 July 2016].

UAE law for the local Dubai courts and Union Supreme Court, and there is a residual risk that the Dubai courts would approach a judgment of the DIFC court in respect of an award in a UAE-seated arbitration outside the DIFC less favourably than they would a judgment of the DIFC court in respect of an award in a DIFC-seated arbitration, perhaps because they may view it as an illegitimate attempt to oust the provisions of arts 202–218 of the CPC, though the grounds (if any) on which they would refuse enforcement remain to be seen.

The next section of this article sets out the impact which these developments may have on the recognition of foreign arbitral awards in the DIFC courts.

3. Recognition of Foreign Arbitral Awards in the DIFC Courts

The UAE acceded without reservation to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) on 21 August 2006. As pre-figured above the grounds upon which enforcement of an arbitration award made in another New York Convention country can be refused are limited (they are set out in art.V). Like the DIFC Arbitration Law 2008 the New York Convention is pro-enforcement and this was, at least initially, reflected in on-shore Dubai. Thus, in *Macsteel International v Airmech (Dubai) LLC*,¹² the Dubai Court of Cassation enforced a DIFC-LCIA arbitration seated in London under the New York Convention, holding that the CPC should be applied only to awards rendered in the UAE, not to foreign awards. Although there is no system of precedent in the UAE it was hoped that subsequent decisions would follow this decision and have regard only to the grounds in the New York Convention for refusing to enforce a foreign arbitral award.

The decision in *CCI v Ministry of Irrigation of the Democratic Republic of the Sudan*¹³ dented those hopes. The Court of Cassation refused to enforce an award under the New York Convention on the basis that foreign awards should be enforced “in accordance with the rules of the procedure of the territory where the award is relied upon” (art.III). The Court of Cassation held that it did not have the necessary jurisdiction pursuant to art.21 of the CPC, which confers jurisdiction upon the UAE courts to hear actions against a foreign entity which does not have a domicile or a place of residence in the UAE if: (a) it has an elected address in the UAE; or (b) the action relates to an obligation entered into or performed or that is stipulated to be performed in the UAE or to a contract intended to be authenticated therein. The decision has been criticised. Paterson and McClure¹⁴ comment that the facts were unusual, featuring an award debtor who “was not resident in the UAE in respect of a contract that was entered into and performed outside of the UAE”. They also speculate that the Court of Cassation may have been reluctant “to be the court to finally enforce an award that has failed to be enforced in several jurisdictions over the last two decades”. The decision is therefore “generally considered an outlier by practitioners”.¹⁵

More recently, in *Al Reyami Group LLC v BTI Befestigungstechnik GmbH & Co KG*,¹⁶ in which a German award creditor sought to enforce its award in the Dubai courts through the New York Convention, the Court of Cassation rejected the defendant’s procedural objections and enforced the award. The decision indicates “a positive shift for the enforcement regime in the UAE and particularly for claimants who are seeking to enforce

¹² *Macsteel International v Airmech (Dubai) LLC* Civil Cassation Appeal No.132/2012.

¹³ *CCI v Ministry of Irrigation of the Democratic Republic of the Sudan* Civil Cassation Appeal No.156/2013.

¹⁴ S. Paterson and M. McClure, “Enforcement of foreign arbitral awards in Dubai: a set back?” (2013) *Lexology* 23 October.

¹⁵ J. Stadwick, “The Birth of a New UAE Federal Arbitration Law: A Long and Difficult Labour”, *Kluwer Arbitration Blog*, 22 August 2014, <http://kluwerarbitrationblog.com/2014/08/22/the-birth-of-a-new-uae-federal-arbitration-law-a-long-and-difficult-labour/> [Accessed 12 July 2016].

¹⁶ *Al Reyami Group LLC v BTI Befestigungstechnik GmbH & Co KG* Civil Cassation Appeal No.434/2014, judgment 23 November 2014.

foreign arbitral awards in the UAE”.¹⁷ It arguably signals a retreat from the decision in *CCI v Ministry of Irrigation of the Democratic Republic of the Sudan*.¹⁸

There remains a risk however that the Dubai courts would apply their own procedural rules in preference to the enforcement mechanism prescribed by the New York Convention, particularly where neither of the parties has a geographical nexus with Dubai. The decisions of the DIFC courts in *Banyan, XX (1) X1 (2) X2 v (1) Y1 (2) Y2* and *A v B*, discussed above,¹⁹ suggest that it ought to be possible to circumvent that risk by obtaining recognition in the DIFC courts before seeking enforcement in the local Dubai courts. There is even the theoretical possibility of an award creditor seeking to enforce a foreign award from a non-signatory to the New York Convention in this manner: art.44 of the DIFC Arbitration Law 2008 provides for the enforcement of arbitral awards “irrespective of the State or jurisdiction in which [they were] made”, though it may well be contrary to UAE public policy to recognise a foreign arbitral award from a non-New York Convention state.

To the extent that there is any residual risk that the Dubai courts would react unpredictably to an award creditor seeking recognition of a foreign arbitral award in the DIFC courts followed by enforcement in the local Dubai courts, it can of course be minimised by seating the arbitration in the DIFC courts in the first instance (because the Dubai courts will then be bound to apply art.7 of the JAL and the DIFC Courts Enforcement Department 2014 statistics (set out above) suggest they are comfortable with this process).²⁰

4. Conclusion

Subject to the unresolved question of constitutionality, it appears that an award creditor in an on-shore arbitral award can apply for recognition of their award in the DIFC courts, and can therefore take advantage of art.7 of the JAL to enforce judgment through the local Dubai courts. By the same logic, it may equally be possible for an award creditor to seek recognition of a foreign arbitral award in the DIFC courts, followed by enforcement in the local Dubai courts. If the local Dubai courts uphold these strategies then the two-stage process contemplated in this article could become attractive for award creditors whose debtors hold assets in on-shore Dubai.

¹⁷ S. Tannous and S. Bono, “United Arab Emirates” in International Comparative Legal Guides, *International Arbitration 2015*, <http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2015/united-arab-emirates> [Accessed 24 June 2016].

¹⁸ *CCI v Ministry of Irrigation of the Democratic Republic of the Sudan* Civil Cassation Appeal No.156/2013.

¹⁹ *Banyan Tree* Case ARB 003/2013 judgment 2 April 2015; *XX (1) X1 (2) X2* judgment 29 July 2015; and *A v B* Case ARB 002/2014 judgment 22 January 2015.

²⁰ See H. Quinlan, S. Stevens and N. Roberts, “Enforcing arbitration awards in the UAE”, Practical Law Company Practice Note.

