Claim No: CFI-036-2016

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF FIRST INSTANCE

BEFORE JUSTICE SIR RICHARD FIELD

BETWEEN

(1) BARCLAYS BANK PLC

(2) CREDIT SUISSE LOAN FUNDING L.L.C.

(3) MIDTOWN ACQUISITIONS L.P.

(4) SPECIAL SITUATIONS INVESTING GROUP INC

Claimants

and

ESSAR GLOBAL FUND LIMITED

Defendant

Hearing:19 - 20 February 2017

Counsel: Tom Montagu-Smith QC instructed by

Stephen Harwood Middle East LLP for the 3rd Claimant.

Arshad Ghaffar assisted by Ms Sharon Lakhan,

instructed by Global Advocacy and Legal Counsel for the Defendant.

Judgment:13 April 2017

JUDGMENT OF JUSTICE SIR RICHARD FIELD

ORDER

UPON reviewing the Claimant's Application Notice CFI-036-2016/1 dated 6 November 2016 seeking immediate judgment

AND UPON reviewing the Defendants' Application Notices CFI-036-2016/2 and CFI-036-2016/3 dated 14 November 2016 seeking to contest the DIFC Courts' jurisdiction and 24 November 2016 seeking to strike out the immediate judgment application and a stay, respectively

AND UPON hearing Counsel for the First Claimant and Counsel for the Defendant at a hearing on 19 and 20 February 2017

IT IS HEREBY ORDERED BY CONSENT THAT:

1.The Claimant be granted immediate judgment on their claim to enforce a judgment in the total sum of USD 191,769,169 issued by the Supreme Court of the State of New York dated 25 August 2016.

2. The Defendant's applications for a stay of proceedings and contesting jurisdiction are dismissed.

3. Unless either of the parties serves a notice within 7 days hereof challenging the following order, the Defendant shall pay the Third Claimant its costs of the action, its costs seeking immediate judgment and any additional costs incurred in resisting the Defendant's applications for a stay and contesting jurisdiction, such costs to be assessed on the standard basis if not agreed.

Issued by:

Nassir Al Nasser

Judicial Officer

Date of Issue: 13 April 2017

At: 3pm

Summary of Judgment

This dispute arises out of the Claimants seeking to enforce a judgment (the "**NY Judgment**") of the Supreme Court of the State of New York (the "**NY Supreme Court**"). The Third Claimant ("**Midtown**"), sought immediate judgment on the claim while the Defendant ("**EGFL**"), applied for a stay of Midtown's application and a declaration that the DIFC Courts do not have jurisdiction to determine the claim. The parties addressed all three applications at a Hearing on 19-20 February 2017 upon which Justice Sir Richard Field has issued this Judgment.

The underlying NY Judgment was a **Judgment by Confession** issued on 25 August 2016 without adversary proceedings, pursuant to the New York Civil Practice Law and Rules ("**NY CPRL**"). The NY Judgment was based upon an **Affidavit of Confession** and related **Term Sheet** whereby EGFL agreed to cover its liability under two contracts in the amount of USD 360 million, provided that such payments were received in compliance with an agreed payment schedule. Should payments not be received according to this schedule, the larger settlement amount of USD 415.4 million would become due.

No appeal was filed in the New York Courts within the designated time period and on 4 October 2016, the Claimants filed their Claim Form, following it with Midtown's application for immediate judgment on 6 November 2016. Shortly thereafter, EGFL filed a motion in the NY Supreme Court to vacate the NY Judgment for `fraud, misrepresentation, and/or other misconduct' contending that pursuant to the Term Sheet, the Affidavit of Confession was only to be used to obtain judgment in the event that EGFL defaulted on the agreed payment plan. This motion remains pending, although a hearing was held on 29 March 2017 and no stay of execution was granted at that time.

In response to Midtown's active application for immediate judgment in this Court, EGFL makes a number of arguments, contending that:

(1) The DIFC Courts do not have jurisdiction to enforce judgments of foreign courts as such matters of `foreign affairs' are exclusively reserved to the UAE Federation by Article 120 of the UAE Constitution;

(2) The holding in the DIFC Courts of Appeal case of *DNB Bank ASA v Gulf Eyadah Corporation* [2015] DIFC CA 007 that the DIFC Courts have jurisdiction to recognise and enforce foreign judgments is *obiter dicta*, founded on faulty reasoning and should not be followed;

(3) As the NY Judgment did not result from adversary proceedings, it is not capable of enforcement in accordance with common law principles;

(4) Since the NY Judgment could be vacated on motion pursuant to the NY CPRL, it cannot be enforced as it is not `final and conclusive on the merits';

(5) Midtown's application for immediate judgment should be refused as the NY Judgment was procured by fraud or in breach of the requirements of natural justice and there is a triable issue involving foreign law;

(6) In any event, pending the decision of the NY Supreme Court on EGFL's motions to vacate, Midtown's application for immediate judgment should be stayed or execution of any judgment issued in favour of Midtown should be stayed.

Midtown denies the above arguments, contends that all requirements for enforcement of the NY Judgment in the DIFC are met, and argues that there are no grounds for a stay.

In his Judgment, Justice Sir Richard Field granted Midtown's application for immediate judgment on their claim to enforce the NY Judgment and denied EGFL's application for a stay of execution, giving detailed reasoning to address EGFL's numerous arguments.

EGFL argued, regarding its constitutional claim, that to the extent that Dubai and DIFC legislation purport to confer on the DIFC Courts jurisdiction to enforce a judgment of a foreign court, they are unconstitutional as a violation of Article 120 of the UAE Constitution, which requires that matters of `foreign affairs' are exclusively reserved to the UAE Federation. Further, EGFL argued that this issue was not taken up in the *DNB Bank* case and therefore the Court should now dis-apply the *DNB Bank* case and instead should refer the issue to the UAE Union Supreme Court ("**USC**") in compliance with A rticle 58 of Federal Law No. 10 of 1973.

In response to this constitutional argument, Midtown submitted that the *DNB Bank* Judgment of the DIFC Courts of Appeal, which found that the DIFC Courts have jurisdiction to recognise and enforce foreign judgments for sums of money, was binding on the Court of First Instance. Justice Field did not accept this point, stating that the Court of First Instance may appropriately examine the merits of EGFL's constitutional argument.

In assessing the merits of the constitutional argument, Justice Field found that there was no conflict between Article 120 of the UAE Constitution and the legislation held by the Court of Appeal in the *DNB Bank* case to confer jurisdiction on the DIFC Courts to enforce foreign judgments. "Foreign affairs" in

Article 120 connotes the conduct of foreign policy as between states on the international plane, whereas the recognition of foreign judgments by the DIFC Courts involves the application of a rule of private commercial law based on a private voluntary or consensual or quasi-contractual obligation to pay the sum awarded in the foreign judgment.

Even if enforcing foreign judgments were a matter of foreign affairs within the reach of Article 120, the legislation conferring jurisdiction on the DIFC Courts to enforce foreign judgments is within the exception to Article 120 provided by Article 3(2) and Article 7(3) of Federal Law No. 8 of 2004 in respect of civil and commercial laws within Financial Free Zones.

Further, Justice Field found that it was not necessary to refer this issue to the USC for determination, stating first that Article 58 of Federal Law No. 10 of 1973 does not compel reference and second that the DIFC Courts are free to reject the constitutional challenge pursuant to a grounded judgment.

EGFL further argued that in any event, the Court should not follow the *DNB Bank* case because the reasoning therein is *obiter dicta* and is flawed for its failure to distinguish between enforcement and execution. In response, Justice Field found that it is the duty of the DIFC Courts of First Instance to follow and apply the judgments of the DIFC Courts of Appeal, including the *DNB Bank* case. Furthermore, Justice Field found EGFL's attack on the reasoning used in the *DNB Bank* case to be without merit.

EGFL also argued that since the NY Judgment was not the outcome of adversarial proceedings, it was not a `judgment' for the purposes of enforcement of foreign judgments under common law principles. However, Justice Field found that the NY Judgment is a `judgment' for the purposes of enforcing foreign judgments for a number of reasons, namely that it calls itself a judgment, EGFL voluntarily provided an Affidavit of Confession, EGFL agreed that a resulting judgment could be enforced in other jurisdictions. Further, other judgments that are not the result of a substantive contest on the merits, such as judgments by consent, are similarly enforceable; and the NY Judgment is analogous to a judgment on admissions allowed pursuant to the Rules 15.2 and 15.3 of the Rules of the DIFC Courts ("**RDC**").

EGFL argued that the NY Judgment is not final and conclusive because there is a possibility it may be vacated pursuant to NY CPRL. Justice Field found that the NY Judgment is final and conclusive under common law principles as it is *res judicata* as to EGFL's liability for the sum admitted to be due. Just as pendency of an appeal would not prevent the judgment from being final and conclusive, the pendency of the motions to vacate did not render the NY judgment otherwise than final and conclusive. Furthermore, a judgment disposing of a case by consent is just as capable of being final and conclusive `on the merits' as one following determination of disputed issues. Thus, Justice Field found that there is no room for a successful argument that the NY Judgment is not final and conclusive on the merits.

EGFL argued in defence of Midtown's application that the Claimants fraudulently misled the NY Supreme Court by asserting that the Judgment by Confession was not in any way conditioned upon any default. EGFL argues that the Affidavit of Confession was not to be used to obtain judgment so long as the payment plan was followed and accepts that the Claimants did not act dishonestly albeit they did not act innocently. However, Justice Field found that the hall-mark of the common law conception of fraud would require the court to be misled or deceived with a dishonest intention. Seeing as EGFL did not allege dishonesty, it has no defence against Midtown's application for fraud.

EGFL argued that the obtaining of a Judgment by Confession against it without sufficient notice or opportunity to be heard offended the basic notions of natural justice and such argument would be a defence against Midtown's enforcement claim. However, Justice Field states that the provision of the Affidavit of Confession in exchange for a substantial benefit in the form of the prospect of a favourable settlement with knowledge of the Judgment by Confession regime in New York shows that EGFL has no prospect of success on their `natural justice' defence. Additionally, no trial is necessary to consider this argument further.

EGFL also argued that Midtown's application required determination of issues of foreign law. However, Justice Field found firstly that it was unnecessary to make any findings as to New York law regarding EGFL's motion to vacate in the NY Supreme Court. Secondly, Justice Field found that his assessments of New York law as relate to EGFL's arguments that the NY Judgment is not final and conclusive or that it was given in breach of natural justice are based on the `international approach' authorised by the DIFC Courts of Appeal in *Fidel v Felecia and Faraz* [2015] DIFC CA 002. Therefore, no trial is necessary on points of foreign law.

Having dismissed EGFL's various arguments against issuing an immediate judgment, Justice Field moved on to assess Midtown's application for immediate judgment, stating that Midtown must satisfy the Court under RDC 24.1(1)(b) and (2) that EGFL has no real prospect of successfully defending Midtown's claim and that there are no compelling reasons for a trial. Justice Field states, in light of the reasoning already detailed in response to EGFL's arguments, that EGFL has no real prospect of establishing any of its defences against Midtown's claim and further, it is just and appropriate to reach this conclusion without a trial. Therefore, Justice Field found that Midtown is entitled to immediate judgment as the NY Judgment is

for a sum of money, is final and conclusive and is not impeachable for fraud or breach of natural justice. Thus, Midtown's application for immediate judgment was granted.

By granting Midtown's application for immediate judgment, Justice Field denied EGFL's application for a stay of Midtown's application. Upon an assessment of EGFL's pending motions, Justice Field acknowledged that while their motion is `certainly arguable, it is far from being a sure-fire winner'; therefore, and in light of all the circumstances of the case, Justice Field declined to grant a stay of execution as justice did not call for it.

Thus, Justice Field granted Midtown's application for immediate judgment and accordingly dismissed EGFL's arguments in full, also denying its application for a stay of execution.

This summary is not part of the Judgment and should not be cited as such

JUDGMENT

1.The Court has before it the following applications: (i) an application made by the Third Claimant ("**Midtown**"), a company registered in the State of New York, for immediate judgment on a claim to enforce a judgment in the total sum of USD 171,769,169 issued on 25 August 2016 by the Supreme Court of the State of New York (the "**NY Judgment**"); and (ii) applications by the Defendant ("**EGFL**"), an exempt limited company incorporated in the Cayman Islands, for a stay of Midtown's application; and (iii) a declaration that the Court has no jurisdiction to determine Midtown's claim. All three applications were heard in one hearing, EGFL's jurisdiction application coming on before Midtown's application.

2. The NY Judgment was a `Judgment by Confession' issued under 3218 of the New York Civil Practice Law and Rules ("**NY CPRL**") which allows for judgment to be entered for a sum of money confessed by a defendant to be due in an affidavit and authorising the entry of judgment. Such a judgment is entered by a clerk of the court upon the filing of the Affidavit of Confession by the creditor. There is in no adversary proceeding.

3. The Affidavit of Confession in question was dated 18 March 2016. It was provided by the EGFL in connection with a settlement agreement contained in a Term Sheet also dated 18 March 2016 (the "**Term Sheet**"). The parties to the Term Sheet were the "**Lenders**," including the Claimants, contracting through their agent, US Bank National Association (the "**Agent**"), of the one part, and, of the other part, EGFL and certain of EGFL's affiliates and subsidiaries to whom EGFL owed debts and payables ("**Affiliate Creditors**"). The settlement related to EGFL's liability under two contracts both dated 30 September 2014, a contract of guarantee (called a "**Guaranty**") and an Equity Contribution Agreement (the "**ECA**"). Under the Guaranty, EGFL guaranteed up to a limit of USD 200 million the obligations of Essar Steel Minnesota LLC ("**ESML**") under a Credit Agreement (the "**Credit Agreement**"), also dated 30 September 2014, by which Lenders, including the Claimants, granted ESML a term loan facility of up to USD 450 million. On 23 February 2016, the Agent gave notice to EGFL, inter alia, that USD 412,132,810 was immediately due and payable by reason of admitted events of default under the Credit Agreement. In consequence of this notice, EGFL became immediately liable to pay the Agent on behalf of the Claimants USD 200 million plus interest at the rate of 13.5% pa for the period down to payment together with fees, reasonable costs and expenses.

4. By Section 4.8 thereof, the Guaranty was governed by the laws of the State of New York without regard to its conflict of laws principles.

5. By Section 4.9(a) of the Guaranty, EGFL agreed that: (i) any legal action, suit or proceeding arising out of or relating to the Guaranty could be commenced in the Federal or State Courts located in Manhattan City and State of New York and irrevocably submitted to and accepted and consented to personal jurisdiction in any such court; (ii) a judgment in any such action, suit or proceeding could be enforced in any other jurisdiction by suit upon such judgment, a certified copy of which would be conclusive evidence thereof; and (iii) EGFL waived any objection it might have to the laying of venue of any such action, suit or proceeding, and further waived any claim that any such action, suit or proceeding brought in any of the aforesaid courts has been brought in an inconvenient forum.

6. The second and third paragraphs of the Term Sheet provided:

> "Terms and provisions of the Term Sheet designated upon execution of the Term Sheet...shall be immediately binding and effective upon the Parties. All other terms and provisions contemplated by this Term Sheet are subject to definitive settlement documents to be negotiated and entered into between all relevant parties on or before 24 March 2016 provided that the effectiveness of such settlement agreement will be subject to: (a) finalization of the definitive documentation (the Definitive Documents) by 24 March 2016 and (b) EGFL making the first instalment of the Settlement Amount ... of US$10 million by 24 March 2016.
>
> Upon execution of the Term Sheet, the Lenders undertake to forebear, suspend and hold in abeyance all of their rights, actions or claims of whatsoever nature including presenting any winding up or similar petition and on the Confessions of Judgment (as agreed herein) against EGFL or its affiliates until 31 March 2016, provided that EGFL makes the first instalment of the Settlement Amount of US$10 million on or by 24 March 2016."

7. The Term Sheet further provided that on its execution: (i) "EGFL stipulates to liability and confesses to judgment under the Guaranty for USD 201.6 million and under the ECA for USD 415.4 million less amounts received on account of the Guaranty"; (ii) "in consideration for the Confessions of Judgment in the aggregate amount of USD 617 million, the Lenders waive and settle all rights and claims save for fraud and misconduct arising from the Guaranty, the ECA or the Credit Agreement but if the Confessions for Judgment are for any reason unenforceable the parties rights and defences under the ECA and the Guaranty are reinstated"; (iii) whilst the Settlement Amount was USD 415.4 million plus interest and costs and fees, the lesser sum of USD 360 million plus interest and costs and fees would be accepted in settlement if the payments due on the dates specified in a payment plan were made over a period ending on 31 March 2017; (iv) Sections 4.8 (governing law) and 4.9 (submission to jurisdiction) of the Guaranty were incorporated into the Term Sheet.

8. The payment plan was as follows:

(a) USD 10 million on or before 24 March 2016

(b) USD 10 million on or before 30 April 2016

(c) USD 10 million on or before 31 May 2016

(d) USD 10 million on or before 30 June 2016

(e) USD 33.3 million on or before 31 August 2016

And if the Early Settlement Payment has not been paid in full by 30 September 2016:

(f) USD 33.3 million on or before 31 December 2016

(g) Balance of the Settlement Amount on or before 31 March 2017.

9. The Claimants applied to the Supreme Court of New York for Judgment by Confession on 24 August 2016. The application was supported by an affirmation made by Mr Benjamin Finestone of Quinn Emanuel Urquhart & Sullivan LLP in which it was stated that the Confession of Judgment was not conditioned in any way upon any default, the Confession of Judgement having been provided on 18 March 2016 by when EGFL had defaulted under the Guaranty.

10. As already recorded, the NY Judgment was issued the following day, 25 August 2016.

11. By 5513(a) NY CPLR, EGFL had 30 days in which to appeal but no appeal was lodged whether within the 30 day period or at all. On 4 October 2016, the Claimants' Claim Form herein was served and on 6 November 2016 the Claimants' application for immediate judgment was issued. Five days later, on 11 November 2016, EGFL filed a motion in the Supreme Court of New York pursuant to 5015 NY CPLR to vacate the NY Judgment "on the ground of fraud, misrepresentation, and/or other misconduct of [EGFL]". In brief, EGFL contend on this motion that under the provisions of the Term Sheet, the Guaranty Confession of Judgment was only to be used to obtain a judgment if there was a default on the payment programme and it had not been guilty of any such default.

12. On 6 December 2016, EGFL filed yet another motion in the Supreme Court of New York, this time under 317 and/or under 3218 NY CPLR, on the grounds that: (i) EGFL had not been served with nor notified of the filed Confession of Judgment until after the judgment had been entered; and (ii) the judgment was issued in violation of the Confession's terms and therefore without authority.

13. On 15 November 2016, the First, Second and Fourth Claimants assigned their interest in the NY Judgment to Midtown.

The parties' contentions in brief outline

EGFL's case

14. EGFL contends that:

(1) To the extent that Article 5(A)(1)(e) and Article 7 of the judicial authority law (the "**JAL**") (Dubai Law No. 12 of 2004 as amended by Dubai Law No. 16 of 2011) and Article 24 of the DIFC Courts Law (DIFC Law No. 10 of 2004) purport to confer on the DIFC Courts jurisdiction to enforce a judgment of a foreign court, those provisions are unconstitutional because the enforcement of such judgments involves "foreign affairs" and such matters are exclusively reserved to the UAE Federation by Article 120 of the UAE Constitution. The DIFC Courts therefore have no jurisdiction to enforce foreign judgments because the provisions relating to the enforcement of foreign judgments in the Federal Civil Procedure Code (the "**CPC**") have been dis-applied to the DIFC. I shall refer to the issue raised by this contention as the "**constitutional issue**".

(2) Even if the enforcement of foreign judgments is not a matter of "foreign affairs", the decision of the DIFC Courts of Appeal in *DNB Bank ASA v Gulf Eyadah Corporation* [CA-007-2015] (the "***DNB Bank* case**") holding that the DIFC Courts have jurisdiction to recognise and enforce foreign judgments is all *obiter dicta* and founded on faulty reasoning and therefore should not be followed. I shall refer to this issue as the "***DNB Bank* issue**".

(3) Since the NY Judgment was not the outcome of an adversary proceeding, it is not a judgment capable of being enforced in accordance with common law principles. I shall call this the "**judgment issue**".

(4) Since the NY Judgment is capable of being vacated by the same court that issued it on motions presented under 5015, 3218 and 317 NY CPRL, it cannot be enforced because it is not "final and conclusive on the merits." I shall call this the "**final and conclusive issue**."

(5) Midtown's application for immediate judgment should be refused on the grounds that: (i) the NY Judgment was procured by fraud by the Claimants and/or in breach of the requirements of natural justice (the "**fraud issue**" and the "**breach of natural justice issue**"); and (ii) there is a triable issue involving foreign (New York) law (the "**foreign law issue**")

(6) Pending the decision of the NY Supreme Court on EGFL's motions under 5015, 3218 and 317 NY CPRL, Midtown's application for immediate judgment should be stayed, failing which execution on any judgment issued in favour of Midtown should be stayed (the "**stay issues**").

Midtown's case

15. Midtown denies that the Court lacks jurisdiction to make the enforcement order it seeks and submits that all the requirements for the NY Judgment to be enforced in the DIFC are met. It further submits that there are no good grounds for staying its application or for a stay of execution of the enforcement judgment to which it is entitled.

The constitutional issue

The *DNB Bank* case

16. In the *DNB Bank* case, the DIFC Courts of Appeal held that, by virtue of Article 24(1)(a) of the DIFC Courts Law[1], read with Articles 7(4) and 7(6) of the JAL[2], the DIFC Courts of First Instance has jurisdiction under Article 5(A)(1)(e) of the JAL[3] to hear claims for the recognition and enforcement of foreign judgments for sums of money. The Court of Appeal further held that a foreign judgment which is enforced by the DIFC Courts becomes a local judgment and therefore falls within the scope of *"judgments, decisions and orders rendered by the Courts"* under Article 7(2) of the JAL.

17. The foreign judgment in issue in the *DNB Bank* case was a judgment for USD 8.7 million plus costs issued by the Commercial Court of England & Wales sitting in London.

18. The constitutional point taken by EGFL in the instant case was not taken in the *DNB Bank* case and it was argued on EGFL's behalf by Mr Ghaffar that it is open to the DIFC Courts of First Instance to uphold the point and dis-apply the *DNB Bank* case or refer the question to the Union Supreme Court ("USC") pursuant to Article 58 of Federal Law No. 10 of 1973, as amended by Federal Law No 26. of 1992.

19. The primary submission on the constitutional issue of Mr Montagu-Smith QC for Midtown was that the *DNB Bank* case in the Court of Appeal was binding on the Court of First Instance. Accordingly, it was the Court of Appeal and only the Court of Appeal that could overturn its previous decision that foreign judgments were enforceable by the DIFC Courts.

20. I decline to accept Mr Montagu-Smith QC's primary submission. In my opinion, following the approach taken by the Court of Appeal in *Investment Group Private Limited v Standard Chartered Bank* [CA-004-2015] (the "***IGPL* case**"), it is appropriate to examine the merits of EGFL's constitutional argument and then to decide whether: (i) there is any conflict between Article 120 and the DIFC legislation held by the Court of Appeal in the *DNB Bank* case to confer jurisdiction on the DIFC to enforce foreign judgments; and (ii) whether it is appropriate to refer the issue to the USC for determination.

The Common Law Doctrine of Obligation

21. At this stage, it is appropriate to take note of the common law doctrine of obligation that underpins the approach of common law courts to the enforcement of foreign judgments. This is best done by citing some illuminating passages in Dicey, Morris and Collins, *The Conflict of Laws*, 15th ed ("**DMC**") and in Briggs, Civil Jurisdiction and Judgments, 6th ed ("**Briggs**").

> **"The bases of enforcement and recognition.** English courts have recognised and enforced foreign judgments from the 17th century onwards. It was at one time supposed that the basis of this enforcement was to be found in the doctrine of comity. English judges believed that the law of nations required the courts of one country to assist those of any other, and they feared that if foreign judgments were not enforced in England, English judgments would not be enforced abroad. But later this theory was superseded by what is called the doctrine of obligation, which was stated by Parke B. in *Russell v Smyth* and *Williams v Jones* and approved by Blackburn J. a generation later in *Godard v Gray* and *Schibsby v Westenholz* in the following words: ``We think that . . . the true principle on which the judgments of foreign tribunals are enforced in England is . . . that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action." It followed that provided the foreign court had jurisdiction to give the judgment according to the English rules of the conflict of laws, the judgment is conclusive in England (unless it is impeachable for reasons of fraud, public policy or the like) and not merely *prima facie* evidence of the defendant's liability as had at one time been supposed." [DMC, para 14.007]
>
> "The common law approach to the recognition of judgments is to ask whether the party who is now said to be bound by the foreign judgment stood, or behave in such a way, in relation to the foreign court, for it to be appropriate to say he obliged himself to obey or abide by the judgment. The focus of the law has been on the position of the defendant.
>
> For the last century and more, foreign judgments have been recognised on the basis of the doctrine of obligation, and the point of the enquiry is whether the party against whom the foreign judgment is asserted placed himself, voluntarily, in a position where it could be fairly said that he was bound to abide by the adjudication of the foreign court. Judgments, therefore, bind those who by their own actions choose to put themselves in the way of the obligation they create...
>
> A foreign judgment cannot have any effect in the English legal order, for the decision of a foreign sovereign is confined to the territorial jurisdiction of that sovereign. However, if the parties may be seen to have assumed an obligation to each other to abide by and obey the judgment, that obligation (or the consequences which flow from it) may be enforced, just as any other agreement may be enforced, without any need to address the principle of State or judicial sovereignty. However it is viewed, the focus of attention is on the acts of the party who is to be bound, here assumed to be the defendant.
>
> The doctrine of obligation was articulated as the basis for the enforcement of foreign judgments in 1870. The `obligation' to which the court referred appears to have been understood as a voluntary, or private, or consensual or quasi-contractual obligation, assumed by the party to be bound, rather than one simply by conduct of the party to be obliged, and not from anything else. It was irrelevant to ask what should have happened, or where an action should have been brought. The question was whether the party to be obliged had acted in such a way as to oblige himself to obey the judgment. This puts in perspective many things about the common law doctrine on when a foreign court has jurisdictional competence to bind a party to its judgment. It explains why the English common law does not accept the existence (or concern

itself over the lack) of a strong connection between the adjudicating court and the cause of action as a distinct basis for the recognition of a judgment; why the fact that an English court might have exercised jurisdiction is of no relevance; why reciprocity has no part to play in the assessment of whether a foreign judgment should be recognised. These facts and matters tell us nothing about whether the party to be bound by the judgment submitted or consented to the jurisdiction of the foreign court." [Briggs, para 7.62]

Article 120 of the UAE Constitution

22. Article 120 of the UAE Constitution provides:

> "The Federation shall have exclusive legislative and executive Jurisdiction in the following matters:
>
> (1) Foreign Affairs [.]"

23. Mr Ghaffar argued that the jurisdiction to recognise a foreign judgment involved "foreign affairs" because that jurisdiction flows from the sovereignty of the state in which the foreign judgment is issued and involves an exercise of sovereignty by the state in which is located the recognising court which is an emanation of that state.

24. In support of this contention, Mr Ghaffar cited *Adams and Others v Cape Industries plc and Another* [1990] Ch 433, a decision of the Court of Appeal of England and Wales. There, the plaintiffs sought to enforce against the first and second defendants, C1 and C2, judgments in default of defence issued by a US Federal Court for damages for personal injuries caused by working with asbestos in the USA. C1 was an English company which presided over a group of subsidiary companies engaged in the mining in South Africa, and the marketing of asbestos. C2 was an English subsidiary of C1 which marketed asbestos. Enforcement of these judgments against C1 and C2 was resisted on various grounds including a contention that the US court lacked jurisdiction over C1 and C2 and that the judgments were issued in breach of the requirements of substantial justice.

25. The judge at first instance, Scott J (as he then was), expressed the view that the source of the authority of the foreign court was to be found in the sovereign power which established it and accordingly, the exercise of a US Federal District Court over a person resident in the US was, by the standards of English law, a legitimate and not an excessive exercise of jurisdiction. Responding to this view, the Court of Appeal said:

> "Any attempt to weigh up the soundness of this or any other account of the rules governing the recognition of judgments should, as it seems to us, begin with the exploration of the reasons why such judgments are recognised at all. Unfortunately, the cases give virtually no guidance on this essential question. Underlying it all must be some notion of comity, but this cannot be comity on an individual nation-to-nation basis, for our courts have never thought it necessary to investigate what reciprocal rights of enforcement are conceded by the foreign country, or to limit their exercise of jurisdiction to that which they would recognise in others. The most one can say is that the duty of positive law first identified in **Schibsby v Westenholz,** LR 6 QB 155, must stem from an acknowledgement that the society of nations will work better if some foreign judgments are taken to create rights which supersede the underlying cause of action, and which may be directly enforced in countries where the defendant or his assets are to be found. But this tells one nothing of the practical value about how to identify the foreign judgments which have this effect."

26. In Mr Ghaffar's submission, the suggestion in this passage that the doctrine of obligation stems from an acknowledgement that the society of nations will work better if some foreign judgments are enforced demonstrates that the enforcement of foreign judgments by the DIFC Courts is a matter of "foreign affairs".

27. Mr Ghaffar also relied on paragraphs 102-103 of Chief Justice Hwang's judgment in the DNB Bank case:

> "102. Lord Bridge in *Owens* stated (at page 484) the common law position that a claim for enforcement is based on a legal obligation on the judgment debtor to comply with the judgment by a court of competent jurisdiction:
>
> "A foreign judgment given by a court of competent jurisdiction over the defendant is treated by the common law as imposing a legal obligation on the judgment debtor which will be enforced in an action on the judgment by an English court in which the defendant will not be permitted to reopen issues of either fact or law which have been decided against him by the foreign court."
>
> 103. In my view, this is founded on the concept of international comity which connotes courtesy or the need for reciprocity between foreign courts (Dicey, Morris & Collins, *The Conflict of Laws*, Sweet & Maxwell, 15th ed, page 5). In recognising foreign judgments, courts are expected to respect the reasoning of the foreign courts, without going into the merits of the decision. Lord Bridge's judgment clearly establishes the principle that the enforced judgment becomes an independent judgment in which the defendant will not be allowed to reopen issues of fact or law which were decided against him."

28. In addition, I was taken by Mr Ghaffar to certain extracts from Ma tre Jenard's Report on the European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and two passages in Professor McLachlan's book *Foreign Relations Law*.

29. The extracts from the Jenard Report:

> "As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments." [Citing a Note from the EEC Commission to the Member States inviting them in 1959 to commence negotiations]
>
> "It is clear that at the recognition and enforcement stage, the Convention governs only international legal relationships, since ex hypothesi it concerns the recognition and enforcement in one Contracting State of judgments given in another Contracting State." [Chapter III]

30. In the first passage cited from Professor McLachlan's book[4] there are set out three propositions, namely, that: (i) foreign relations issues are

not excluded from legal regulation; (ii) the central question in such cases is allocation, or choice of law or choice of jurisdiction and whether the issue is justiciable or is a matter for resolution on the plane of public international law; and (iii) such issues should not be addressed by the invocation of a blanket rule of exclusion but rather by adopting a "fine-grained-approach". In the second McLachlan passage[5] the Professor opines that where the questions before the court are ones of private international law - the determination of jurisdiction, applicable law and the enforcement of foreign judgments - the acts of the foreign state have to be disaggregated in order to address the specific questions posed by the private international law rules of the forum.

31.In Mr Ghaffar's submission, these cited passages show that, notwithstanding the private law context of such questions as jurisdiction, choice of law and enforcement of foreign judgments, these matters are nonetheless matters of foreign relations or foreign affairs.

32. I do not accept Mr Ghaffar's contention that the recognition of foreign judgments by the DIFC Courts falls within the concept of "foreign affairs" as provided for in Article 120 of the UAE Constitution. In my judgment, the expression "foreign affairs" in that and related Articles in the Constitution connotes the conduct of foreign policy as between states on the international plane, which is something wholly different from the recognition of a foreign judgment by the DIFC Courts.

33. I derive this meaning of "foreign affairs" not only from Article 120 itself, but also from Article 123, which provides in relevant part:

> "Notwithstanding Article 120, Clause (1), which provides that the UAE has exclusive jurisdiction in the *matters of foreign policy and foreign relations*, a member Emirate of the UAE may conclude limited conventions of a local and administrative nature with neighbouring countries provided such conventions are not to be in conflict with the interests of the UAE or the federal laws provided that the Federal Supreme Council be so notified in advance. ..." [Italics supplied]

34. I also note that there is no mention of the recognition of judgments in the list of powers of the UAE Ministry of Foreign Affairs set out in Cabinet Resolution No. 6 of 2001 on the organizational structure of the Ministry of Foreign Affairs.

35. In my opinion, it is plain and obvious that the recognition of foreign judgments by the DIFC Courts is not a matter of foreign policy conducted between states. Instead, it results from a rule which is a rule of private commercial law based on a private voluntary or consensual or quasi-contractual obligation, assumed by the party to be bound (see the passage from Briggs cited above). The fact that the ultimate justification for the rule may be based on the very broad notion of international comity identified by the Court of Appeal of England and Wales in *Cape Industries* (which is what I am sure Hwang CJ had in mind in the *DNB Bank* case) is nothing to the point. After all, the rule that an agreement in the nature of a contract is enforceable is nonetheless a rule of private commercial law, notwithstanding that its theoretical underpinning is often said to be based on the universal principle of "*pacta sunt servanda*".

36. I would add that I am not impressed by Mr Ghaffar's recourse to the passages he cited from the Jenard Report and Professor McClachlan's book. Matre Jenard was commenting on a multilateral regulation designed to harmonise the law of the member states of the European Union on the recognition and enforcement of judgements, which is a long way away from the application of the private law rules on such matters which are applied by the DIFC Courts. As for the thoughts of Professor McClachan, I can see no equivalence between what he chooses to call "foreign relations" for the purpose of his thesis and the expression "foreign affairs" in Article 120.

37. Further and in the alternative, even if enforcing foreign judgments were a matter of foreign affairs within the reach of Article 120, I am of the clear opinion that the legislation conferring jurisdiction to enforce foreign judgments identified by the Court of Appeal in the *DNB Bank* case is within the exception to Article 120 provided by Article 3(2) and Article 7(3) of Federal Law No. 8 of 2004 in respect of civil and commercial laws within Financial Free Zones. Those provisions state:

> "Article 3(2)
>
> Further, these zones [Financial Free Zones] and Financial Activities are subject to all provisions of Federal law with the exception of the Federal civil and commercial law.
>
> .
>
> Article 7(3)
>
> Subject to the provisions of Article 3 - for the purpose of establishing a Financial Free Zone - the relevant Emirate may issue regulations necessary for it to perform its activity."

38. In the *IGPL* case, the Court of Appeal held that the CPC had been dis-applied in respect of the DIFC by virtue of Articles 3(2) and 7(3) of Law No. 8 which empowered the Emirate of Dubai to pass legislation which derogated from UAE civil and commercial laws, including the CPC. This decision was followed and applied by H.E. Justice Ali Al Madhani in the follow-up *DNB Bank* case [CFI-043-2014] in which he held that the fact that the case before him involved the enforcement of a foreign judgment did not take it out with the reasoning in the *IGPL* case where the issue was whether the UAE Constitution and the CPC precluded the DIFC Courts from having competent jurisdiction under Article 5(A) of the JAL. I respectfully agree with H.E. Justice Ali Al Madhani's decision in this case.

39. I pause to note that my conclusion that the recognition of foreign judgments by the DIFC Courts is not "foreign affairs" for the purposes of Article 120 of the UAE Constitution means that what would otherwise be damagingly serious consequences are avoided. Included in these consequences are the following. First, the on-shore Dubai Courts would have no jurisdiction to enforce foreign judgments because Law No. 5, which confers on those Courts that jurisdiction by providing for the implementation of the Federal Civil Procedure Code[6], would itself be unconstitutional because Dubai Law No. 5 is not a federal but a Dubai law. Second, those aspects of the common law doctrine of *forum non conveniens*[7] and anti-suit injunctions[8] that take into account considerations of international comity would be unconstitutional, as would be the conflict of law rules that lead to the application of foreign law, it being remembered that the entirety of the jurisdiction of the DIFC Courts is exclusively statutory.

Article 58 of Federal Law No. 10 of 1973

40. Article 58 of Federal Law No. 10 of 1973 establishing the USC allows for references to be made to the USC of constitutional issues either by the court below acting on its own initiative or where the constitutional challenge is made by one of the parties and the court "admits" the challenge. Article 58 does not in my judgment compel a court to make a reference but if the court rejects a constitutional challenge, the rejection must be pursuant to a grounded judgment and the concerned parties may challenge that rejection along with the decision to be issued on the merits of the case in the court that has jurisdiction to examine the appeal to such decision.

41. In *Fiske et al v Firuzeh* [ARB-001-2014] H.E. Justice Ali Al Madhani, relying on Case No 1/34 Constitutional of 9 June 2008, stated that under Article 58, "the party pleading a challenge of non-constitutionality of a certain law must plead before this Court to a certain level of seriousness, and that in my view should be the same level as would be pleaded before the USC. Moreover the judge considering the challenge would have to be convinced to the same level as the USC".[48]

42. Mr Ghaffar submitted that H.E. Justice Ali Al Madhani was here holding that the plea of unconstitutionality must be no more than seriously arguable before there could be a reference. Mr Montagu-Smith QC submitted that H.E. Justice Ali Al Madhani was deciding that it was only if a judge determined that the challenge was well made that there could be a reference to the USC. Since I have found after full argument that EGFL's constitutional challenge fails and that therefore there is no conflict between Article 120 of the Constitution and the DIFC legislation conferring on the DIFC Courts jurisdiction to enforce a judgment of a foreign court, it is unnecessary for me to decide between these competing submissions and I decline to do so.

The DNB Bank issue

43. Mr Ghaffar submitted that the reasoning in the *DNB Bank* case on the jurisdiction issue is all non-binding *obiter dicta* because the Defendant ultimately abandoned its challenge to the jurisdiction of the court. He further contended that the Court of Appeal's reasoning in this case is flawed in that it confuses enforcement with execution. He argued that Article 7(6) of the JAL refers to the Rules of the DIFC Courts ("**RDC**") which in turn refer to an enactment that "provides that the decision may be enforced as if payable under an order of the DIFC Courts" which reference was held by the Court of Appeal to be found in Article 7(6) of the JAL and Article 24(1)(a) of the DIFC Courts Law. However, Article 7(6) cannot conceptually be the enactment referred to, being itself the enactment which contains the reference to the RDC. The enactment referred to must therefore be Article 24(1)(a) which speaks of the "ratification" of the judgments of any "recognized foreign court". However, the process of bringing an action on a foreign judgment under common law is not a "ratification" of that foreign judgment. If the action be successful, the resulting judgment is an independent judgment given in an independent and separate action brought in the enforcing state. In addition, the use of the word "recognised" in Article 24 raises the questions: recognised by whom or under what authority and in what instrument and for what purposes - none of which are answerable by a reference back to Article 7(6) of the JAL which expressly refers only to execution, not to enforcement. In the result therefore, absent a (federal) statute recognizing the Courts of New York there is no power to "ratify" - that is to register - judgments of that foreign Court in the DIFC Courts (or in Dubai Courts generally), let alone to permit a separate action on the judgment when none of the jurisdictional gateways in Article 5 of the JAL are met.

44. In my judgment, it is not open to EGFL to argue that the *DNB Bank* case is not binding on the Court of First Instance. The judgment given in that case dealt authoritatively with the question whether the DIFC Courts had jurisdiction to enforce foreign judgments and in these circumstances, it is the duty of this Court to follow and apply the judgment of the Court of Appeal. In any event, I am wholly unconvinced as to the cogency of the points made by Mr Ghaffar in seeking to undermine the Court of Appeal's decision. In particular I would observe that, if the Court has power to execute a judgment of a foreign court under Article 7(6), it must by necessary inference have power to enforce that judgment by issuing a judgment of its own ordering the defendant to pay the sum(s) ordered to be paid in the foreign judgment.

The judgment issue

45. The common law requirements for the enforcement of a foreign judgment are set out in DMC Rule 42 as follows:

> "Rule 42:
>
> (1) Subject to the Exceptions hereinafter mentioned and to Rule 63 (international conventions), a foreign judgment *in personam* given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 43 to 46, and which is not impeachable under any of Rules 49 to 54, may be enforced by a claim or counterclaim for the amount due under it if the judgment is
>
> (a) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and
>
> (b) final and conclusive, but not otherwise.
>
> Provided that a foreign judgment may be final and conclusive though it is subject to an appeal, and though an appeal against it is actually pending in the foreign country where it was given.
>
> (2) A foreign judgment given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 43 to 46, which is not impeachable under any of Rules 49 to 54 and which is final and conclusive on the merits, is entitled to recognition at common law and may be relied on in proceedings in England.
>
> (3) No proceedings may be brought by a person on a cause of action in respect of a judgment which has been given in his favour in proceedings between the same parties or their privies in a court in another part of the United Kingdom or in a court in an overseas country unless that judgment is not enforceable according to clause (1), or not entitled to recognition according to clause (2), of this Rule.
>
> This Rule must be read subject to Rule 59."

46. In support of his contention that since the NY Judgment was not the outcome of an adversarial proceeding it was not a "judgment" for the purposes of DMC Rule 42, Mr Ghaffar cited *Ex Parte Moore. In re Faithfull* (1885) 14 QBD 627. Here, upon a motion for judgment in default of pleading, judgment was entered which, inter alia, ordered the defendant to pay the plaintiff the taxed costs of the action which costs were taxed and only partly paid by the defendant. The plaintiff then served on the defendant a bankruptcy notice for the balance of the costs due (£53. 9s. 8d) which the registrar set aside on the ground that the judgment against the defendant was not a "final judgment" within s.4(1)(g) of the Bankruptcy Act 1883. On appeal, Lord Selborne, Lord Chancellor said:

> "It seems to me perfectly plain that this sum of £53.9s.8d was due to the appellant under a final judgment. To constitute an order a final judgment nothing more is necessary than *that there should be a proper litis contestation*, and a final adjudication between the parties to it on the merits." [Italics supplied]

47. Cotton LJ said:

> "I should say no more, but for the fact that the decision of the learned registrar seems to have been founded upon a misapprehension of some expressions used in my judgment in Ex parte Chinery. In order to decide whether a garnishee order was a final judgment, we had to consider what was the meaning of the expression "final judgment." *It is a judgment in an action between parties brought to establish some right of the plaintiff against the defendant.* In giving judgment in that case I made use of these words: "I think we ought to give to the words `final judgment' in this sub-section their strict and proper meaning, i.e., a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established - unless there is something to shew an intention to use the words in a more extended sense." [Italics supplied].

48. In my judgment, the NY York Judgment is a "judgment" for the purposes of DMC Rule 42. I say this for the following reasons.

> (1) The NY Judgment was issued by the NY Supreme Court under 3218 NY CPRL and it calls itself a `Judgment', albeit a `Judgment by Confession'. It also states that "On the filing of the Confession of Judgment and Stipulation of Liability Under the Guaranty made by the defendants herein.it is Adjudged that [the Claimants] collectively do recover of [EGFL]...the sum...totalling USD 171,769,169.00 and that the plaintiff shall have execution thereof". Further, 3218 NY CPRL provides that a Confession Judgment may be enforced in the same manner and with the same effect as a judgment in an action in the NY Supreme Court.
>
> (2) EGFL voluntarily provided an Affidavit of Confession that it well knew could be the foundation under NY York law of a judgment of the NY Supreme Court upon which there could be execution in the same manner as a money judgment resulting from a contested action.
>
> (3) EGFL agreed by Section 4.9(a) of the Guaranty that a judgment in any action, suit or proceeding arising out of or relating to the Guaranty commenced in the NY Supreme Court could be enforced in any other jurisdiction by suit upon such judgment.
>
> (4) The facts of the instant case are substantially similar to those in *Berliner Industriebank AG v Jost* [1971] 2 QB 463 where the Court of Appeal of England and Wales held that an entry in a table of ascertained proofs of debt in German bankruptcy proceedings deemed under German bankruptcy law to be an unappealable judgment if not objected to by the bankrupt, was an enforceable judgment in England. The case of *Ex Parte Moore. In re Faithfull* did not involve the enforcement of a foreign judgment but the operation of s.4(1)(g) of the Bankruptcy Act 1883. It did not deal with the different ways in which a judgment might come to be issued by the foreign court.
>
> (5) Foreign judgments in default of defence are enforceable at common law (see para 14-023 of DMC and the authorities there cited in footnote 106) notwithstanding that there has been no contest on the merits.
>
> (6) The NY Judgment in this case is closely analogous to a judgment on admissions for which the RDC make provision in Rules 15.2 and 15.3.

The final and conclusive issue

49. Mr Ghaffar submitted that the NY Judgment was not final and conclusive because, pursuant to 5015, 3218 and 317 NY CPRL, the judgment could be vacated by the same court that issued it and EGFL is seeking such relief in the motions it has issued under these provisions. He cited *Nouvion v Freeman* (1890) 15 App. Cas 1 at 9-10. There, a Spanish "remate" judgment was sought to be enforced in England, this being a judgment given in an "executive" action where the defendant could advance only limited defences and in particular could not impeach the instruments sued on by the plaintiff. Additionally, the remate judgment did not debar the plaintiff from bringing a "plenary" action in the same court in which the first action was not *res judicata*. The House of Lords held that in these circumstances the remate judgment had not finally and conclusively established the existence of the debt ordered to be paid in that judgment and accordingly it was not enforceable in England. Lord Herschell said:

> "My Lords, I think that in order to establish that such a [final and conclusive] judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties. If it is not conclusive in the same Court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties£ be afterwards contested in that Court, and upon proper proceedings taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who obtained the judgment to claim a decree from our Courts for the payment of the debt.
>
> The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a Court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they have failed to take advantage of them, or may have waived any of their rights, *a final adjudication has been given that a debt or obligation exists which cannot thereafter in that Court be disputed,* and can only be questioned in an appeal to a higher tribunal. In such a case, it may well be said that giving credit to the Courts of another country we are prepared to take the fact that such adjudication has been made as

establishing the existence of the debt or obligation." [Italics supplied]

50. In my opinion, the Confession Judgment at issue in this case is a final and conclusive judgment for the purposes of DMC Rule 42. It is founded on an admitted liability attested to in an affidavit and under 3218 CPRL it is liable to be executed upon by the judgment creditor as soon as it has been issued. The judgment is accordingly in my view, *res judicata* as to EGFL's liability for the sum admitted to be due in the Affidavit of Confession. I would add that if Mr Ghaffar's submission were well founded, no judgment of the NY Supreme Court, even one following a contested hearing, would be final and conclusive because the right to issue a motion under 5015 CPRL applies in respect of any judgment issued by that court.

51. Just as the pendency of an appeal against a foreign judgment does not render that judgment otherwise than final and conclusive, so too, in my view, is the NY Judgment's final and conclusive character not affected by the pending motions to have it vacated under 5015, 3218 and 317 NY CPRL. Also, it is clear that a judgment in default can be final and conclusive even though the judgment might be set aside on application by the defendant (see DMC para 14-023 and the references there cited in footnote 106); and if this be so, I can see no room for a successful argument that the NY Judgment is not final and conclusive for the purposes of DMC Rule 42.

52. Mr Ghaffar further submitted that not only did the NY Judgment have to be final and conclusive, it had to be final and conclusive "on the merits", which it was not, because the "on the merits" requirement predicates a judicial mind having been applied to the claim and this had not happened in this case. In my opinion, this submission is misconceived. That part of DMC Rule 42 that deals with the enforcement of judgments at common law is contained in paragraph (1) which mentions no requirement that for a foreign judgment to be enforceable it must be "final and conclusive on the merits" beyond being "final and conclusive". The expression "final and conclusive on the merits" appears in paragraph (2) of the Rule which deals with when a foreign judgment can give rise to a plea of *res judicata*. The explanation for the additional requirement of "on the merits" is that, where a party is relying on a foreign judgment to establish an issue estoppel, it is necessary for the domestic court to be able to divine exactly what issues were determined in the foreign proceedings. By way of contrast, where a foreign judgment for a sum of money is sought to be enforced, the content of what is being enforced is clear from the judgment itself. It is also to be noted that it has long been recognised that a judgment disposing of a case by consent is just as capable of being "final and conclusive on the merits" as one given following the determination of disputed issues (see *Naji v Shelbourne et al* [2011] EWHC 3298 (QB) per Popplewell J at para 126, citing *Re South American and Mexican* Co [1895] 1 Ch 37.)

The fraud issue

53. DMC Rule 50 states:

"A foreign judgment relied upon as such in proceedings in England is impeachable for fraud. Such fraud may be either:

(1) fraud on the part of the party in whose favour the judgment is given; or

(2) fraud on the part of the court pronouncing the judgment."

54. EGFL's defence to Midtown's application based on fraud involves the allegation that the Claimants misled the NY Supreme Court through Mr Finestone stating in his affirmation submitted to the court that the Confession of Judgment was not conditioned in any way upon any default.

55. EGFL maintains that the Term sheet is to be construed, or contains an implied term, to the effect that the Claimants by executing the Term Sheet bound themselves not to use the EGFL's Affidavits of Confession to obtain a judgment for the confessed sums so long as the payment plan was complied with, which it was. Mr Finestone's statement that the Confession of Judgment was not conditioned in any way upon any default was accordingly false and the NY Supreme Court was thereby misled into issuing the Judgment by Confession.

56. EGFL shies away from alleging that the deception of the court was dishonest. The deception was not innocent but neither was it dishonest. Mr Montagu-Smith for Midtown submits that the fraud contemplated in Rule 50 involves conduct of a dishonest character.

57. It was in *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295 that it was first definitively established that a foreign judgment obtained by fraud could not be enforced in an action brought in an English Court. The Court of Appeal applied the law applicable to the enforcement of domestic judgments first laid down by De Grey CJ in the *Duchess of Kingston's Case*[9] who stated that "fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice". In my view it is plain that the "fraud" contemplated in all the judgments of the Court of Appeal was common law fraud which has always had as its central characteristic dishonesty. As Lord Coleridge CJ put it in *Abouloff* (at p.301):

"...it appears to me, the question for the Courts of this country to consider is whether, when a foreign judgment is sought to be enforced in this country, the foreign court has been *intentionally misled by the fraud* of the person seeking to enforce it, whether a fraud has been committed upon the foreign court with the intention to procure its judgment." [Italics supplied]

58. In *Vadala v Lawes* (1890) 25 QBD 310, the Court of Appeal held that in an action to enforce a foreign judgment, the defendant was able to raise the defence that the foreign judgment had been obtained by fraud even though the fraud alleged could not be proved without re-trying the questions adjudicated upon by the foreign court. The alleged fraud in this case was that the plaintiff had knowingly placed before the Italian court bills of exchange which he alleged to be commercial bills when in truth and in fact he knew them to be bills for gambling transactions.

59. Mr Ghaffar relied on two authorities in support of his submission that non-dishonest deception of the foreign court was sufficient to establish a defence to enforcement of the foreign court's judgment. In *Syal v Heyward* [1948] 2 KB 443 the defendants had applied to set aside the registration of an Indian judgment made under the Foreign Judgments (Reciprocal Enforcement) Act 1933 on the ground of fraud. The issue for the Court of Appeal was whether the court below had erred in ordering an allegation of fraud to be tried and on condition that the defendants pay a sum into court. The allegation of fraud was that the plaintiff had deceived the Indian court by pretending that he had lent the defendant 20,000 rupees, whereas, in fact, he had only lent 10,800 rupees, thereby concealing from the court that the defendants might have a defence under the Indian Usurious Loans Act 1918. The Court of Appeal upheld the decision ordering the issue of fraud to be tried and the imposition of the

condition of a payment into court. In the course of giving the judgment of the Court, Cohen LJ said:

> "...in cases under the s. 4 of the Act of 1933, the question is not one of fraud on the plaintiff, but fraud on the court, and it seems to us to be clearly established by authority binding on us, that if the defendant shows a prima case that the court was deceived, he is entitled to have that issue tried even in trying it the court may have to go into defences which could have been raised at trial."

60. Mr Ghaffar submitted that these words show that all EGFL had to show was a prima facie case that the court was deceived in order to establish conduct sufficient to vitiate a foreign judgment.

61. The second case relied on by Mr Ghaffar was *Jet Holdings Inc et al v Patel* [1990] 1 QB 335. Here the defendant sought to defend an action on a judgment made by a Californian Court in default of his complying with an order of the court on the ground that the judgment had been procured by fraud and/or because the judgment offended English notions of substantial justice. The fraud alleged was that, first, as a result of violence actual or threatened by agents of the plaintiffs, directed against the defendant to get him to repay money untruthfully alleged to be due, the defendant did not go to California in compliance with the California court's order that he attend for a medical examination and deposition; second, that USD 100,000 had been obtained from the defendant with the result that he was unable to afford attorneys in California; and thirdly the USD 100,000 had not been taken into account in the judgment. The courts below gave summary judgment in favour of the plaintiffs on their action to enforce the Californian judgment. On appeal, the summary judgment order was set aside. In the course of giving the lead judgment of the Court of Appeal, Staughton LJ said at p.346:

> "It is I think clear that the plaintiff's Californian lawyers were asserting to the court implicitly and even to some extent expressly, that the defendant's account of violence, threats and fear was untrue. If in fact it was true, that assertion, together with the actual incidents relied on, is capable of amounting to fraud in this context: see the speech of Viscount Dilhorne in *R v Humphreys* [1977] AC 1 at 21, where he quotes a passage from *Spencer, Bower and Turner, Res Judicata*, 2nd ed. (1969) p.323 with approval:
>
> The fraud necessary to destroy a prima facie case of estoppel by res judicata includes every variety of mala fides and mala praxis whereby one of the parties misleads and deceives the judicial tribunals.
>
> Although that was said in the context of estoppel by *res judicata*, I cannot see that it is any the less applicable in the context of enforcement of a foreign judgment; nor apparently did Viscount Dilhorne, since in that passage he also cited *Abouloff v Oppenheimer* 10 QBD 295 and *Vadala v Lawes* 25 QBD 310."

62. Mr Ghaffar boldly submitted that these words of Staughton LJ mean that all EGFL needs to do to establish a *prima facie* defence to Midtown's application is to show that the NY Supreme Court was misled.

63. In my judgment, neither of the two authorities relied on by Mr Ghaffar comes close to establishing that the non-dishonest misleading of the foreign court is sufficient to establish a defence to the enforcement of a foreign judgment. On the contrary, they are consistent only with an approach that requires that the foreign court be misled or deceived with a dishonest intention, this being the hallmark of the common law conception of fraud referred to in the judgments in *Abouloff* and *Vadala v Lawes.*

64. It follows that EGFL has no defence to Midtown's application based on DMC Rule 50.

The breach of natural justice issue

65. DMC Rule 52 reads:

> "A foreign judgment may be impeached if the proceedings in which the judgment was obtained were opposed to natural justice".

66. Mr Ghaffar contended that the obtaining of the Confession Judgment without prior notice to EGFL, in a proceeding that precluded any opportunity for EGFL to be heard, offended the basic notions of natural justice. In many cases, if no notice has been given to a party of a litigation proceeding, or if notice is given but he is not afforded a reasonable opportunity to be heard, the basic English notions of natural justice will have been breached. However, in this case EGFL, acting with the assistance of lawyers of high reputation, agreed to and did provide the Claimants with Affidavits of Confession well understanding that these could lead to a Confession Judgment without any prior notice and without there being any hearing involving either of the parties. Further, in exchange for providing the Affidavits of Confession, EGFL received the substantial benefit of the prospect of a definitive settlement agreement under which a considerably lesser sum than that due would be accepted in settlement of the Claimants' unanswerable money claims and the avoidance, at least down to 31 March 2016, of the risk of winding up or other insolvency proceedings being presented against it. The situation is therefore substantially similar to that in *Vallee et v Dumergue* (1849) 4 Ex 290, where a defendant sued on a French judgment sought to advance a defence that he had had no notice of the proceedings notwithstanding that he had provided an address for service of proceedings. The Court of Exchequer struck out this defence. Baron Alderson said:

> "All these averments point to actual notice alone. Now, if this be so, the replication is not an argumentative denial of this notice, but consists of a statement of facts which shew, that, by the agreement to which the defendant has become a party, no such notice was given to him, and that the plea, which is in substance that circumstances under which the judgment was obtained were contrary to natural justice, cannot be supported; for that it is not contrary to natural justice that a man has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them."

67. The evidence as to the existence of the Judgments by Confession regime in New York, the applicable CPLR provisions and the agreement under which EGFL provided the Claimants with Affidavits of Confession, is all presently before court so that a trial would add nothing of further relevance or assistance. In my judgment I can therefore safely conclude that this defence has no prospect of success.

The foreign law issue

68. It was submitted on behalf of EGFL that, since the determination of Midtown's application for judgment required the determination of issues of foreign law, namely, those involved in: (i) EGFL's 5015 CPRL motion; (ii) deciding whether the NY Judgment was final and conclusive; (iii) deciding whether the NY Judgment was given in breach of natural justice, immediate judgment should be refused and there be a trial at which the court would hear live expert evidence on these foreign law issues.

69. As I have already held, EGFL's 5015 CPRL motion does not afford a defence to Midtown's application because the NY Judgment is final and conclusive regardless of the pendency of this motion. In deciding whether Midtown should have immediate judgment, it is therefore unnecessary to make any findings as to the law of NY applicable to the 5015 CPRL motion.

70. On the other hand, in determining whether the NY Judgment is final and conclusive I have adopted the approach of considering what the legal position is in New York and then taking that into account when deciding as a matter of English law whether the judgment satisfies the common law requirement of finality and conclusiveness. Also, in deciding the natural justice issue I have had regard to the wording of 3218 CPRL and the Term Sheet that is governed by NY law. In my judgment, I was entitled to take this approach without hearing evidence from experts on New York law. This is because it was held by the Court of Appeal in *Fidel v Felecia and Faraz* [CA-002-2015] that the DIFC Courts should take the "international approach" in determining questions of foreign law by hearing submissions on the same and reading the laws, rules, commentaries and text books put before the court rather than hearing live experts evidence. I accordingly reject the submission that there should be a trial to determine: (i) whether the NY Judgment is regarded as final and conclusive under NY law; (ii) whether the NY Judgment was given in breach of natural justice; and (iii) the basic merits of EGFL's 5015 CPRL motion in connection with EGFL's application for a stay of execution (see below).

Immediate Judgment

71. To succeed on its application for immediate judgment Midtown must satisfy the Court under RDC 24.1(1)(b) and (2) that: (i) EGFL has no real prospect of successfully defending Midtown's claim; and (ii) there is no other compelling reason for a trial. In my judgment, for the reasons I have given above when dealing with EGFL's submissions resisting Midtown's application, EGFL has no real prospect of establishing any of its proposed defences to Midtown's claim. I am further of the view that it is just and appropriate to reach this conclusion on the material before the court without the need for a trial. It was not suggested on behalf of EGFL that there is some other compelling reason for a trial and indeed there is none.

72. In short, it not having been contended that the NY York Supreme Court did not have jurisdiction in accordance with common law principles to issue the NY Judgment, I am satisfied that Midtown is entitled to an immediate judgment to enforce the NY Judgment on the basis that that judgment is for a sum of money, is final and conclusive and is not impeachable for fraud or breach of natural justice.

The stay issues

73. In deciding that Midtown is entitled to be granted immediate judgment, I have implicitly dismissed EGFL's application for a stay of Midtown's application.

74. What remains to be considered is Mr Ghaffar's submission that if the Court were minded to grant immediate judgment it should nonetheless grant a stay of execution pending the handing down of judgment by the NY Supreme Court on EGFL's various motions under 5015, 3218 and 317 NY CPRL including application for a stay of execution pending judgment on those motions. I understand that all of these motions were heard on 29 March 2017 and that no stay was granted there and then. I further understand that it is uncertain when judgment on these motions is likely to be handed down and that this may not happen for a number of months.

75. On the basis that EGFL's motion under 5015 CPRL appears to be its most substantial application to the NY Supreme Court, I think that in deciding whether to grant a stay of execution I should form as good an assessment of EGFL's chances on this motion as I can. I am of this opinion because the stronger is EGFL's case under 5015 CPRL, the stronger is its case for a stay, and *vice versa*. I appreciate that it is for the NY Supreme Court to decide the 5015 motion, not the DIFC Courts, and I intend no disrespect to the former court in undertaking this exercise.

76. As recorded above, EGFL contends that the Term Sheet is to be construed as limiting the Claimants' entitlement to applying for Confession Judgments to where EGFL is in breach of the payment plan. In making this contention, EGFL is faced with the difficulty that the Term Sheet does not so provide in terms. Indeed, on the contrary, in the third paragraph of the Term Sheet the Lenders only "forebear, suspend and hold in abeyance all of their rights, actions or claims...on the Confessions of Judgment.until 31 March 2016", and then only if EGFL makes the first instalment of the "Settlement Amount" of USD 10 million on or by 24 March 2016.

77. EGFL is accordingly left with its argument that, notwithstanding the third paragraph, the Term Sheet must be read to mean what EGFL says it means for otherwise it will be a commercial absurdity. It seems to me that the success of this contention will depend in material part on: (1) the factual matrix of the Term Sheet, which includes the fact that, *quoad* the Claimants, EGFL was effectively in mercy when entering into the Term Sheet agreement, owing as it did at least USD 617 million from 26 March 2016, the date of the Notice of Acceleration; (2) the fact that the second paragraph of the Term Sheet contemplates a definitive settlement being concluded by 24 March 2016, including the security package specified in Section 8; and (3) no definitive agreement including a security package has been concluded.

78. Even if EGFL's interpretation of the Term Sheet be held to be the correct one, it need hardly be said that the more difficult it will have been for EGFL to establish this interpretation, the more difficult will it be to establish that the Claimants knew they were not entitled to obtain the NY Judgment and were therefore guilty of "fraud, misrepresentation, and/or other misconduct" within the terms of 5015 NY CPLR.

79. EGFL will also have to show that it was not in default of the payment schedule. Three payments of USD 10 million each were made on 24 March, 31 March and 3 May 2016, the latter payment being 3 days late; and two further payments of USD 5 million due on 31 May 2016 were made late on 6 June and 23 June 2016. EGFL maintains that the Claimants agreed to accept these late payments. However, it was stated on behalf of the Claimants in an email to EGFL that the acceptance of these payments did not amount to a variation of the payment plan and Midtown argues that that spells doom for EGFL's contention that it was agreed that there would be no default by reason of the lateness of these payments. Plainly, if there was no effective variation of the payment plan, EGFL's 5015 motion is pretty likely to fail.

80. The next payment of USD 10 million was due on 30 June 2016. Nothing was paid on this date but further sums of USD 5 million were received by the Claimants on 21 July and 18 August 2016 respectively. However, these sums were not paid by EGFL and Midtown contends that they do not constitute payments made under the payment plan. EGFL, on the other hand, maintains that it was agreed that they should constitute payment under the plan.

81. The payments in question were made pursuant to two agreements (a participation agreement and a representation agreement) under which an entity separate entirely from EGFL (the "**Participant**") agreed to purchase from the Lenders a last-out participation interest in the term loans made under the Credit Agreement and EGFL made certain representations to the Lenders, including, inter alia, that the participant was entirely separate from it and it (EGFL) had no agreement or understanding with the participant that would breach any organizational documents, law, judgment or contract to which it was a party.

82. In my judgment, whilst EGFL's case on its 5015 motion is certainly arguable, it is far from being a sure-fire winner.

83. In a judgment dated 17 March 2017[10], Mr Justice Teare, sitting in the London Commercial Court, awarded Midtown summary judgment on its claim to enforce the NY Judgment in England and Wales but granted a stay of enforcement pending the determination of EGFL's motion for a stay of execution pending determination of EGFL's 5015, 3218 and 317 NY CPRL motions. Teare J said that he understood that the stay motion would be heard at the end of March 2017 and in his view it would be odd and arguably inconsistent with the doctrine of comity to permit execution of Midtown's English summary judgment were the NY Supreme Court to grant a stay of execution.

84. I take a different view on the question of a stay of execution. Unlike the London Commercial Court, this Court now knows that the NY Supreme Court did not grant a stay of execution from the bench on 29 March 2017 and also that it is not known when judgment on EGFL's motions will be handed down. It may not be for a number of months. In the meantime, EGFL is liable under the NY Judgment for the sum of USD 171,769,169 and has ceased to make any further payment under the payment plan. In these circumstances justice does not, in my view, call for a stay of execution. Instead, Midtown should be free right away to execute on the immediate judgment I propose to award to it. If the NY Judgment is eventually vacated by the NY Supreme Court, EGFL can apply to Midtown for reimbursement of any sums obtained by execution and it was not suggested by Mr Ghaffar that Midtown would be unable to meet any legally sound claim that it should repay those sums.

Conclusion

85. For the reasons given above, Midtown are awarded immediate judgment on their claim to enforce the NY Judgment and there will be no stay of execution.

Issued by:

Nassir Al Nasser

Judicial Officer

Date of Issue: 13 April 2017

At: 4pm