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Enforcement of New York Convention Awards in the UAE (Part I): Quo vadis?

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International award creditors can now look with some measure of optimism to enforcing their awards against Middle Eastern stakeholders in the UAE. This is so following a recent spate of judgments of the UAE courts that have confirmed enforcement of foreign awards under the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards (the “New York Convention”).

Prior to accession of the UAE to the New York Convention in 2006 (see Federal Decree No. 43 of 13 June 2006), the enforcement of foreign awards before the UAE Courts was - save the application of relevant bi- or other multi-lateral conventions - subject to Article 235 of Federal Law No. 11 of 1992 (the “UAE Civil Procedures Code”), which governs the enforcement of foreign judgments in the UAE. Pursuant to Article 235, UAE Courts were empowered to and did in fact refuse enforcement of foreign awards on grounds such as:

- the lack of proper jurisdiction of the tribunal at the place of arbitration;
- the deficient issuance of the arbitral award at the place of arbitration;
- the improper summoning or representation of one of the parties in the foreign arbitration proceedings; or
- the contradiction of the foreign award with a previous UAE judgment or its violation of public policy or *bonos mores* as understood in the UAE.

Despite the UAE’s accession without entering any reservations and its resultant wide obligations under the New York Convention, the UAE Courts were initially reticent to apply the terms of the Convention to the enforcement of foreign awards (see Dubai Court of Cassation, case No. 258/1999, judgment dated 2/10/1999; Dubai Court of Cassation, case No. 267/1999, judgment dated 27/11/1999; Dubai Court of Cassation, case No. 17/2001, judgment dated 10/03/2001). To the contrary, they persevered in the obsolete application of the requirements set out in Article 235 of the UAE Civil Procedures Code and used these as a pretext for a *quasi* review on the merits of foreign awards in order to refuse their enforcement. On repeated occasions, the UAE Courts even proved susceptible to formalistic procedural grounds, which are

commonly invoked in the ratification process of domestic awards under the applicable provisions of the UAE Civil Procedures Code, for setting aside foreign awards. A flagrant example of the formalism applied to domestic awards is the infamous *Bechtel* case (*International Bechtel v. Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, petition No. 503/2003, judgment dated 15 May 2005), in which a Dubai award involving a foreign party was set aside by the Dubai Court of Cassation for failure by the arbitrators properly to follow the oath-taking procedure which is mandatory for the hearing of witnesses under the UAE Civil Procedures Code.

In a surprising *volte face*, a number of UAE Courts have most recently taken a more arbitration-friendly approach to the enforcement of foreign awards. In sum, being faced with one or the other of the traditional grounds for setting aside foreign awards, the UAE Courts - in reliance on the express terms of the New York Convention - have dispensed with any procedural matters of form and/or the requirements set out in Article 235 of the UAE Civil Procedures Code as valid grounds for non-recognition and/or nullification.

More specifically, 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 one on costs, issued 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 noting that (i) the awards were duly certified and issued in the United Kingdom, (ii) that the UAE have ratified the New York Convention with effect from 19 November 2006, and (iii) that the awards were issued pursuant to English Law in the United Kingdom, which is a signatory to the New York Convention, the Fujairah Court held that the two underlying foreign awards were good for enforcement in the UAE. It is notable that the Court's conclusions were prefaced by an express reference to the obligation to comply with international treaties and conventions, which under UAE law form part of the domestic law, in the enforcement of foreign award.

Most recently, in *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 involving two Dubai-based companies, one free zone one limited liability, following an application for enforcement by the award creditor under the New York Convention. The award debtor objected to the enforcement of the awards, seeking nullification on a number of procedural grounds, including:

- lack of capacity of the signatory of the arbitration clause to sign on behalf of the defendant;
- invalidity of the formation and composition of the arbitral tribunal;
- lack of terms of reference to arbitration in violation of the provisions of Article 216 (a) of the UAE Civil Procedures Code and Article V (c) of the New York Convention;

- failure of the arbitral tribunal to apply the mandatory provisions of UAE law on oath-taking for witnesses; and
- failure to render the awards within the prescribed time-limit of 6 months in violation of the provisions of the UAE Civil Procedures Code.

After stating that (i) both awards are “undoubtedly foreign awards, were both issued outside the UAE in London in accordance with New York Convention” and that (ii) it was well established that the UAE have ratified the New York Convention by Federal Decree No. 43/2006, and having set out in full relevant provisions of the Decree, the Dubai Court of First Instance held:

“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.”

Importantly, the Dubai Court of First Instance expressly discarded the application of Articles 235 and 236 of the UAE Civil Code to the enforcement of foreign awards in the UAE. This ruling was recently affirmed by the Dubai Court of Appeal in *Airmec Dubai LLC v. Maxtel International LLC* (judgment of 22nd February 2012).

Despite the positive outlook provided by more recent UAE supervisory court case law, there remains some measure of uncertainty in the UAE judiciary’s proper commitment to the terms of the New York Convention. By way of illustration, in a most recent ruling the Dubai Court of First Instance refused recognition and enforcement of an award issued by the Singapore International Arbitration Centre on the basis that the award concerned was not ratified in the country of origin and could therefore not be executed under Articles 235 and 236 of the UAE Civil Procedures Code even though clearly stating that the ratification process provided for under the UAE Civil Procedures Code applied only to UAE domestic – with the exclusion of foreign – awards, the Court only made fleeting reference to the existence and the UAE’s membership to the New York Convention (see Dubai Court of First Instance, case No. 531/2011, judgment dated 18 May 2011).

Taken in the round, these latest developments in the UAE Courts’ enforcement practice of foreign awards may give hope to international investors who are seeking to enforce a foreign arbitration award against award debtors in the UAE. Judging by the UAE Courts’ most recent case law on the subject-matter, the incipient trend of enforcement of foreign awards under the New York Convention appears to be consolidating swiftly. Provided the UAE judiciary stays on this firm course, the widely-criticized enforcement practice under the relevant provisions of the UAE Civil Procedures Code can confidently be relegated to the annals of history. In the meantime, however, the DIFC may well serve as a viable – yet presently still untested – “host” or “intermediate” jurisdiction for enforcement of New York Convention

awards in the UAE. This idea will be further explored in Part II of this blog to be posted in August 2012.


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