THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

FISKE

FIRMIN

Claimants

and

FIRUZEH

Defendant

ORDER OF H.E. JUSTICE ALI AL MADHANI

UPON reviewing the Defendant's Application Notice and supporting documents requesting that: (i) the issue of conflict of legislative provisions be referred for determination by the Union Supreme Court ("USC") of the United Arab Emirates; and (ii) these proceedings be stayed pending the determination of the USC ("the Defendant's Application").

AND UPON hearing Counsel for the Claimants and Counsel for the Defendant;

IT IS HEREBY ORDERED THAT:

1. The Defendant's Application is dismissed.

2. The Defendant shall pay the Claimants their costs of the application within 14 days of the date of this Order, to be assessed by the Registrar if not agreed.

SCHEDULE OF REASONS

The Application

1. This is the Defendant's Application.

2. The Defendant, Y, applied for an order referring the alleged direct conflict between: (i) the UAE Civil Procedure Code, Federal Law No.11 of 1992 (as amended by Federal Law No. 30 of 2005) ("**CPC**") and (ii) the judicial authority law, Dubai Law No.12 of 2004 (as amended by Law No.16 of 2011) ("**JAL**"); and the DIFC Arbitration Law, DIFC Law No.1 of 2008 (as amended by DIFC Law Amendment Law, DIFC Law No.1 of 2013) ("**Arbitration Law**") and, therefore, the alleged unconstitutionality of the latter provisions, for determination by the USC pursuant to Articles 99(3), 121 and 151 of the UAE Constitution.

3. The Defendant further requested that these proceedings be stayed pending final determination by the Union Supreme Court should the issue be referred to it, and applied for the costs of the application.

Background

4. In the present case the Claimants (who have no connection with the DIFC) seek an order against the Defendant (a company incorporated and domiciled in mainland Dubai) before the DIFC Courts for recognition and enforcement of a foreign arbitration award pursuant to the combined application of Article 5(A)(1)(e) of the JAL and Articles 42 and 43 of the Arbitration Law.

5. The Defendant contests the jurisdiction of this Court to recognise and enforce a foreign arbitration award in a separate application which shall be dealt with by this Court at a later date.

6. In 2014, the Defendant submitted the current application.

7. This Court heard the Defendant's Application over the course of a one-day hearing and dismissed it, with reasons to be delivered before the main jurisdiction hearing.

The Defendant's grounds in support of their Application

8. The first argument of the Defendant in support of its Application is that the UAE Federal Civil Procedures Law ("CPC") provides at Article 31(1) that Jurisdiction shall be vested in the court within the area in which the Defendant has its domicile, unless the law provides otherwise. Furthermore, Article 31(3) provides that in commercial matters, jurisdiction shall be vested in the court in whose area the Defendant has its

domicile or the court in whose area the agreement was made or was performed in whole or in part, or in the court in whose area the contract should have been performed.

9.&#65533;Article 31(1) of the CPC provides as follows:

> "Jurisdiction shall lie with the court in whose circuit the defendant's domicile is situated unless otherwise stipulated by law."&#65533;

With reference to the present case, the Defendant suggests that under the CPC (Federal Law), jurisdiction in relation to any commercial claim against &#65533;the Defendant resides with the Dubai Courts, being those of the Defendant's domicile.

10.&#65533;The Defendant also cites Articles 235 and 236 of the CPC in arguing&#65533; that foreign arbitral awards are to be enforced before the court of first instance within the jurisdiction of which they are&#65533; sought to be enforced (which by virtue of Article 31 must be that of the Defendant's domicile, i.e. Dubai), under the usual procedures for bringing a claim.

11.&#65533;For the Defendant the "usual procedures" for enforcing an award of arbitrators involve ratification by the Court in accordance with Article 215 of the CPC. The "usual procedures" for a claim in the Dubai Courts also mean that litigants must follow the procedural requirements for the conduct of civil litigation in those courts, including, amongst other things, as to: service; pleadings; evidence; the language of the proceedings and translation of all non-Arabic documents that are submitted in the case.

12.&#65533;The Defendant then asserts that the provisions of the DIFC Arbitration Law, in particular Articles 42 and 43, in addition to Article 5(A)(1)(e)&#65533; and 7 (2) and (3) of the JAL are in conflict with the "usual procedures" discussed above.

13.&#65533;Article 42(1) of the DIFC Arbitration Law permits recognition and enforcement of an arbitral award within the DIFC irrespective of the State or jurisdiction in which it was made. However Article 42(4) provides that:

> "Awards recognised by the DIFC Courts may be enforced outside the DIFC in accordance with the Judicial Authority Law and recognition under this Law includes ratification for the purposes of Article 7 of the Judicial Authority Law."

The JAL provides the following at Articles 5(A) and 7:

> "Article 5 Jurisdiction
>
> "(A) The Court of First Instance

(1) The Court of First Instance shall have exclusive jurisdiction to hear and determine...

.

(e) Any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations;"

&#65533;

> "Article 7 Execution

.

(2) 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 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..

(3) In addition., when executing the judgments, decisions and orders issued by the Courts or Arbitral Awards ratified by the Courts through Dubai Courts, the following must be observed:.

(c) the execution judge of Dubai Courts shall apply the execution procedure and rules stipulated in the aforementioned Federal Civil Procedure Code, including any objections to the execution; the execution judge may not reconsider the merits of the judgment, decision or order;"&#65533;

14.&#65533;The Defendant asserts that the application of the said Articles would probably lead to the definition of recognition as "ratification" for the purposes of the JAL, which is a Dubai law and in turn to the enforcement of awards recognised by the DIFC Courts outside of the DIFC even if the case has no jurisdictional link to the DIFC.`

15.&#65533;Consequently, DIFC legislation would have effect outside the DIFC and that should not be allowed according to Article 7(3) of Federal Law No.8 of 2004, which provides that Emirates may - within the limits of the goals of establishing an FFZ - issue legislation necessary for the conduct of their activities.

16.&#65533;The wording of Articles 7(2) and (3) of the JAL, which provide that when executing Arbitral Awards ratified by the DIFC Courts through the Dubai Courts the execution judge of the Dubai Courts shall apply the execution procedure and rules stipulated in the CPC, would create a conflict with "ratification" within the meaning of Article 215 of the CPC, which is a very different process from "recognition" within the meaning of the DIFC Arbitration Law.

17.&#65533;This is a conflict between Dubai local law (JAL) and a superior Federal law (CPC) as it is plain from the provisions in Article 7 of the JAL&#65533; that "*the legislator did contemplate that there could be circumstances in which recognition of a foreign arbitral award by the DIFC*

Courts could trigger enforcement proceedings, through the Dubai Courts, against assets in the Emirate of Dubai (but outside the DIFC) without the need for separate recognition of the award by the Courts of Dubai" (see *Eloise*❓***& Elspet***❓***v Elroy***❓***, ARB 002/2013***).

18.❓The true situation for the Defendant is that the DIFC Arbitration Law cannot equate recognition under DIFC law with ratification under Dubai law or affect the meaning of a Dubai law.

19.❓The Defendant envisages further complication: "*it should be noted that [the Claimants] claim "Judgment in terms of the Awards". If the DIFC Courts were to issue a judgment , that judgment would fall to be executed under Article 7 of the JAL as a judgment of the DIFC Courts, not a foreign arbitration award ratified by the DIFC Courts thereby sidestepping the requirement for ratification under Article 215 CPC."*

20.❓The laws of Dubai and those of the DIFC are legislation issued by the authorities of the Emirates, whereas the CPC "Federal law" is constitutionally superior to the laws of Dubai and the DIFC. In the event of any contradiction as cited in the decision in ARB 002/2013, the conflict issue should be referred to the USC for determination.

21.❓Articles 99(3), 121 and 151 of the Constitution provide, respectively, that:

Article 99(3):

"The Federal Supreme Court has the following powers.Consider the constitutionality of laws, legislation and regulations in general if it is so requested by any court in the country while hearing a relevant case. The concerned court shall comply with the decision of the Federal Supreme Court rendered in this connection."

Article 121:

".the UAE [i.e. the Federal legislature, as opposed to the legislatures of the individual Emirates] has exclusive legislative jurisdiction in the following matters .regulation of the free financial zones, the manner in which they are established, and how far they are excluded from scope of application of the federal legislative provisions."

Article 151:

"The provisions of this Constitution shall prevail over the Constitution of the member Emirates of the Union and the Union laws which are issued in accordance with the provisions of this Constitution shall have priority over the legislation, regulations and decisions issued by the authorities of the Emirates. In case of conflict, that part of the inferior legislation which is inconsistent with the superior legislation shall be rendered null and void to the extent that removes the inconsistency. In case of dispute, the matter shall be referred to the Union Supreme Court for its ruling."

Article 58 of Federal Law No.10 of 1973 (as amended by Federal Law No. 26 of 1992) relating to the USC ("USC Law") provides that:

"Requests for constitutionality examination raised while examining a case before the courts shall be referred to the Supreme Court by virtue of a justified decision from the court, signed by the president of the competent court and including the texts to be examined, if reference is done upon a decision from the court on its own.

If the challenge of the constitutionality is raised through the plea of one of the litigants in the lawsuit and accepted by the court it shall fix a term for the challenger to submit its challenge to the Supreme Court, and if the term expires without the submission of proof by the challenger that it has lodged its appeal in time, it shall be considered as having relinquished it.

If the court rejects the plea, the refusal shall be by a justified decision. The interested parties may appeal it with the decision that is issued on the merits of the case before the court that has jurisdiction to examine the appeal to such decision whenever the appeal thereto is allowed.

The court before which the action is examined shall order a stay of action until the Supreme Court decides on the constitutionality. The stay decision shall be issued with the decision to refer indicated in the first paragraph of this article or after the appeal has been lodged within the term fixed by the court as mentioned in the second paragraph."

22.❓With reference to the judgment in **Allianz Risk Transfer AG Dubai Branch v Al Ain Ahlia Insurance Company PJSC, CFI 012/2012, dated 24 April 2013,** the Defendant finally argues that as courts of the UAE, it is manifest that the DIFC Courts are subject to the superior constitutional jurisdiction of the USC under the UAE Constitution and therefore also the USC Law .The procedures of the USC under the USC Law therefore must be recognised as binding on the DIFC Courts, including the procedure set out in Article 58 of that Law for applications made by a party to proceedings for examination of the constitutionality of legislation within the context of the proceedings.

23.❓In the present case, the Defendant submits that as this application is made under Article 58 of the USC Law, the court to which the application is made (here, the DIFC Courts) shall refer an issue of conflict to the USC and order the proceedings before it to be stayed.

The Claimants' Grounds for dismissing the Defendant's Application

24.❓The first argument put forward by the Claimants is that the application and the legislation relied on are misconceived. They assert that there is no conflict between Article 5(A)(1)(e) of the JAL and Articles 42 and 43 of the Arbitration Law with the CPC, and that the Defendant's submissions entirely ignore the constitutional foundation of the DIFC.

25.❓The Claimants refer to Article 121 of the UAE Constitution (as amended) which provides that:

"the Federation shall have exclusive legislative jurisdiction in the following matters.

"organising the free zone areas, determining the method of creation of such zones and the scope of its exception from the implementation of the Federal laws."

26. The Claimants also referred to Federal Law 8 of 2004 which deals with the establishment of free zones:

(1) Article 2 states that such zones shall be established by Federal Decree;

(2) Article 3(2) states that civil and commercial laws of the UAE shall not apply to the free zones;

(3) Article 7(3) provides that:

"Subject to the provisions of Article 3, the concerned Emirate may, within the limits of the goals of establishing the Financial Free Zone, issue legislation necessary for the conduct of its activities."

27. The real situation is that, by Federal law, the UAE has dis-applied the Civil and Commercial laws of the UAE within the DIFC and has conferred onto the Dubai authorities the power to enact legislation. There can therefore be no conflict between DIFC law and UAE law with the CPC, which does not apply:

"This must be right - if the Defendant's argument were correct, the result would be that all of the provisions of the CPC (and, indeed, the UAE Civil Code and all other Federal law) would be mandatory. Any DIFC law which was different from Federal law (most of them) would, by the Defendant's argument, be unconstitutional. On this basis alone, all of the Defendant's argument fails"

28. The Claimants' second argument is that Article 1 of the CPC, as amended by Federal Law 30 of 2005, expressly provides that the civil procedure law will apply except where an Emirate has retained its local judiciary powers and has not transferred them to the Federal judiciary.

29. Thus, by Federal law, the Emirate of Dubai is entitled to regulate its own Courts and determine which of them shall have jurisdiction over any particular dispute. It may adopt some, all or none of the provisions which would otherwise apply.

30. The Defendant further argues that where it presumably applies, Article 31(1) of the CPC does not provide any mandatory constitutional right to be sued in the Court of a party's domicile.

31. Article 31(1) provides:

"The court, in which area the defendant's residence exists, should have the jurisdiction unless the law stipulates otherwise."

According to the Claimants, Article 31 is therefore a default position, as it expressly allows for the possibility that the law may provide a different rule.

32. The Claimants also argue that there is no arguable constitutional complaint. Federal law permits the Emirate of Dubai and the DIFC to enact its own legislation.

33. There is, in any event, no arguable conflict between the DIFC position and the Dubai position. The provisions on which the Defendant seeks to rely would not apply whether or not the Defendant was sued in the Dubai Courts. Contrary to the Defendant's submissions, the CPC does distinguish between foreign and domestic arbitration awards.

34. Article 212(4) states:

"The arbitrators' award shall be issued within the United Arab Emirates; otherwise, the rules applicable to arbitration awards passed in foreign countries shall apply thereto."

35. The enforcement of foreign awards is governed by Articles 235 to 238 of the UAE Civil Procedure Code.

(1) Article 235 sets out rules for enforcement of foreign judgments;

(2) Article 236 provides that those rules shall also apply to the enforcement of foreign arbitration awards;

(3) Article 238 however provides that, in enforcing arbitration awards and judgments, the Court shall apply any existing international treaties or conventions.

36. One set of rules therefore applies to arbitration awards made in the UAE. Another set applies to arbitration awards "passed in foreign countries". Where a treaty exists, its terms will be applied.

37. The Dubai Court of Cassation has confirmed this in **Airmec v Maxtel (Cassation No. 132/2012)**. Foreign arbitral awards will be dealt with under the provisions of the New York Convention.

38. The Claimants had claimed enforcement of the awards in the Dubai Courts, those courts would have applied exactly the same criteria as would be applied by the DIFC Courts - those set out under the New York Convention.

39. There is therefore no arguable basis on which it can be said that, as a result of proceedings being brought in the DIFC, the Defendant has been deprived of any defences arising under the CPC.

40. This argument is, in any event, entirely theoretical. The Defendant has not even begun to explain what defences under the CPC it would lose.

Finally the Claimants submit that a stay of these proceedings pending appeal or the outcome of an application to the USC is transparently an attempt to cause further delay and asked the Court to dismiss the application mainly on the grounds that:

(1) There is no merit in the Referral Application and no merit in any appeal;

(2) If the Defendant's argument was correct, it would affect nearly every case currently before the DIFC Courts. There is no more reason to stay this case than there would be to stay all of the Court's business;

(3) The complaint ultimately goes to jurisdiction and so should have been included in the Defendant's application disputing the Court's jurisdiction.

The decision

41. As can be seen from the Defendant's arguments (summarised above), the current application asserts that this Court should stay the proceedings and refer the matter to the USC to review the constitutionality of Article 5(A)(1)(e) of the JAL and Articles 42 and 43 of the Arbitration Law against the rules of the Federal CPC in relation to the ratification and enforcement of the Arbitral award, on the basis that the Dubai and DIFC laws conflict with a superior Federal law - which constitutes public policy in that matter.

42. First of all, I agree with the Defendant that the USC has amongst other powers the authority to consider the constitutionality of legislation and regulations in general if it is so requested by any court in the country while hearing a relevant case, and that courts in the UAE shall comply with the decision of the USC rendered in this connection as stated in Article 99 of the UAE Constitution.

43. According to Article 151 of the Constitution - the examination of constitutionality entails the following:

> "The provisions of this Constitution shall prevail over the Constitution of the member Emirates of the Union and the Union laws which are issued in accordance with the provisions of this Constitution shall have priority over the legislation, regulations and decisions issued by the authorities of the Emirates. In case of conflict, that part of the inferior legislation which is inconsistent with the superior legislation shall be rendered null and void to the extent that removes the inconsistency. In case of dispute, the matter shall be referred to the Union Supreme Court for its ruling."

44. I also agree with the Defendant's submission that the DIFC regime is not exempted from the jurisdiction of the USC when it comes to the Constitutionality Examination, including the fact that the DIFC Courts is a UAE Court that can refer a matter to the USC if requested to do so, and then must comply with the decision of the USC rendered in that connection.

45. The text of Article 55 of the USC Law suggests that a mere application by parties is not sufficient to refer the challenge of constitutionality to the USC, the Court must first agree that the application should be submitted.

> "If the challenge of constitutionality is raised through the plea of one of the litigants in the lawsuit and accepted by the court it shall fix a term for the challenger to submit his challenge to the Supreme Court, and if the term expires without the submission of proof by the challenger that it has lodged its appeal in time, it shall be considered as having relinquished it."

46. This means that this Court has the capacity to consider the merits of the application and determine whether a conflict exists between two or more laws that fall under the jurisdiction of the USC. But the question remains as to what extent the referring court's view should stand?

47. The answer to this question can be found in ***Case No. 1/34 Constitutional of 9 June 2008*** presented to this Court by the Defendant at the hearing (not part of the Authorities Bundle):

> "the court has the authority to evaluate whether the pleading of non-constitutionality is serious or not."

48. That leads this Court to the conclusion that 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.

49. The question in the current application is whether there is a constitutional conflict between Article 5(A)(1)(e) of the JAL and Articles 42 and 43 of the Arbitration Law on the one hand, and the rules of the CPC on the other hand in relation to the ratification and enforcement of foreign awards before this Court.

50. In the current application the Defendant is raising a challenge of conflict between Dubai and DIFC laws applicable in the DIFC and before this Court on the one hand, and between CPC rules which are not applicable in the DIFC or before this Court on the other.

51. The rules of the CPC are not applicable in the DIFC or before this Court by Federal legislation (Federal Law 8 of 2004 3(2)) and that means there cannot (practically) be a conflict between an applicable rule and an inapplicable one.

52. It is very well known that public policy can be generally defined as a system of laws, regulations, regulatory measures, or courses of action concerning a public matter and that the source of that public policy is usually laws.

53. Thus, it can be said that it is public policy in the whole of the UAE not to apply the CPC within the DIFC and that leads us to conclude that there are no conflicts as long as the said Dubai and DIFC laws apply within the Centre (DIFC).

54. The Defendant then argues that the application of Article 5(A)(1)(e) of the JAL and Articles 42 and 43 of the Arbitration Law- which are Dubai and DIFC laws - would extend to take effect outside the jurisdiction of the DIFC in Dubai mainland where the conflict with the CPC would be clearer.

55.The answer to the previous argument is that the DIFC Courts should deal with matters before it according to the given laws, regulations, public policy or public order that are applicable to it within its capacity and jurisdiction. So that if the outcome of the DIFC Courts proceedings would result in conflict with the law or public policy of other or foreign courts' jurisdiction (or is expected to in any way) then it is for that Court according to its rules to decide whether to enforce the decision of the DIFC Courts or not for legitimate reason.

56.The DIFC Courts cannot and should not decide on behalf of other or foreign courts as to public policy or the right legal or judicial practice in that jurisdiction.

57.The foregoing is not in conflict with what the Deputy Chief Justice Sir John Chadwick held in this regard in his judgment in ARB 002/2013 at paragraph 41, in which he found that:

> "It seems to me plain, from the provisions in Article 7 of the Judicial Authority Law, that the legislator did contemplate that there could be circumstances in which recognition of a foreign arbitral award by the DIFC Courts could trigger enforcement proceedings, through the Dubai Courts, against assets in the Emirate of Dubai (but outside the DIFC) without the need for separate recognition of the award by the Courts of Dubai; and vice versa. An example of such circumstances might be a case in which the party against whom the arbitral award had been made had assets in the Emirate of Dubai of which some were within the DIFC and others were not. In such a case it seems to me most unlikely that the legislator intended that the party seeking to enforce the award should be required to seek recognition of the award from both the DIFC Courts and the Dubai Courts."

58.This judgment of the Deputy Chief Justice provides an interpretation of legislation that is applicable within the DIFC and is binding within the DIFC, hence, Dubai courts are still free to have their say should a dispute or challenge similar to the one at hand be raised before them.

59.If one were to follow the Defendant's argument, the result would be that all of the provisions of the CPC would be mandatory and then any DIFC law which differed from Federal law (such as in the circumstances of the present case) would, according to the Defendant's argument, be unconstitutional.

60.I also agree with the Claimant's argument that was made during the trial as to what would happen if the Defendant was found to have assets within the DIFC now or later in the future, the stay of these proceedings would in my view affect the Claimant's right to the recognition and enforcement of any assets of the Defendant which might be eventually found within the DIFC.

61.Nothing in the rest of the Defendant's or Claimants' submissions or arguments require me to provide any further reasoning than what has been said above.

62.For the above-mentioned reasons the Defendant has failed to establish before this Court that there is any constitutional conflict between Dubai and DIFC law on the one hand and Federal law on the other hand which might require a referral to the USC for a constitutionality examination and determination, accordingly this application is dismissed.

63.The Defendant is to pay the costs of this application on the standard basis, to be assessed by the Registrar if not agreed by the parties.

64.The Court directs that the Defendant's time to apply for permission to appeal this Order be 14 days from the date on which the Defendant receives this Order in accordance with Rules 44.36(1) and 44.37 of the Rules of the DIFC Courts.

Issued by:

Natasha Bakirci

Assistant Registrar

Date of issue: xx 2014

At:xx