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Attachment orders in support of enforcement actions of arbitration awards: An Abu Dhabi Court of Cassation invention

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A recent ruling of the Abu Dhabi Court of Cassation (see Appeal No. 519 of 2013, ruling of the Abu Dhabi Court of Cassation of 2nd October 2013) has done well to surprise the local arbitration community: It exudes a certain measure of inventiveness of the UAE Courts in matters of arbitration and demonstrates a level of arbitration-friendliness that international observers would usually fail to ascribe to the UAE Courts, which - in the past - have tended to attract attention for their skepticism of arbitration as a viable private dispute resolution mechanism as an alternative to the courts. Not so in the present instance, which gave rise to a ruling by the Abu Dhabi Court of Cassation in confirmation of the availability of attachment orders in support of enforcement actions of domestic arbitration awards. In other words, according to the Court, an award creditor is entitled to an order for attachment of an award debtor's assets pending the ratification of a domestic arbitral award. In reaching this finding, the Abu Dhabi Court of Cassation had to interpret the wording of the UAE Civil Procedures Code that contains the Court's powers to grant attachments expansively to include arbitration awards.

By way of background, the applicant, a subcontractor, sought to secure an attachment over the assets of a contractor, the award debtor, pending the enforcement of a favourable arbitration award issued by a sole arbitrator in Case No. 11/2011 under the auspices of the Abu Dhabi Conciliation and Arbitration Centre (ADCCAC). Both the Abu Dhabi Court of First Instance and the Abu Dhabi Court of Appeal are understood to have confirmed the availability of attachment orders in support of enforcement actions of arbitral awards, pending ratification. The Abu Dhabi Court of Cassation affirmed the lower courts' rulings without reservation. The Court started by quoting in full Article 227 of Federal Law No. (11) of 1992 issuing the Law of Civil Procedure as amended (the UAE Civil Procedures Code), permitting in principle the adoption of provisional measures on the basis of judgments that remain subject to appeal; then continued to excerpt Article 254 of the UAE Civil Procedures Code in its pertinent subparagraph (2), which provides that "[t]he judge for summary proceedings **must order an attachment if the judgment creditor holds a judgment, albeit not mandatorily enforceable, awarding a debt in a specified amount.**" (my translation and emphasis); and concluded with a citation of Article 258 of the UAE Civil Procedures Code, which

replicates the wording of Article 254(2) in pertinent part. Relying on these Articles, the Abu Dhabi Court of Cassation held as follows:

“This means that a creditor relying upon a court judgment in seeking a provisional attachment against the personal assets of his debtor in the hands of the debtor or a third party has a valid application, notwithstanding that the judgment is a primary judgment that is not enforceable provided the judgment is of a specified amount even if disputed by the debtor before the court that issued the judgment. This also applies to arbitral awards. While an arbitral award is not self-executory, it has precautionary power to enable the issuance of provisional measures, such as a provisional attachment against personal assets in the hands of the debtor or garnishment, without a need for the judge’s permission for an attachment or an action to validate the attachment given that an arbitral award is not enforceable [subject to ratification].”(my translation).

Read in context, the Abu Dhabi Court of Cassation’s ruling imposes an obligation on the Court to grant an order for attachment where an arbitration award awards the award creditor a specified amount of money by way of debt and hence makes the issuance of an attachment order automatic in those circumstances. This is little surprising given the *res iudicata* effect of arbitration awards under UAE law, no appeal being possible on the merits and hence the finding of liability in the amount of a specified debt. The ruling follows some previous reports of several UAE Courts of First Instance having awarded attachments in similar circumstances, yet never to date has a UAE Court of Cassation been reported as having granted an attachment in support of an arbitral enforcement action. The Abu Dhabi Court of Cassation’s confirmation to this effect will – in accordance with prevailing court practice – bear significant evidentiary weight in similar proceedings before the lower courts, including those of the other Emirates, despite the absence of the principle of binding precedent from the UAE civil law system.

For the avoidance of doubt, there is no reason to believe that the Abu Dhabi Court of Cassation’s ruling in favour of the availability of attachment orders to ring-fence an award debtor’s assets pending enforcement of a domestic award would not also extend to enforcement actions in relation to foreign awards, e.g. in the terms of the New York Convention (for the enforcement of foreign arbitral awards, done in New York, 8 June 1958). To the contrary, international enforcement scenarios would appear predestined for provisional applications of the nature discussed here in order to ensure ready enforceability against an award debtor with assets in the UAE.

This being said, the Abu Dhabi Court of Cassation’s ruling in the present case should not detract from an award creditor’s entitlement to apply for an attachment order prior to the commencement of the arbitration proceedings. This is a recommended course of action given the anticipated duration of the arbitration proceedings and the mandatory ratification process before the UAE Courts following issuance of the award.

A claimant should be aware, however, that the granting of an attachment in these circumstances is far from automatic. Unlike in the event of an application for attachment in support of an arbitral enforcement action, to succeed in an application for attachment at the outset of an anticipated arbitration, the claimant will have to prove a genuine risk of the dissipation of assets by the purported debtor. This follows Article 252(1) of the UAE Civil Procedures Code, which requires a demonstration of “fear” of loss of the targeted assets on the basis that (i) the purported debtor is not resident in the UAE (see Article 252(1)(a)), that (ii) the purported debtor may abscond or otherwise dissipate the targeted assets (see Article 252(2)(b)), or (iii) otherwise through the threatened loss of the security that was provided for the purported debt (see Article 252(1)(c)).

Irrespective of the foregoing, the Abu Dhabi Court of Cassation’s ruling is a welcome confirmation of the actual arbitration-friendliness of the UAE Courts and provides comfort to international investors that they will be able to ring-fence an award-debtor’s assets pending ratification of a favourable arbitration award.

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