The 60th Anniversary of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: A Middle Eastern Retrospect and Emirati Prospect

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September 2018

This year, 2018, marks the 60th anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). Last June, the United Nations Commission on International Trade Law ("UNCITRAL") hosted a special event understandably in New York to commemorate the diamond jubilee of what one late Swedish arbitration lawyer, Dr J Gillis Wetter, referred to as early as 1990 as "the single most important pillar on which the edifice of international arbitration rests".

Over the years, the New York Convention has verily proved to be an effective method of obtaining enforcement of foreign awards. While it may still feel complex, owing to this international convention, it is oftentimes much smoother to enforce a foreign award than a foreign judgment. This relatively high degree of certainty has led multitudinous practitioners and users to often favour arbitration over litigation. To date, the New York Convention continues to constitute one of international arbitration's strong magnetism over litigation.

In this article, we aim to provide a terse retrospect on the New York Convention in the Middle East and highlight the prospect of its application, particularly in the United Arab Emirates ("UAE"), after presenting some of the key highlights of this successful international law instrument.

Selected Key Highlights of the New York Convention

The New York Convention establishes the presumption of validity of arbitral awards and burdens the opposing party with the task of showing that a ground for refusal exists.

Whereas in times past, a party seeking enforcement of a foreign award had to supply proof of exequatur evidencing that it had become final at the seat of the arbitration, in praesenti, through the New York Convention, one is no longer required to initiate proceedings in the jurisdiction of its origin. The New York Convention has effectively removed the requirement of double exequatur, a principal barrier to enforcement of foreign awards.

The title of this international convention only mentions somewhat misleadingly the recognition and enforcement of foreign 'arbitral awards'. While it is not the main topic of this article, another fundamental aspect of international arbitration that the New York Convention covers is those of arbitration agreements. In fact, the New York Convention guarantees the validity of written arbitration clauses. Article II mandating the Contracting States to recognise and enforce certain

arbitration agreements was inspired by the 1923 Geneva Protocol on Arbitration Clauses.

In short, Contracting States have undertaken to give effect to certain arbitration agreements when seised of an action in a matter covered by such agreement and to recognise and enforce arbitral awards made in other states, subject to some limited exceptions. As it is a treaty and thus part of public international law, in principle, non-application and misapplication of the New York Convention may engage the international responsibility of the concerned state. The conditions set forth in the New York Convention are the maximum level of control a Contracting State may exert. A more liberal regime may obviously be pursued to facilitate and relax the recognition and enforcement conditions of foreign arbitral awards.

Retrospect on the New York Convention in the Middle East

In 1958 with just 24 Signatories, including Jordan, the beginnings of this successful multilateral instrument seemed humble. Today, the New York Convention prosperously boasts 159 Parties. While both Iraq and Yemen are parties to the Riyadh Arab Agreement for Judicial Cooperation ("Riyadh Convention") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, also known as the Washington Convention, they are yet to partake in the New York Convention. In the region, it seems only Yemen will likely remain aloof for the time being, since Iraq's accession to the New York Convention is expected to be completed soon after the Iraqi cabinet has endorsed its ratification on 6 February 2018.

Article I(3) of the New York Convention permits the Parties to restrict the scope of application of the treaty when signing, ratifying or acceding to it. For instance, the reciprocity reservation allows a Contracting State to apply the New York Convention only to awards made in the territory of another Contracting State. Overall, 74 out of 159, less than half, Parties appear to have made this reservation. It is worth noting that Egypt, Jordan, Oman, Palestine, Qatar, Syria and the UAE have participated without any declaration or reservation and thus in these jurisdictions, foreign awards, whether made in Contracting or non-Contracting States, must be enforced alike.

The second reservation, so-called the commercial reservation, allows a Party to apply the New York Convention only to "differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration". In reality, this means that each Contracting State may determine for itself which relationships it considers commercial in nature. In addition to the seven abovementioned Parties, Kuwait, Lebanon, and Saudi Arabia have not made reservations in this regard, i.e. these three countries only made the reciprocity reservation. Overall, 48 out of 159, that is markedly less than 74 and less than one third, seem to have made the commercial reservation.

Article III of the New York Convention requires each Contracting State to recognise and enforce foreign arbitral awards in accordance with its own rules of procedure that are subordinate to the conditions laid down in Articles IV and V. Such rules of procedure may therefore not derogate from these conditions that shall supersede any domestic law in this respect.
Article IV requires the party applying for enforcement to supply (i) the duly authenticated original award or a duly certified copy, (ii) the original arbitration agreement or a duly certified copy, and (iii) a certified translation of the award and/or agreement. Article IV sets out the only conditions an applicant has to comply with.

Even when a party seeking enforcement has complied with Article IV, a court may refuse enforcement if one of the exhaustive grounds in Article V is met. These grounds are either for the other party to prove or the court to find on its own volition. The Article V(1) grounds that may be invoked by the resistant primarily relate to a party's fundamental right to due process of law. As to

the Article V(2) grounds, the requested court will ex officio take the public interests into consideration so as to ensure the constitutional legitimacy of its exercise of public power.

Article VI gives the enforcement court discretion to adjourn its decision on the enforcement of the award, pending the decision of the court of primary jurisdiction on the award, as described by Article V(1)(e). Further to the wait-and-see and upon application of the party claiming enforcement, the court may see to it that security be provided for the period of the wait.

In his seminal study in 1981, Albert Jan van den Berg already found that Article III and the following conditions had “not provoked differing interpretations” and even Article V, the grounds for refusal of enforcement, was “interpreted in a more or less uniform manner” by courts.

While the regional assessment may still be, as our Founder and Senior Partner Essam Al Tamimi concluded rather recently in 2014, that “enforcement in the Middle East has, at times, been inconsistent, unpredictable and challenging”, the general consensus today is that, as the UNCITRAL Secretariat found in 2016 through its Guide on the New York Convention, notwithstanding the inconsistencies in the legal systems of the Contracting States, “[t]he New York Convention has been applied in a consistent manner”.

Prospect of the New York Convention in the Middle East

In accordance with Article VII(1), the provisions of the New York Convention do not affect the validity of the treaties concerning the enforcement of arbitral awards a Contracting State had entered into or deprive an interested party of any relevant rights available to it under existing national laws or treaties of the state where the award is sought to be relied upon. This means that the Contracting States that enforce arbitral awards pursuant to more favourable provisions of other treaties or domestic laws will not be in breach of the New York Convention obligations. This provision ensuring the New York Convention’s durability and compatibility with other international conventions was described by a late French jurist Philippe Fouchard as “the treasure, the ingenious idea”. It is our view that a more favourable domestic regime of enforcement of foreign awards does not exist in the Middle East. As the New York Convention itself remains to date one of the most favourable enforcement regimes, Article VII(1), otherwise known as the more-favourable-right provision, is made almost redundant as in practice, the award creditor, ten to one, will and does rely principally on the New York Convention.

It is also understood that only the party seeking enforcement may avail itself of Article VII(1), but may not mix and match provisions of the New York Convention on the one hand, and those of national laws or other treaties on the other: no cherry-picking. Notable multilateral treaties in this regard in the Middle East, particularly in the Gulf Cooperation Council (“GCC”), are the Riyadh Convention and the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications (“GCC Convention”).

In the event, the New York Convention appears more favourable to enforcement of foreign arbitral awards than the two regional treaties, i.e. the Riyadh Convention and the GCC Convention, it would then be the national legislation of the Parties in the Middle East on this aspect that may serve as ‘baseline’. However, legislation based on the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) would not likely provide an alternate route since, in terms of enforcement, the Model Law is a receptor of the New York Convention.

As seen above, Article III requires each Contracting State to recognise and enforce foreign awards in accordance with its own rules of procedure that are subordinate to “the conditions” laid down in the following Articles. It goes on to provide that it cannot discriminate against foreign awards by

imposing “substantially more onerous conditions” than the conditions that are imposed on domestic awards. The term “conditions” in the second sentence confusingly relates to the rules of procedure, not to “the conditions” in the first sentence under which the enforcement is to take place. While it may not always be clear what “substantially more onerous” means, the national legislation of the Parties should serve as ‘benchmark’ for the rules of procedure that are applied to foreign awards.

Egyptian courts (e.g. Ahmed Mostapha Shawky v. Andersen Worldwide & Wahid El Din Abdel Ghaffar Megahed & Emad Hafez Ragheb & Nabil Istanboly Akram Istanboly, Court of Appeal of Cairo, Egypt, 23 May 2001) have made clear that where the national law does not contain any rules of procedure specifically applicable to the enforcement of foreign awards, there does not exist an obligation to enact specific rules of procedure to govern the enforcement of foreign awards. Evidently, the national legislation was to serve as ‘benchmark’. The travaux préparatoires also indicate that the drafters did not have in mind a harmonised set of rules of procedure applicable to the enforcement of foreign awards. As to “substantially more onerous conditions”, Egyptian courts, in Al Ahram Beverages Company v. Société Française d’Etudes et de Construction, Court of Appeal of Tanta, Egypt, 17 November 2009, applied provisions of the Egyptian Arbitration Law which govern enforcement of domestic awards, for those of the Egyptian Civil Code and Commercial Procedure which govern the enforcement of foreign awards were found to impose more onerous conditions.

Enforcement of Foreign Arbitral Awards in the UAE

Pursuant to UAE Federal Decree No 43 of 2006 dated 13 June 2006 attaching the text of the New York Convention which was published in the Official Gazette on 28 June 2006, it was resolved that the UAE join the New York Convention. The accession was effected on 21 August 2006, and the New York Convention entered into force in the UAE on 19 November 2006. In a ruling dated 27 April 2010, the Fujairah Federal Court of First Instance, in Case No. 35/2010, effected the first enforcement of the first two foreign awards (one on the merits and the other one on costs) pursuant to the terms of the New York Convention. The general approach of the UAE courts have been generally to apply the terms of the New York Convention when faced with an application to recognise and enforce a foreign arbitral award in the UAE (see, for example, Dubai Court of Appeal in Case No. 132/2012, Airmec Dubai LLC v. Maxtel International LLC).

This year, that is more than ten years after the entry into force of the New York Convention in the UAE, also marks the enactment of the UAE Federal Law No 6 of 2018 on Arbitration (“Arbitration Law”). In June 2018, the Arbitration Law came into effect as it repealed the so-called UAE Arbitration Chapter, i.e. Articles 203-218 of the UAE Federal Law No 11 of 1992 on Civil Procedure (“CPC”).

The newly born Arbitration Law of the UAE is an illustration of how a piece of national legislation can, now and going forward, interact with a threescore-year-old treaty to serve as ‘benchmark’, if not ‘baseline’.

Although the Arbitration Law, for example Article 55, only concerns enforcement of domestic arbitral awards, it is our view that the competent courts as defined in Article 1 are expected to apply the rules of procedure mutatis mutandis, despite the silence but in accordance with the second sentence of Article III of the New York Convention, to the enforcement of foreign awards and the aspects incidental thereto insofar that such are not regulated by the New York Convention. The enforcement of foreign awards in the UAE is expected to benefit from the same expedited enforcement regime afforded to the domestic arbitral awards under the Arbitration Law. This is the Arbitration Law as benchmark.

Pursuant to Article 238 of the CPC, not repealed by the Arbitration Law, the New York Convention is part of the UAE legal order, and when invoked shall apply to the enforcement of foreign awards in the UAE. Therefore, the conditions for enforcement set out in Articles IV and V of the New York Convention will apply to foreign awards, unless the party seeking enforcement instead chooses another treaty or the Arbitration Law as the basis of its request, pursuant to Article VII(1).

Conclusion

That the New York Convention is 60 years of age does not mean that it no longer communes with the younger international conventions and national legislations. Seven countries from the Middle East, including the UAE, have participated without any declaration or reservation so in these jurisdictions, and while it regrettably may not have always been really been the case, foreign awards, whether made in Contracting States or not, must be enforced alike.

The newly born Arbitration Law of the UAE which came into force this year can be an illustration of such interaction.

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