

Abu Dhabi Court of Cassation Re-affirms Precedence of New York Convention

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However the previous rules on the enforcement of foreign arbitral awards (found at articles 235 – 238 of the UAE Civil Procedure Law) have not been repealed. This has sometimes led to confusion as to whether the previous rules still apply notwithstanding the UAE's ratification of the New York Convention.

In Challenge No. 679 of 2010, the Abu Dhabi Court of Cassation reaffirmed the supremacy of the New York Convention over the previous UAE Civil Procedure Law, quashing the decisions of both the Court of First Instance and Court of Appeal.

Facts and procedural background

The Claimant filed a claim before the Abu Dhabi Court of First Instance seeking the ratification and enforcement of a French arbitration award that had been issued under the auspices of the ICC.

The Defendant argued that the award contradicted a criminal judgment issued in the UAE in which the Claimant had been ordered to pay a fine for fraud.

The Abu Dhabi Court of First Instance decided to defer its judgment pending issuance of a decision in the criminal case. In due course the Claimant submitted a certificate issued by the Public Prosecution in which it was found that the criminal case had lapsed due to the expiry of a time limit.

The Abu Dhabi Court of First Instance then issued its judgment and refused to ratify the award. Article 235(a) of the UAE Civil Procedures Law states that a foreign judgment or foreign award is not to be recognized and enforced if the UAE courts would have had jurisdiction over the dispute. The Court of First Instance found that this was so in the case, and so refused to ratify the award, notwithstanding the fact that this is not a ground for refusal under the New York Convention.

The Claimant appealed to the Abu Dhabi Court of Appeal which upheld the decision of the Court of First Instance. The Claimant challenged the appeal court's decision before the Abu Dhabi Court of Cassation.

The Abu Dhabi Court of Cassation

The Claimant argued that the appealed decision misapplied the law in upholding the First Instance decision which applied Article 235 of the Civil Procedures Law instead of the New York Convention.

The Court of Cassation accepted the appeal and quashed the decisions made by the Court of First Instance and the Court of Appeal.

The Court of Cassation held that Articles 235-238 of the UAE Civil Procedures Law (and in particular Article 238) require UAE courts to abide by the provisions of any international conventions to which the UAE is a signatory. If however a foreign award was rendered in a state that is not a signatory to an international convention or treaty acceded by the UAE, the court would need to determine whether the conditions set out in Article 235 of the Civil Procedure Law have been met.

Since the UAE ratified the New York Convention in 2006, the provisions for recognition set out in the Convention have become mandatory laws of the state notwithstanding its contradiction to previous laws (including Article 235-238 of the Civil Procedures Law).

The appealed decision contradicted the above view in upholding the lower court's decision on the basis that the UAE courts would have had jurisdiction to hear the dispute.

Case Comment

The decision by the Abu Dhabi Court of Cassation is welcome because it clarifies again that the provisions of the New York Convention take precedence over the pre-existing recognition and enforcement criteria found in Articles 235-238 of the Civil Procedure Law.

This is important because the provisions in the Civil Procedures Law make it extremely difficult to enforce foreign arbitral awards. As can be seen from the Court of First Instance judgment, one of the reasons for refusing recognition and enforcement under the Civil Procedures Law is if it cannot be established that the local court would not have had jurisdiction over the dispute (article 235(a)). This will almost always be the case since the court will consider that it has jurisdiction if a party is based in the UAE or has assets in the UAE, and enforcement is only likely to be sought where there are assets in the UAE.

The difficulty of enforcing foreign arbitral awards under the Civil Procedures Law was why it was so important that the UAE accede to the New York Convention. Under the Convention, foreign arbitral awards can only be refused recognition on the basis of a few narrow procedural irregularities, or if the award is against public policy.

Whilst the judgment is welcome, it does highlight two areas for concern:

1. Although the Court of Cassation is clear that the New York Convention takes precedence over the Civil Procedures Law, from time to time the lower courts are still applying the old law And ignoring or misunderstanding the application of the New York Convention. In light of this judgment of the Court of Cassation hopefully we will see less instances of this.
2. The Court of Cassation made a distinction between foreign awards issued from a state that had signed the New York Convention (and to which it would therefore apply the New York Convention criteria on enforcement); and awards from non-Convention states (to which would be applied the old Civil Procedures Law criteria). This is arguably incorrect because on acceding to the Convention the UAE did not make any reservations to this effect, and the terms of the Convention state that its criteria is to apply to all foreign arbitral awards regardless of where they are issued (unless a reservation is made). However since the vast majority of states have signed the New York Convention, it is unlikely to arise in practice.