THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

DNB BANK ASA

Claimant

and

(1)GULF EYADAH CORPORATION

(2)GULF NAVIGATION HOLDING PJSC

Defendants

ORDER OF JUSTICE SIR RICHARD FIELD

UPON reviewing the Appeal Notices of the Claimant and the Defendants dated 15 July 2015 and 21 July 2015, respectively, and the supporting documents seeking permission to appeal against the Judgment of H.E. Justice Ali Al Madhani dated 2 July 2015

AND UPON reviewing the Claimant's and Defendants' skeleton arguments in support of their separate applications for permission to appeal

AND UPON reading the relevant material in the case file

AND IN ACCORDANCE WITH Part 44 of the Rules of the DIFC Courts ("RDC")

IT IS HEREBY ORDERED THAT:

1. The Claimant be granted permission to appeal the said ruling of H.E. Justice Ali Al Madhani.

2. The Defendants be granted permission to appeal the said ruling of H.E. Justice Ali Al Madhani.

3. In accordance with RDC 44.14, the reasons for the making of this Order are set out in the Schedule of Reasons attached to this Order.

SCHEDULE OF REASONS

Introduction

1. Both the Claimant and the Defendants have applied for permission to appeal different aspects of the judgment of H.E. Justice Ali Al Madhani issued on 2 July 2015 dismissing the Defendants' challenge to the jurisdiction of the DIFC Courts to determine the Claimant's claim for recognition and enforcement of a judgment in the Claimant's favour against the Defendants made by Mr Justice Cooke in the Commercial Court of England and Wales on 30 September 2014 ("the English order").

2. The English order was made on a claim for monies due under a number of financial agreements made between the Claimant and the First Defendant, with the Second Defendant contracting as a guarantor. The sums therein ordered to be paid by the Defendants to the Claimant were USD 8,730,236.09 and GBP 8,281.84.

3. The principal legal bases on which the Claimant's claim for the recognition and enforcement of the Cooke J order was advanced were: (i) Article 7 (6) of the judicial authority law No. 12 of 2004; and (ii) Article 24 (1) of the DIFC Courts Law No. 10 of 2004.

4. The Defendants' jurisdiction challenge was advanced on the following grounds: (i) the inapplicability of any of the jurisdiction gateways contained in Article 5 of the Judicial Authority Law No. 12 of 2004 both as a matter of construction and because there is no legal basis for the grant of jurisdiction to recognise and enforce the English order; (ii) the inapplicability of Article 7 (6) since there is no enactment satisfying the requirement of RDC Rule 45.8 that, "an enactment provides that the award may be enforced as if payable under a DIFC Courts order"; (iii) to the extent that reliance might be placed on it by the Claimants, the decisions in *Banyan Tree Corporate PTE Ltd v Meydan Group LLC* were inapplicable since what was at issue there was the enforcement of an arbitration award and not a judicial order; and (iv) to the extent that the Claimants might rely on the Memorandum of Guidance between the DIFC Courts and the English Commercial Court, this was a non-binding document and did not found jurisdiction for the Claimant's claim.

5. The Defendants also relied on the following abuse of process grounds: (i) the Claimant was seeking to circumvent the requirement of filing an application for recognition and enforcement before the non-DIFC Dubai courts and, there being no assets of the Defendants in the DIFC and no prospect that there ever would be, the Claimant was proposing to use the DIFC Courts as a jurisdictional conduit into the other jurisdictions within the UAE; and (ii) alternatively to (i), in any event, the DIFC Courts could not be a conduit jurisdiction where the original foreign judgment has no link at all with the UAE.

6.Additonally, the Defendants applied pursuant to RDC Rule 35.4 (3) to have the Claimant's claim heard in private and/or for their details to be anonymised. This application was dismissed by the judge and there is no appeal from that decision.

7.E. Justice Ali Al Madhani dismissed the jurisdiction grounds advanced by the Defendants although he agreed that if the sole basis of jurisdiction were founded on the *Banyan Tree* case, that case would be distinguishable because it was concerned with an arbitration award rather than a foreign court order. The learned judge also implicitly rejected the first abuse of process submission in holding that the DIFC Courts had jurisdiction by virtue of Article 7 (4) of the Judicial Law to recognise the English order even though the Defendants had no assets within the DIFC.

8.However, when dealing with the Defendants' alternative abuse of process submission, H.E. Justice Ali Al Mahdani expressed the view that the contentions of both sides on this issue were misconceived and proceeded to reject the alternative submission for reasons not advanced by the parties. Paragraphs 44 - 52 of his reasons read as follows:

> "44. It is my view that both Parties' arguments in this regard are misconceived. Unlike the situation in cases where an Arbitral Award is brought for recognition and then for enforcement, Recognised Foreign Judgments or Orders by the DIFC Courts cannot be said to be referred to the Dubai Courts for execution beyond the DIFC jurisdiction.
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> 45.Article 7 (2) of the Judicial Authority Law No. 12 of 2004 as amended by Law No. 16 of 2011 provides that:
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> > "Where the subject matter of execution is situated outside the DIFC, the judgments, decisions and orders rendered by the Courts and the Arbitral Awards ratified by the Courts shall be executed by the competent entity having jurisdiction outside the DIFC in accordance with the procedure and rules adopted by such entities in this regard, as well as with any agreements or memoranda of understanding between the Courts and these entities. Such execution shall be subject to the following conditions."
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> 46.In this Article there is reference to judgments, decisions and orders rendered by the DIFC Courts and the Arbitral Awards ratified by the DIFC Courts to be referred for execution but no reference at all to any foreign judgment recognised by the DIFC Courts. The Article has excluded Recognised Foreign Judgments from that rule. This is not a mistake, because Articles 7(4) and 7(5) of the said law stated that Dubai Court decisions and Arbitral Awards ratified by the Dubai Courts could be brought for execution in the DIFC but not Foreign Courts Judgments recognised by Dubai Courts.
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> 47.Recognised Foreign Judgments were only mentioned in Article 7 (6) as amended:
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> > "The judgments, decisions, orders and ratified Arbitral Awards rendered outside DIFC by any court other than Dubai Courts shall be executed within DIFC in accordance with the procedure prescribed in the Rules of the Courts."
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> 48.In my view, the meaning of Article 7 of the Judicial Authority Law No. 12 of 2004 as amended by Law No. 16 of 2011 along with Article 24(1) of the Court Law in regards to Foreign Court Judgments is that although this Court may execute judgments, decisions and orders rendered by any Recognised Court other than Dubai Courts, that execution shall not go beyond the jurisdiction of this Court which requires this Court not to refer Recognised Foreign Judgments to the Dubai Courts for execution and vice versa.

49.This would surely lead me to say that this Court cannot be said to be a *"conduit jurisdiction Court"* if the matter before it is related to a Foreign Court Judgment. There shall be no contradiction between my finding and the finding in the ***Banyan Tree*** case and ***XX v YY,*** since these cases involved Ratified Arbitration Awards that were said to be able to be sent for execution between the DIFC Courts and the Dubai Courts according to Article 7(3) (4) and (5). For these reasons one cannot imagine that the DIFC Courts are obliged to enforce foreign court judgments in the same way they are obliged to enforce Foreign Arbitration Awards (XX v YY) or even domestic arbitration awards ***(Banyan Tree).***

> *50.*One might argue that Foreign Judgments or Orders recognized by the DIFC Courts come under the meaning of *"the judgments, decisions and orders rendered by the Courts"* in Article 7(2) and therefore can be referred to the Dubai Courts for execution. In my view it does not, and if that were the correct approach there would be no need to particularly mention or add *"Arbitral Awards ratified by the Courts"* in separate words in that provision. The acknowledgement of the "*Arbitral Awards ratified by the Courts"* means that a distinction must be drawn to what this Court issues or renders *(judgments, decisions and orders)* by itself and between what is rendered or issued by another court or institution and then brought for recognition or ratification.
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> 51.My interpretation of Article 7 is that a Recognised Foreign Court Judgment or Ratified Arbitral Award cannot be said to be within the meaning of *"the judgments, decisions and orders rendered by the Courts"*.
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> *52.*In conclusion, although this Court has jurisdiction to recognise and enforce Foreign Judgments and that power shall be within the DIFC and cannot extend beyond the DIFC, this Court has no power to refer Recognised Foreign Judgments to Dubai Courts for execution. Thus, the argument of abuse of process is without merit and therefore I dismiss it."

The Claimant's application for permission to appeal

9.E. Justice Ali Al Madhani's conclusion in paragraph 52 of his ruling has a profound negative consequence for the Claimant because, given the absence of any assets of the Defendants in the DIFC, it has throughout been its desire to enforce the English order in the Courts of Dubai or elsewhere in the UAE on the basis that the DIFC Courts is a jurisdictional conduit into the jurisdictions of those courts.

10.However, notwithstanding the learned judge's conclusion expressed in paragraph 52, the Claimant ended up as the successful party on the Defendants' jurisdiction challenge. Thus, the order made consequent on the learned judge's ruling was:

> (1) Defendants' application to contest jurisdiction is dismissed.
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> (2) Costs shall be paid to the Claimant by the Defendant on the Standard Basis the amount of which shall be assessed, if not agreed, by the Registrar.

11.	This means that, in accordance with Rule 44.8 of the RDC, to be granted permission to appeal the Claimant must satisfy the Court that:

> **(A)**	it has a real prospect of success in establishing that: (1) the Court of Appeal would have jurisdiction to hear the proposed appeal by the Claimant notwithstanding that the Defendants' jurisdiction challenge was dismissed; **and** (2) if the Court of Appeal does have the necessary jurisdiction, that the proposed grounds of appeal have a real prospect of success; or
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> **(B)**	there is some other compelling reason why the proposed appeal should be heard.

12.	A "real prospect of success" means a "realistic" as opposed to a "fanciful" prospect of success, see *Swain v Hillman* [2001] 1 All ER 91, followed and applied in *Khorafi et al v Bank Sarasin-Alpen (ME) Limited CFI-026-2009.*

13.	Article 26 (1) of the DIFC Courts Law (Law 10 of 2004) provides:

> "The Court of Appeal has jurisdiction, pursuant to Article 5(B) of the Judicial Authority Law, to hear and determine appeals filed against judgments and awards made by the Court of First Instance."

14.	Article 5(B) of the Judicial Authority Law provides:

> "The Court of Appeal shall have exclusive jurisdiction to hear and determine (a) appeals filed against judgments and decisions made by the Court of First Instance."

15.	Whether H.E. Justice Ali Al Madhani's conclusion in paragraph 52 of his ruling is a judgment or decision of the CFI notwithstanding that it does not feature in the order made consequent on his judgment depends on how his judgment is to be analysed, see paragraph 27 of the judgment of Waller LJ in *Compagnie Noga D'Importation Et D'Exportation SA v Australia & New Zealand Banking Group Ltd & Ors* [2002] EWCA Civ 1142. In my judgment, the Claimant's contention that the Court of Appeal would have jurisdiction to hear an appeal from the learned judge's conclusion in paragraph 52, in particular because an estopppel might arise from that conclusion, has a sufficient prospect of success for the Court to grant permission for this point to be taken on appeal.

16.	I turn to consider whether the Claimant's proposed grounds of appeal (apart from the appellate jurisdiction question) have a real prospect of success.

17.	The Claimant argues that the learned judge erred in concluding that the DIFC Courts have no power to refer Recognised Foreign Judgments to Dubai Courts because he took no account of the fact that a judgment issued by the DIFC Courts on recognition and enforcement of a foreign judgment is itself a money judgment which would not be a foreign but a domestic judgment and would thus fall within the wording of Article 7(2) of the Judicial Authority Law.

18.	The Claimant submits that when recognising a foreign judgment, common law courts recognise the existence of an enforceable legal obligation which derives from that judgment, so that, where a claim for recognition and enforcement succeeds, the judgment creditor obtains a judgment of the recognising court in his favour. Therefore, in the DIFC Courts context, when seeking execution, the judgment creditor is seeking execution of a DIFC judgment, not the foreign judgment.

19.	Thus, in England there is no barrier to recognition of a foreign judgment which itself enforces a judgment, see e.g. *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2011] 2 Lloyds's Rep. 443, a decision of Hamblen J in the English Commercial Court where a Dutch judgment in respect of a claim for the enforcement of a Russian arbitration award was held to give rise to an issue estoppel in English proceedings. The Claimant also cites, inter alia, the statements in *Enforcement of Foreign Judgments* by Garb and Lew that judgments based on foreign judgments are enforceable in a wide range of common law jurisdictions, including Australia, Canada (British Columbia and Ontario), Cayman Islands, India, Malaysia, Pakistan and South Africa.

20.	As to the observation of H.E. Justice Ali Al Madhani that if recognised foreign judgments counted as "judgments. rendered by the DIFC Courts", there would be no need to include ratified foreign awards within the wording of Art 7(2), the Claimant submits that this view overlooks the distinction between recognition of awards on the one hand and enforcement of awards on the other. Recognition of a foreign award does not of itself give rise to a judgment in the terms of the award. For that, the applicant must seek enforcement of the foreign award by obtaining a judgment in terms of the award, see RDC 43.75. However, that remedy is discretionary (see eg *Honeywell v Meydan* [2014] BLR 599) and thus there may be situations in which a foreign award has been recognised, but there is no DIFC Courts judgment in the terms of the award, either because the claimant has not sought such a judgment or it has been sought but the Court has refused the application.

21.	It follows that recognised foreign awards are referred to in Article 7(2) because they would otherwise not be enforceable; and enforced foreign awards (that is awards in respect of which a DIFC Courts judgment has been entered) are not so referred to, for once foreign awards have been enforced by entry of a judgment in their terms, they become judgments of the DIFC Courts and so are already enforceable under Article 7(2). Similarly, there is no reference in Article 7(2) to foreign judgments because once they are recognised and enforced by action on the judgment, the Court issues a DIFC Courts judgment, which is itself enforceable under Article 7(2).

22.	In my judgment, these submissions are seriously arguable and have a real prospect of success for the purposes of RDC 44.8. Accordingly, I grant the Claimant permission to appeal the finding of the learned judge in paragraph 52 of his judgment and the associated findings and reasoning in paragraphs 44 to 52.

The Defendants' application for permission to appeal

23. H.E. Justice Ali Al Madhani concluded his judgment thus:

> 61. "Having lost the 3 parts of this application, the Defendants are to bear the costs of this application on a standard basis to be assessed by the Registrar if not agreed."

24.	The Defendants seek permission to appeal this award of costs against them. They advance two principal grounds of appeal. First, they submit that they are the victims of substantial unfairness and injustice because they were given no opportunity to argue what order for costs the learned judge should make. Second, they contend that in substance their jurisdiction application succeeded because the effect of the judge's decision was that the Claimant had failed in achieving its stated purpose of obtaining a judgment that would be enforceable in the Dubai Courts and elsewhere in the UAE, this being necessary because the Defendants have no assets within the DIFC. In support of their application they refer to the following findings of the learned judge:

> (i)	".although this Court may execute judgments, decisions and orders rendered by any Recognised Court other than Dubai Courts, that execution shall not go beyond the jurisdiction of this Court which requires this Court not to refer Recognised Foreign Judgments to the Dubai Court for execution and vice versa" (para 48);

(ii)	[the DIFC Courts] "cannot be said to be a `conduit jurisdiction Court' if the matter before it is related to a Foreign Court Judgment" (para 49).

25.	The award of costs involves the exercise of a wide discretion and an appellate court can be expected to be slow to interfere with a decision on costs made below. Appeals against costs orders are accordingly rare but, in my judgment in the circumstances of the instant case, the Defendants' proposed grounds of appeal are sufficiently arguable to be said to have a real prospect of success on the basis that the Court of Appeal dismisses the Claimant's appeal, which at this stage must be assumed in the Defendants' favour.	Accordingly, the Defendants' application for leave to appeal against the learned judge's costs order is granted.

	

Issued by:

Natasha Bakirci

Assistant Registrar

Date of issue: 9 September 2015

At: 5pm