

Dubai Court of Appeal questions UK NYC membership: Investors keep calm ... and carry on!

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In a recent enforcement action of a foreign arbitral award rendered under the ICC Rules in London, England, the Dubai Court of Appeal questioned the United Kingdom's proper membership of the 1958 New York Convention (on the recognition and enforcement of foreign arbitral awards) (the "NYC" or simply the "Convention"). The action was brought by US-based Fluor Transworld Services, which secured an award for US\$ 11 mio in compensation for consultancy services performed in support of the construction of a project comprising a refinery petrochemical complex and a biofuel facility in the Emirate of Fujairah, UAE, against Petrixo Oil & Gas, a UAE energy company in charge of the project. The Court refused enforcement under the NYC on the ground that there was insufficient evidence before it in support of the UK's membership of the Convention. Instead, the Court relied upon Articles 235 and 236 of the UAE Civil Transactions Code (see UAE Federal Law No. 11 of 1992 as amended), according to which foreign awards that do not benefit from an international enforcement instrument must comply with the requirements of reciprocity permitting the enforcement of foreign awards only provided that they originate in countries whose courts in turn enforce awards originating in the UAE: There being no English court precedent enforcing a UAE award, the Dubai Court of Appeal ultimately declined enforcement for lack of reciprocity.

Taking a closer look at the process before the Dubai Court of Appeal, it appears that in actual fact, the question of the UK's membership of the Convention had not been invoked by either party as a ground for refusal to enforce, but was instead raised by the Court *ex officio*, i.e. of its own motion. The Court's conclusion that enforcement under the NYC was not possible must fail on at least three grounds:

- Even though the question of the Dubai Court's proper jurisdiction as a supervisory or enforcing court under an international enforcement instrument may well qualify as a matter of public policy and hence engage the Court's competence to examine the question of whether the jurisdictional criteria under that instrument are met in the individual instance *ex officio* (see e.g. the Dubai Court of Cassation's approach in the *Canal de Jonglei* case and my reporting [here](#)), the United Arab Emirates did not enter into the reciprocity reservation under the NYC and are therefore estopped from relying on NYC membership as a pre-requisite for enforcement of a foreign arbitral award in the terms of the Convention: In other words, the UAE Courts - including the Dubai Courts - as an emanation of the State (read: the UAE) are bound by the UAE's wide enforcement obligations under the NYC, which extend to non-NYC awards, i.e. awards rendered in non-

Convention countries, and as such apply to any foreign arbitral award irrespective of where it has been issued, whether in a Convention or a non-Convention country. This is irrespective of the UAE Courts' examination and its express confirmation of NYC membership of the relevant country of origin in its enforcement actions under the Convention to date (see G. Blanke, "United Arab Emirates" in G. Blanke (ed), *Arbitration in the MENA*, Juris, 2016).

- Even if there were any merit in insisting on NYC membership as a pre-requisite for enforcement of foreign arbitral award under the Convention, the UK is clearly a Convention country and proof to that effect is readily available from the United Nations' list of NYC membership, which is easily accessible in its latest version online at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. What other evidence could possibly be required? In any event, it is common knowledge that the UK is a Convention country and for the Dubai Court of Appeal to shed any doubt on the probative nature of the well-established membership of the NYC is (if anything) a demonstration of embarrassing ignorance! Quite frankly, under public international law, the enforcement obligation under the NYC rests on the UAE and its Courts: If the presiding judge had any doubt on the UK's Convention membership, he should have consulted the United Nations of his own motion to obtain re-assurance of membership (if he then thought that was required as a pre-requisite for enforcement in the prevailing circumstances).
- The Dubai Courts have previously expressed no objections to enforcement under the Convention of foreign arbitral awards rendered in England (see the first successful enforcement action under the NYC before a UAE Court: Case No. 35/2010, ruling of the Fujairah Court of First Instance of 27 April 2010; and the *Maxtel* line of cases culminating in Case No. 132/2012 – *Airmech Dubai LLC v. Maxtel International LLC*, ruling of the Dubai Court of Cassation of 18 September 2012; and my reporting [here](#)) and as such clearly presumed Convention membership.

It bears mentioning in this context that the UAE, including the Dubai, Courts have consistently consolidated their pro-enforcement practice under the NYC on a number of occasions, whether at first instance, appeal or cassation, over the past six years (see my regular reporting on Kluwer Arbitration Blog and most recently [here](#)). Against this background, there cannot be any reasonable doubt that the Dubai Court of Cassation will not overturn the present ruling of the Dubai Court of Appeal and confirm enforcement of the award in the terms of the NYC without the slightest hesitation. Investors may trust in the maturity of the cassation level of the Dubai Courts in matters of Convention enforcement: It is simply unimaginable for the Dubai Court of Cassation to confirm the jurisdictional errors of the lower court!

For the avoidance of doubt, the Dubai Court of Appeal also considered a further ground of appeal which centred on the question as to whether the ICC International Court of Arbitration had properly scrutinized and approved the issuance of the award. To comply with evidentiary requirements, it was – according to the Court of First Instance – not sufficient for the award creditor to submit an original copy of the award bearing the official stamp of the ICC. In order to meet the burden of proof the award creditor was required to submit a letter from the ICC confirming its administrative involvement in the arbitration process as an arbitral institution and the role it played in scrutinizing and approving the final award. In this commentator's view, an official stamp from the ICC on the face of the award should be sufficient to comply with an enforcing court's evidentiary requirements. It is to be hoped that an increase in familiarity with how the ICC International Court of Arbitration operates will promote a better understanding on part of the Dubai Courts of what is and what is not required to demonstrate

(authentic) ICC origin.

In the alternative, irrespective of the final outcome of the appeal process before the Dubai Court of Cassation, investors may draw comfort from the tested role of the DIFC Courts' as a "conduit" or "host" jurisdiction for the recognition and enforcement of foreign arbitral awards for onward execution in onshore Dubai (see my reporting [here](#)). In order to avoid the apparently prevailing uncertainties of enforcement before the onshore UAE Courts, international award creditors may consider it a safer option to apply for recognition and enforcement before the DIFC Courts, whose order to recognise and enforce a foreign arbitral award must be recognised by the onshore Dubai Courts under Article 7 of the Judicial Authority Law (see Dubai Law No. 12 of 2004 as amended), which puts in place a regime of mutual recognition between the Dubai and the DIFC Courts.

In the light of the foregoing, the recent developments before the Dubai Court of Appeal will present no more than a temporary cause for concern pending the appeal to cassation: The Dubai Court of Cassation will no doubt rectify the Dubai Court of Appeal's misguided take on the New York Convention and reassure the international arbitration and investment community that the UAE are a NYC-enforcement-friendly country. If all else fails (God forbid!), the DIFC Courts will provide some reassuring safeguards for now. So, investors keep calm ... and carry on!