The Interpretation of the New York Convention by the UAE Courts: a Geneva Flavor?

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Introduction

The United Arab Emirates (the **"UAE"**) is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the **"NYC"**), which was adopted into UAE law by Federal Decree No. 43 of 2006. However, there have been instances where the lower courts of the UAE have come to interpret the NYC requirements for enforcement, and the concept of "*double-exequatur*" has arisen (i.e., the need for it to be shown that the arbitral award has been rendered enforceable in the jurisdiction in which it was made before it can be enforced in any other jurisdiction).

This has created uncertainty, which undermines one of the NYC's fundamental objectives: to establish uniform international standards for the recognition and enforcement of foreign arbitral awards in signatory countries.[fn] Pieter Sanders, Quo Vadis Arbitration?: Sixty Years of Arbitration Practice, A Comparative Study (Kluwer Law International, The Hague 1999) 67-69; Gary B. Born, The New York Convention: A Self-Executing Treaty (2018) 40 MJIL 116,119 (accessed on 3 January 2019)[/fn]

Recent UAE Case Law on *Double-Exequatur*

Fortunately, to the relief of arbitral award creditors, in a ruling of the Federal Court of Cassation (the **"FCC"**) of 15 January 2019 in the joint Commercial Appeals Nos. 620/2018 and 654/2018, the FCC overturned a refusal by the Khor Fakkan Court of Appeal (the **"Court of Appeal"**) to recognize and enforce a foreign arbitral award issued under the Rules of the London Court of International Arbitration (**"LCIA"**) in London, UK, (the **"LCIA Award"**) on the basis that it had not been granted *exequatur* by the English Court before being enforced in the UAE.

The FCC found that (i) the Court of Appeal's ruling amounted to a "*double-exequatur*" requirement, which was abolished by the NYC; and (ii) the lower court's refusal to recognize and enforce the LCIA Award was due to its misinterpretation of the term "*authenticated*" set forth in sub-paragraph (a) of Article IV(1) of the NYC which states that:

> To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof.

In the FCC's view, the Court of Appeal had confused the meaning of the term *authentication* (an international certification comparable to a local notarization/legalization of any document) with the meaning of *enforceability/exequatur* set forth in Article 4 of the Geneva Treaties.[fn] The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, the predecessors of the NYC.[/fn] The requirement for a leave for *exequatur* from the court under whose law the award was made was abrogated by Article VII(2) of the NYC, and hence the ruling of the Court of Appeal contradicts the prevailing legal position in the UAE.

The FCC confirmed that, pursuant to Article 238 of the UAE Civil Procedures Code, the UAE courts are bound by the NYC. In this matter, the FCC stated verbatim that:

> The argument based on which the lower court rejected the recognition and enforcement of the said award was because it was not granted *exequatur* in the country where it was issued, and, is therefore, unlawful. This is because of the term *authentication*, which caused confusion *in the mind of the lower court*, does not mean ratification of the award and granting it *exequatur* as per the meaning taken from article 236 of the Civil Transactions Law, rather, it means authentication or legalization as required for the official documents issued by a foreign country and invoked within the State, and since the appealed judgement had a contrary opinion, it shall be declared as a wrongful application of the law, which prevented the lower court to adjudicate the case in its proper legal scope and under the provisions of the NYC mentioned above, the Court of Appeal has erred in its judgment and therefore, it must be overturned. (emphasis added)

The Evolution of the *Double-Exequatur* Concept: The Geneva Convention

As for the concept of *double-exequatur*, it should be noted that Article 4(2) of the 1927 Geneva Convention required the party relying upon an award or seeking its enforcement to supply, *inter alia*, "[d]ocumentary or other evidence to prove that the award ha[d] become *final* […] in the country in which it was made".

While Albert Jan van den Berg explains[fn] Albert Jan van den Berg, The New York Convention of 1958: An Overview in (Emmanuel Gaillard & Domenico Di Pietro (eds), Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice (Cameron May 2008) 61[/fn] that:

> The NYC's predecessor, the Geneva Convention of 1927, required that the award had become 'final' in the country of origin. The word 'final' [used in Article 4(2) of the Geneva Convention of 1927] was interpreted by many courts at the time as requiring a leave for enforcement (*exequatur* and the like) from the court in the country of origin. Since the country where enforcement was sought also required a leave for enforcement, the interpretation amounted in practice to the system of the so-called "double-exequatur". The drafters of the NYC, considering this system as too cumbersome, replaced the term "final" in Geneva Convention, qualifying the award, with the word "binding" in NYC. Accordingly, no leave for enforcement in the country of origin is required under the New York Convention. This principle is almost unanimously affirmed by the courts.

The meaning of the term *authentication* stated in sub-paragraph (a) of Article IV(1) of the NYC was clarified by the FCC as per the meaning of the UAE statutes, especially Article 13 of the UAE Law of Evidence, in addition to the legal precedents explaining the meaning of the *authentication* of documents. Indeed, *authentication* shall be executed as per the Hague Convention of 1961 or as per the UAE modalities and requirements through which a document issued in a foreign country shall be certified i.e., by a solicitor or a notary public and by the respective Foreign Ministry. This interpretation is almost unanimously affirmed by the UAE courts.

The Position under the NYC

As a reminder, the NYC was established as a result of dissatisfaction with the Geneva treaties of 1923 and 1927, and one of the basic actions contemplated by it is the abrogation of the double-exequatur requirement. Article VII(2) of the NYC states that:

> *[t]he Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.*

Moreover, pursuant to Article IV of the NYC, the arbitral award creditor is required to provide the court with only two documents (with translations certified by an official or sworn translator or by a diplomatic or consular agent if either document is not made in an official language of the country in which the award is relied upon):

(a) The duly authenticated original award or a duly certified copy thereof; and
(b) The original agreement referred to in Article II or a duly certified copy thereof.

Therefore, pursuant to Article IV of the NYC, enforcement of a foreign award is not conditional upon presentation by the award creditor of proof that the award is final and enforceable in the country of the seat, as the drafters of the NYC did not set such a requirement. Rather, it is for the party resisting recognition and enforcement to provide such proof as clearly required in Article V(1)(e) of the NYC which states:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (e) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Conclusions

Taken in the round, it is clear that Article V(l)(e) and Article VII(2) of the NYC were drafted with a view to put an end to the mechanism of *double-exequatur* required by Article 4 of the Geneva Treaties, by which a party seeking recognition and enforcement of a foreign award had to prove, among other conditions, that the award had become “final” in the country of the seat.

Indeed, Article V(l)(e) of the NYC allows national courts to refuse the recognition or enforcement of an

award if the party resisting enforcement establishes that the award: (a) has not yet become binding on the parties; or (b) has been set aside or suspended. Thus, the binding character of a foreign arbitral award in the hand of a creditor seeking recognition and enforcement in the UAE shall not depend on an exequatur by the courts of the country of the seat.