

Dubai Courts recall UK's accession to NY Convention but forgets reservations

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Background

By way of background, the Court of Appeal on 30 March 2016 rejected an English arbitral award for two reasons that were controversial:

- It ruled that a principle of reciprocity in the UAE's Civil Procedure Law applied to the enforcement of the award. This was controversial because, being a signatory to the NY Convention, the UAE Civil Procedure Law should not have been applied. Under the NY Convention there is no reciprocal principle (i.e. no need to show that the state in which the award was made would enforce a UAE award).
- It ruled that the principle of reciprocity had not been satisfied because there was no evidence that the UK had signed any convention with the UAE relating to the enforcement of arbitral awards. This was controversial because it is a recorded fact that both the UK and the UAE are signatories to the NY Convention. Furthermore, when the UAE signed the NY Convention in 2006 it opted not to sign a reciprocity reservation that allows signatories to limit its application only to awards issued in other contracting states.

Court of Cassation

The Court of Cassation reversed the Court of Appeal judgment.

The Court explained that Article 238 of the Civil Procedures Law provides that "the rules laid down in the foregoing articles shall be without prejudice to the provisions and conventions between the UAE and other countries in this regard". This means that the provisions of conventions between the UAE and other foreign countries or international conventions ratified by the UAE are applicable in relation to the enforcement of foreign judgments and arbitration awards.

The Court noted that both the UAE and the UK are signatories to the NY Convention, and therefore the award was to be recognized and enforced pursuant to the NY Convention, and not the Civil Procedures Law. There was therefore no need to show reciprocity of enforcement.

Whilst the decision is welcome, it is troubling that the Court of Cassation overlooked the fact that when the UAE signed the NY Convention, it did so without making any reservation as to reciprocity under Article I(3). Some states, for example the UK, have made this reservation, which means that they will only apply the Convention to awards made in another contracting State. By not making this reservation, the UAE is obliged under the Convention to, in principle, recognize all foreign awards, regardless of whether they emanate from a Convention state or not. In our view that should have been a key part of the Court's reasoning.

The Decision in Context

A number of UAE court decisions have already upheld English awards and recognized that the UK is a signatory to the NY Convention. They have also recognized that the NY Convention takes precedence over the pre-existing rules for enforcement of awards found in Article 235 of the Civil Procedures Law. This is why the Court of Appeal decision was considered so shocking – it was not only clearly wrong (the UK being a signatory), but was contrary to previous UAE court decisions.

For example, in a ruling dated 27 April 2010 (Case No. 35/2010), the Fujairah Federal Court of First Instance enforced two awards, one on the merits and the other on costs, rendered by a sole arbitrator in London under the Rules of the London Maritime Arbitration Association (LMAA) following an application for enforcement by the award creditor in terms of the New York Convention. After evidencing that:

- the awards were indeed certified and issued in the United Kingdom
- that the UAE had ratified the New York Convention in 2006; and
- that the awards were issued pursuant to English Law in the United Kingdom, which is also a signatory to the New York Convention

the Fujairah Court held that the two underlying foreign awards were enforceable in the UAE.

Similarly, in the case of Maxtel International FZE v. Airmec Dubai LLC (Court of First Instance Commercial Action No. 268/2010), dated 12 January 2011), the Dubai Court of First Instance enforced two awards, one on the merits and one on costs, issued by a sole arbitrator in London under the DIFC-LCIA Arbitration rules. The case involved two Dubai-based companies. Following an application for enforcement under the NY Convention, the award debtor objected to the enforcement of the awards seeking nullification on a number of procedural grounds under the UAE Civil Procedures Code. However once it was established that both awards were foreign awards, and having showed that the UAE has ratified the New York Convention, the Dubai Court of First Instance held that

“the court’s supervisory role when looking to recognize and enforce a foreign arbitral award is strictly to ensure that it does not conflict with the Federal Decree under which the UAE acceded to the New York Convention on the recognition and enforcement of foreign arbitral awards and satisfied the requirements of Articles IV and V of the Decree in terms of being duly authenticated.”

This ruling was affirmed by the Dubai Court of Appeal (Case No. 132 of 2012) in 22 February 2012.

Conclusion

As can be seen, there are UAE judgments dating back to 2010 that have found that English awards are to be enforced under the NY Convention. The Court of Appeal decision was therefore extraordinary to find otherwise. However it is a reminder both that the UAE courts can at times render errant decisions (and perhaps more so given the lack of a binding precedent system), but also that the system accounts for this with an ability to appeal. Indeed, from the Court of First Instance there is an automatic right to appeal, and lawyers are obliged to file an appeal, unless explicitly directed not to by their clients.

Although understandable, it is a shame that the Court of Appeal judgment will likely get more attention than the Court of Cassation judgment reversing it. Equally, it is unfortunate that although the Court of Cassation came to the right decision, it did so without fully acknowledging the extent of the UAE’s commitments under the NY Convention. In any event, there has been considerable progress in Dubai’s legal system in recent years with the courts working to support the rising popularity of arbitration in the UAE. The Court of Appeal decision should not obscure or detract from this progress.