

Enforcing an ICC Arbitral Award in the UAE: Fluor Transworld Services vs. Petrixo Oil

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Background

On 11 November 2012, Fluor Transworld Services, a US based firm, and Petrixo Oil, a UAE company owned by prominent Dubai businessman, entered into a Technical Service Agreement, where Fluor Transworld Services provided Petrixo Oil with technical and consulting services in relation to two projects in Fujairah.

Fluor Transworld Services (Claimant) provided Petrixo Oil (Defendant) with the consulting technical services as agreed and the latter became liable to pay US\$ 11,894,782.15. The Defendant abstained from paying the dues without any justifiable reasons. The Claimant issued arbitration proceedings against the Defendant pursuant to the Rules of Arbitration of the International Chamber of Commerce (ICC). The ICC arbitration was seated in the United Kingdom (UK). After obtaining an arbitral award in 2015, the Claimant filed Commercial Case No.1223-2015 against the Defendant before the Dubai Court of First Instance to recognize and enforce the ICC arbitral award.

The Claimant filed the case to obtain enforcement of the arbitral award to obtain payment of the principal amount of US\$ 10,205,004.21 (AED 37,452,365.45), and the accrued simple interest on the amount for a total sum of US\$ 650,768.92 (AED 20,388,321.93), the expenses and legal fees totaling GBP 55,192.2 (AED 312,939.77), other arbitration fees incurred by the Claimant amounting to US\$ 125,500 (AED 460,585), and simple interest of 3.25% on the amount as of the date of ruling until the full payment, and validating and enforcing a precautionary attachment no. 314 of 2015 (Commercial).

In response, the Respondent requested the court to dismiss the arbitration award, not to recognize the award and to invalidate the provisional attachment and declare it void. The Respondent argued that (a) the signatory to the agreement had no right to agree on the arbitration, and the memorandum of association did not confer on it such a right, (b) the record was devoid of UK rules on the enforcement of a UAE award, (c) the award was not final or subject to compulsory enforcement, (d) the Defendant was not given proper notice of the appointment of the arbitrator and of the arbitration proceedings and was unable to present its case, (e) the arbitral tribunal was not appointed in the manner agreed upon by the parties or in accordance with ICC Rules of Arbitration, (f) the terms of reference were not submitted to the Court for approval in accordance with Article 23.1(c) of the ICC Rules of Arbitration, (g) the arbitrator breached Article 3 of the ICC Rules of Arbitration by failing to mention that the Secretariat had received any copies or had been sent a copy of any notification or communication from the arbitral tribunal to the parties. The Respondent also argued that the arbitrator breached Article 33 of the ICC Rules of Arbitration by not submitting the award in draft form, before signing it, to the court for approval, and the Claimant violated the arbitration procedure agreed upon with the arbitrator by not delivering documents by hand and only sent them by email.

Court of First Instance

At the hearing dated 30 December 2015, the Court of First Instance dismissed the case on the basis that there was no evidence of the court mentioned in Article 1 of the ICC Rules of Arbitration (i.e. International Court of Arbitration) approving the award as to its form, which it considered to be a breach of Article 33 of the ICC Rules of Arbitration (which states that no award shall be rendered until it has been approved by the ICC court as to its form). The Court of First Instance held that there was a breach of the arbitration procedure set out in the ICC Rules and ruled that the Claimant's action was without merit.

Court of Appeal

The Claimant appealed the ruling pursuant to Commercial Case no. 52-2016. On 30 March 2016, the Court of Appeal dismissed the appeal on the basis that in order for the award to be enforceable in the UAE, both the UAE and the UK would have to be parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) or to the Geneva Convention on the execution of foreign arbitral awards (Geneva Convention) in order to enforce the arbitral award. The Court of Appeal stated that there was no proof on record to indicate that the UAE and the UK were parties to "one convention".

Court of Cassation

The Claimant appealed to the Court of Cassation under Commercial Appeal No. 384-2016. The Court of Cassation held that Article 238 of the Civil Procedure Law (CPC) indicates that international conventions signed between the UAE and other countries, which have been ratified by the UAE, applies to the enforcement of foreign court judgments, orders and arbitral awards. Article III of the New York Convention states that each contracting country must recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the country where the award is relied upon. The UK ratified the New York Convention on 24 September 1975 and the UAE acceded to the New York Convention by Federal Decree No. (43) of 2006. This means that the country where the arbitral award was issued and the country where it is to be enforced are both contracting parties to the New York Convention, which therefore applies to the issue at stake. The Court of Cassation overturned the Court of Appeal's ruling with remand for a new decision.

Court of Appeal (on remand)

The portion of the ruling which was objected to was quashed and remanded back to the Court of Appeal for a reassessment of the facts. On remand, the Court of Appeal stated that challenges raised by a party against the arbitral award concerning the arbitrator's judgment or the validity or sufficiency of the justification for his award would be unacceptable, as the court must not address its substantive aspects and the extent of its conformity with the law and facts, according to Articles 212 and 216 of the CPC. An arbitral award may be set aside only in the circumstances specified in Article 216 of the CPC. The Court of Appeal concluded that the previous court rulings were clearly erroneous as a matter of law and are quashed, and has ruled that the ICC arbitral award is confirmed.

Commentary

Since 2010, the UAE has enforced foreign arbitral awards pursuant to the New York Convention. However, with no system of binding precedent in the UAE, the Court of Appeal's decision contrasted from the recent judgments of enforcing foreign awards and made a contradictory decision on its own motion (it had not been raised in the Defendant's counterclaim). The Court of Appeal's decision came as a surprise when it ruled that there was "no evidence" that the UK and the UAE were parties to the New York Convention, without fully acknowledging UAE's commitments under the New York Convention. Although the decisions by the Court of Cassation and the Court of Appeal (on remand) are in line with the recent trend, it is believed that the courts have missed the important fact that the UAE acceded to the New York Convention without any reservation. This means that the UAE is obliged to enforce all foreign awards, even if the country where the award was issued is not a signatory to the New York Convention.

In respect to foreign arbitral awards, the local courts are to apply the relevant convention's rules in order to enforce all foreign arbitral awards. In this case, Article III of the New York Convention applied, stating that each contracting country must recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the country where the award is relied upon.

In the recent years, Dubai has made substantial progress and improvements in supporting arbitration as a means of dispute resolution and in applying the New York Convention; the Court of Appeal's erroneous judgment should not detract from the achieved growth.

The Claimant was represented by Al Tamimi & Company in the Dubai Court of Cassation Decision, and Al Tamimi & Company supported the Claimant in overturning the incorrect ruling pursuant to the New York Convention.