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Recent ruling of Dubai Court of Cassation on enforcement of foreign arbitral awards: Back to square one it is ...

Gordon Blanke (Blanke Arbitration LLC) · Monday, October 21st, 2013

In a blog earlier this year ([see my blog of 12 March 2013](#)), I expressed concerns about a Dubai Court of First Instance ruling (see Case No. 489/2012, ruling of the Dubai Court of First Instance of 18 December 2012) that in complete disregard of the prevailing provisions of 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) and the Bi-lateral Enforcement Convention between the UAE and France (see 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) refused enforcement of a trilogy of arbitration awards rendered under the auspices of the International Chamber of Commerce (ICC) International Court of Arbitration in France. The question I then asked as to whether it was all “back to square one” can now be answered in the affirmative: In its recent ruling of 18 August 2013 (see Case No. 156/2013, ruling of the Dubai Court of Cassation), the Dubai Court of Cassation affirmed that both the Court of First Instance and the Court of Appeal (see Case No. 40/2013, ruling of the Dubai Court of Appeal of 31st March 2013) were essentially correct in their refusal of enforcement. The only consolation that remains is that the Dubai Court of Cassation’s approach may have been politically motivated and will therefore - it is to be hoped - remain an isolated instance in the UAE courts’ more recent enforcement practice, which has embraced the meaning and scope of the terms of the New York Convention and other bilateral enforcement instruments ([see my previous blog of 21st November 2012](#)).

To recap, in essence, the initial application before the Dubai Court of First Instance related to the enforcement of a total of three awards rendered under the ICC Arbitration Rules in Paris in ICC reference 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 Ministry of Irrigation of the Republic of Sudan (which in turn forms part of the Sudanese Government), ultimately refused to perform the awards voluntarily, hence the application for enforcement to the Dubai Courts. The Court of

First Instance found against the award creditor, refusing enforcement of the awards on the basis that (i) it did not have jurisdiction over the award debtor, which essentially was a foreigner without domicile in the United Arab Emirates and that (ii) the subject obligation, i.e. the agreement to construct the Canal de Jonglei, had been concluded and carried out abroad and hence outside the UAE. According to the Court of First Instance, neither Article 21 nor Article 235 of the UAE Civil Procedures Code could therefore be engaged and as a consequence the UAE Courts lacked proper jurisdiction of enforcement. To the best of my recollection, no mention at all was then made of the potential role of the New York Convention or the UAE-France Bi-lateral Enforcement Convention and the fact that these set a very low jurisdictional threshold, requiring no more than membership of the enforcing jurisdiction and possibly the location of assets of the award debtor in the enforcing jurisdiction (if that). Essentially, in the terms of any of the applicable international enforcement instruments, enforcement is based on a couple of minimum authentication requirements going to the originality and authenticity of the arbitration award and/or the underlying arbitration agreement.

Upon closer review, it appears from the Dubai Court of Cassation's ruling that not only the Dubai Court of First Instance, but also the Dubai Court of Appeal had given short shrift to the terms of the New York Convention and the UAE-France Bi-lateral Enforcement Convention. In the words of the Dubai Court of Cassation, the Dubai Court of Appeal *"did not heed the substantive defence [going to the application of the prevailing provisions of the New York Convention and the UAE-France Bi-lateral Enforcement Convention] and held [instead] that the execution of the arbitration awards in question is subject to Article 21 and 235 of the UAE Civil Procedures Code [...]"* (my translation). Despite recognising in principle the importance of Article 238 of the UAE Civil Procedures Code, which gives preference to the application of international enforcement instruments, including in particular the New York Convention, the Dubai Court of Cassation then continued its own reasoning in the following terms:

"Article 3 of [Federal Decree No. 46 of 2006] provides that 'each contracting country must recognize arbitral awards as binding awards and must execute the same according to the procedural rules applicable in the territory in which enforcement of the award is being sought, according to conditions specified in the following articles, where no more severe conditions or higher fees or charges than those imposed upon recognition or execution of local arbitral awards may be specified or imposed upon recognition of arbitral awards subject to such agreement.' Article 15 of Agreement of Judicial Cooperation and Recognition and Execution of Judgments in Civil and Commercial Affairs between UAE and Republic of France, under Federal Decree No. 31 of 1992, published in the Official Gazette on 10/12/1992, provides that 'procedures aiming at execution of a judicial judgment shall be subject to the law of the country, where subject of the judgment may not be subject to any examination by judicial authorities in the country in which execution is sought [...]' This indicates that foreign judgments and arbitral awards must be executed according to the procedural rules applicable in the country in which

execution is being sought. Whereas the provision of Article 21 of the [UAE] Civil Transactions Law provides that 'rules of competency and all procedural matters shall be subject to the law of country in which the case is initiated or procedures are followed.' Article 19(1) of the [UAE] Civil Procedures Law provides that 'provisions of this law shall apply to all civil, commercial and personal status cases initiated before courts of the country.' Article 21 [of the same Law] provides that 'courts shall be competent to examine cases against any foreigner who does not have a domicile or a place of residence in the country in the following cases: 1. if he has a selected residence in the country, [...] 3. if the case is related to a concluded or executed commitment or to a commitment subject to a condition to be executed in the country.' [Sub]paragraph (d) of the second clause of Article 93 of the [UAE] Civil Transactions Law provides that 'an artificial person shall have an independent domicile, where such domicile shall be the place in which its management center is located. Regarding artificial persons having their headquarters outside and having activities inside [the UAE], their management center according to the law of the country shall be in the place of local management.'

Read together, the above provisions confirm - as established by this Court - that international competency of courts is for public order, where courts of the country are not competent for examining cases initiated against foreigners who do not have a domicile or place of residence herein, unless the case is related to a commitment which has been concluded or executed or subject to a condition to be executed in the case, or unless the foreign artificial person has the main management center outside the country and has a branch in the country if the dispute is related to a matter connected to such branch.

Whereas the above has been the case and whereas the judgment of the Court of First Instance supported by the appealed judgment has been based, when ruling with lack of competency of Dubai Courts to examine the case, upon what has been specified in its minutes that 'it has been established by papers that the Ministry of Irrigation (appellee) in the Republic of Sudan does not have a domicile or place of residence in the UAE and that the commitment has been made and executed outside UAE', whereas those reasons are palatable and have origin in papers and are consistent with sound application of procedural rules applicable in the country and the New York Convention and [the UAE-France Bilateral Enforcement Convention], hence all reasons of appeal shall be deemed as baseless." (my translation)

The wording of the Dubai Court of Cassation leaves no doubt that it is trying to imply into the relevant articles on enforcement under the prevailing Conventions a meaning they do not have and that essentially restricts the scope of application of the relevant enforcement instruments to situations in which the UAE Courts would have subject-matter or personal jurisdiction in any event. Taken to its logical conclusion, this - in turn - leads the proper enforcement of foreign awards within the meaning and spirit

of the New York Convention or the UAE-France Bi-lateral Enforcement Convention *ad absurdum* and blatantly disregards the intended role of Article 22 of the UAE Civil Transactions Code and of Article 238 of the UAE Civil Procedures Code, which – read together – exempt the domestic rules on jurisdiction for enforcement from application in the context of international conventions. Against this background, it is to be hoped that the present ruling will remain confined in its application to its own proper facts and not serve as a basis for a re-writing of the UAE court’s more recent pro-enforcement history.

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