

Recent ruling of Dubai Court of First Instance on enforcement of foreign arbitral awards: Back to square one?

Kluwer Arbitration Blog

March 12, 2013

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Please refer to this post as: Gordon Blanke, 'Recent ruling of Dubai Court of First Instance on enforcement of foreign arbitral awards: Back to square one?', Kluwer Arbitration Blog, March 12 2013, <http://arbitrationblog.kluwerarbitration.com/2013/03/12/recent-ruling-of-dubai-court-of-first-instance-on-enforcement-of-foreign-arbitral-awards-back-to-square-one/>

A recent ruling of the Dubai Court of First Instance (see Case No. 489/2012, ruling of the Dubai Court of First Instance of 18 December 2012) questions *de novo* the UAE courts' compliance with their obligations under international enforcement instruments in the enforcement of foreign arbitral awards. Following the recent trend of consolidation of the UAE courts' practice to abide by the terms of international enforcement instruments - foremost amongst them the New York Convention (see Convention on the recognition and enforcement of foreign arbitral awards, done in New York on 10 June 1958, as ratified and hence implemented in UAE law by UAE Federal Decree No. 43 of 2006), this ruling marks a sudden and unwelcome setback in what commentators had believed had become a turning-point in the UAE enforcement practice of foreign arbitral awards (see my previous report here).

In essence, the present application before the Dubai Court of First Instance relates to the enforcement of a trilogy of awards rendered under the Arbitration Rules of the International Chamber of Commerce (ICC) International Court of Arbitration in Paris (see ICC Case No. 5277/RP/BGD), one preliminary award in relation to a

discrete finding of fact, a final award on the merits and an award on costs. In the final award, the ICC tribunal awarded the Claimant, la Compagnie Française d'Entreprises S.A (CFE), several million US\$ for outstanding payments for works performed in the construction of the Canal de Jonglei in South Sudan. The award debtor, the Government of the Republic of Sudan, ultimately refused to perform the awards voluntarily, hence the present application for enforcement to the Dubai Courts.

Eschewing any reference to relevant provisions of potentially applicable international enforcement instruments binding on the UAE in the present context, the Dubai Court of First Instance simply pronounced in pertinent part as follows:

“Pursuant to articles 21 [...] of the Civil Transactions Law, articles 19.1, 20, 21 and 42 of the Civil Procedures Law as well as practice of the Court of Cassation, it has been upheld that the international jurisdiction of Courts is a matter of the public policy. Further, the UAE Courts lack jurisdiction over the cases brought against any foreigner having no domicile or place of residence within the UAE, unless such case does relate to an obligation that has been concluded, carried out or has to be carried out in the United Arab Emirates or if a foreign company, located abroad, has a branch in the United Arab Emirates and the dispute relates to such branch ...

In its rulings based on article 235 of the Civil Procedures Law, the Court of Cassation has established that for having a judgment rendered by a foreign Court enforced in the United Arab Emirates, the national Courts should not enjoy the jurisdiction over hearing the dispute decreed under such foreign judgment in pursuance of the principles of jurisdiction as set forth in the Civil Procedures Law...

Whereas the papers prove that the Ministry of Irrigation in the Republic of Sudan (the Defendant) does not have any domicile or place of residence within the United Arab Emirates and that the subject obligation has been concluded and carried out abroad, therefore the conditions stipulated in article 235 of the Civil Procedures Law have not been satisfied and hence the Court decrees lack of jurisdiction.”

With all due respect to the Dubai Court's holding, its reasoning is entirely flawed. Even though the Court is right in pointing out that (i) Articles 19 to 24 of the UAE

Civil Procedures Code set out the relevant principles for determining proper jurisdiction of the UAE Courts in international matters and over foreign persons, that (ii) Article 21 of the UAE Civil Transactions Code confers upon the UAE Courts the right to rely upon its own procedural laws in determining its own proper standing in international matters and that (iii) Article 235 of the UAE Civil Procedures Code applies to foreign enforcement actions brought in the UAE, the Dubai Court is wrong to rely on these provisions for present purposes. This is because the Dubai Court has completely ignored the text of Article 238 of the UAE Civil Procedures Code and Article 22 of the UAE Civil Procedures Code: The former exempts the application of the provisions governing the execution of foreign judgments and foreign arbitration awards under Articles 235 and 236 of the UAE Civil Procedures Code from the enforcement of foreign judgments and arbitration awards that fall within the scope of application of international conventions. In similar vein, the latter exempts the application of Article 21 of the UAE Civil Transactions Code from cases governed by international conventions binding on the UAE.

Under the New York Convention, enforcement of a foreign award is conditional upon presentation by the award creditor of (i) an original or officially certified copy of the foreign arbitration award (rendered in another Convention country) and (ii) an original or officially certified copy of the underlying arbitration agreement. Equally, under the Convention on Judicial Cooperation and the Recognition and Enforcement of Judgments in Civil and Commercial Matters between the United Arab Emirates and the French Republic, as ratified by UAE Federal Decree No. 31 of 1992, enforcement in either of the two countries of an award rendered in the respectively other is conditional upon (i) the existence of a valid arbitration agreement, (ii) confirmation that the subject-matter of the underlying award is arbitrable in the State of enforcement and (iii) presentation of a certified copy of the arbitrator's mandate, a full certified copy of the award attested in the State of issuance and proof demonstrating that the award is final and hence not subject to appeal in the State of issuance. Under either of the two Conventions, enforcement does not depend – contrary to the terms implied by the Dubai Court of First Instance in its ruling – upon the award debtor having a geographical nexus (in the form of domicile or otherwise) with the country of enforcement.. The jurisdiction of enforcement of a supervisory court in a Convention country is entirely independent from any jurisdictional criteria apart from the authentication requirements listed in shorthand above. In other words, there is no requirement for subject-matter

jurisdiction for a court to have jurisdiction of enforcement under either of the Conventions, provided the court in question is an emanation of a Convention country.

By way of illustration, in Case No. 764/Judicial Year No. 24 (ruling of the Federal Supreme Court of 7 June 2005), the UAE Federal Supreme Court confirmed that enforcement of an award rendered in France, including the instant ICC award issued in Paris, France, proceeds under the terms of the France-UAE Bilateral Convention, provided the formal authentication requirements set out in the Convention have been met. The Court emphasized that pursuant to Article 238 of the UAE Civil Procedures Code, the terms of international conventions concluded by the UAE with foreign countries prevail over the provisions of Article 235 read together with Article 236 of the UAE Civil Procedures Code in the enforcement of foreign awards. In the words of the Court:

“The provisions of Article 235, 236 and 238 of the Law of Civil Procedures are to the effect that the provisions of conventions between the United Arab Emirates and other foreign countries, and international agreements ratified by the UAE, will be applicable with regards to the enforcement of the judgments of foreign courts and the arbitral awards as being domestic law, irrespective of the conditions set out in Article 235 of the Law of Civil Procedures ... The courts of the UAE must ascertain that the conditions set out in such international conventions and agreements have been met before ordering that such orders be ratified or enforced in the UAE.”

This ruling hence confirms the UAE Court’s deference to the terms of bi-lateral enforcement treaty between the UAE and France.

At present, this commentator is not aware of whether the Dubai Court of First Instance’s ruling has been appealed to the higher courts or not. If so, it is to be hoped that the Dubai Court of Appeal and the Court of Cassation in a final instance will overturn the ruling of the Dubai Court of First Instance, declare that the Dubai Courts have proper jurisdiction and proceed to the enforcement of the disputed ICC awards under the relevant applicable international enforcement instruments. In the event that the Dubai Court of First Instance’s ruling is not appealed, it is to be hoped that it will remain an isolated instance that will not be followed by future courts and be considered no more than an unfortunate accident in the recent more

modern practice of the UAE courts in the enforcement of foreign awards, rather than going all the way back to square one ...