

Dubai Cassation court emphasises its strict compliance to the New York Convention

by Hassan Arab - h.arab@tamimi.com - Dubai International Financial Centre
Marwa El Mahdy - m.elmahdy@tamimi.com -

February 2013

In a recent judgment issued on 18 September 2012, Dubai Court of Cassation confirmed to the international society its determination and commitment to strictly complying with the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

The ruling is the latest in a series of positive decisions rendered pursuant to the UAE acceding to the New York Convention in November 2006. It tackles different arguments relating to the scope of jurisdiction of local courts with respect to foreign awards, the burden of proof for setting aside the award and the scope of review allowed from the lower courts.

Summary of facts:

The Claimant (an international steel trader) entered into a purchase agreement with the Respondent (a contractor domiciled in Dubai) under which the Respondent purchased a consignment of steel sheeting from the Claimant.

The Parties agreed to refer any dispute arising from their agreement to be resolved by way of DIFC-LCIA arbitration seated in London.

A payment dispute arose between the parties which was referred to arbitration according to their agreement. The arbitration tribunal rendered two awards for the Claimant, the first award concerned damages under the agreement and the second award concerned arbitration and legal costs. Consequently, the Claimant initiated legal action before Dubai Court of First Instance seeking enforcement of the two arbitral awards issued against the Respondent, and requested that the precautionary attachment be confirmed as enforceable.

Procedural History

– First Instance Court:

The Respondent for the court to set aside the two arbitral awards on the following grounds:

a- The signatory of the arbitration agreement did not possess required authority to agree to arbitrate on behalf of the Respondent nor the authority required to dispose of the right which is the subject of the dispute.

b- Procedures of appointing the arbitrator were invalid.

c- The two arbitral awards were issued without an arbitration deed as required by Article 216 of the UAE Civil Procedures Law (CPL) and Article 5 (c) of the New York Convention.

d- The arbitration proceedings were invalid as the arbitral awards were rendered by application of the English law in contradiction with the parties' agreement to arbitrate under DIFC rules.

e- The Arbitrator failed to administer the oath to the witnesses as required by Article 211 of CPL.

The Court of First Instance ruled the following:

- In the main action: to recognise the two arbitral awards subject of dispute and to confirm the precautionary attachment filed by the Claimant.
- In the counter action: to dismiss the counter claim filed by the Respondent for lack of jurisdiction.

The Respondent appealed to the Court of Appeal which upheld the lower court's judgment; consequently the Respondent challenged the judgment before the Court of Cassation.

Judgment:

The appeal is based on five grounds.

The agreement between the parties was invalid, it was not signed by the manager of the company who is the authorised signatory. The Respondent, during proceedings before the lower court, requested that the Claimant produces original of the agreement, however the latter failed to produce the original and merely submitted a faxed copy alleging that the agreement was concluded via fax.

The Court of Cassation rejected this argument. The lower courts allowed the Respondent to realise its defence by identifying its employee who signed the contract in order to determine whether or not such employee was granted the authority to sign agreements on behalf of the manager. However, the Respondent denied knowing the identity of the employee and denied having concluded the agreement contrary to its admissions in its memorandum before the lower courts in which the Respondent admitted having concluded the agreement and only concerned its defence around irregularity in the arbitration proceedings. Furthermore, Article 5 of the New York Convention of 1958 placed the burden of proof on the party claiming nullity of an arbitration award in this case the Respondent who merely denied the documents without furnishing any evidence supporting its allegations.

The First Instance Court dismissed the Respondent's counter claim for lack of jurisdiction on grounds that such jurisdiction belonged to the arbitrator who issued the two arbitral awards and that the court's supervision is limited to ensuring that the arbitral awards were issued in compliance with Federal Decree no. 43 of 2006 (by which the UAE acceded to the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards). The Respondent further stated that the New York Convention provisions do not preclude an action for setting aside an arbitral award. The Respondent requested setting aside the arbitral awards as per Article 206 of the CPL which states that it is permissible for parties to request setting aside arbitral awards while the action to ratify such award is being heard before courts.

The Court of Cassation rejected this argument. It is concluded from provisions of the CPL in relation to arbitration and the procedures to be followed by the court when ratifying arbitral awards, in particular articles 212, 213 and 215 that the national courts have the jurisdiction to either ratify/recognise or set aside an arbitral award that was issued within the UAE, otherwise the court is compelled to apply rules concerning arbitral awards issued in a foreign state.

It is also construed from Article 238 of CPL that rules of international conventions which were ratified by the UAE are considered as internal legislation within the UAE and it is compulsory for the national courts to apply such rules to all disputes arising in relation to the execution of foreign arbitral awards and foreign judgments.

The two arbitral awards subject of dispute were issued in London in accordance to the New York Convention on recognition and execution of foreign arbitral awards, therefore the UAE courts jurisdiction in relation to foreign arbitral awards is only limited to ensuring they do not contravene

the required procedural and substantive forms for awards as per articles 4 and 5 of the New York Convention. The Court of Cassation confirmed that the two arbitral awards fulfilled these requirements.

The Respondent argued the invalidity of the arbitration clause included in the agreement as well as the invalidity of the procedures by which the arbitrator was appointed in accordance to Article 44/7 of the DIFC arbitration rules. Furthermore, The Arbitrator failed to administer the oath to the witnesses as per Article 211 of CPL.

The Court of Cassation rejected this argument. As mentioned above, Article 5 of the New York Convention placed the burden of proof on the party claiming nullity of an arbitration award. The Respondent in this case requested to set aside the arbitral award failed to produce any evidence to support the above allegations.

The Respondent further claimed that the jurisdiction to hear this case was for the DIFC courts as per the parties' agreement.

The Court of Cassation held that these arguments were inadmissible. The effect of Federal Decree no. 43 of 2006, is that all UAE courts have the jurisdiction to recognise and enforce foreign arbitral awards which means that parties can resolve to any court in the UAE to request enforcing a foreign arbitral award.

The arbitral awards were issued in contradiction to Islamic Sharia and public policy in the UAE as it awarded usurious interests.

The Court of Cassation rejected this argument. Prohibition on agreeing to usurious interest in any type of civil or commercial transaction under Article 409 of the Penal Law and Article 714 of the Civil Transactions Law is limited to transactions between individuals without extending to transactions between individuals and corporate entities which can agree with other corporate entities or individuals on conventional interest. As per the documents, the parties to the agreement subject of dispute in question are corporate entities; therefore any interest awarded is permissible.

Accordingly, the petition to cassation was dismissed.

Practice Note

The judgment in study has affirmed several important principals concerning commercial international arbitration. At the international level, the judgment as mentioned earlier confirmed the UAE Courts' determination to comply with the New York Convention. On the domestic level, the judgment confirmed the principle that all UAE courts shall have the jurisdiction to hear actions in relation to confirmation and enforcement of foreign arbitral awards.