

Kluwer Arbitration Blog

Enforcement of New York Convention Awards in the UAE (Part II): THE DIFC as “host” jurisdiction?

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As explored in some detail in [Part I](#) of this blog post, recent UAE supervisory court case law has heralded a new era of enforcement of international awards in strict compliance with the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards (the “New York Convention”).

To recap, the *Maxtel* line of case law (see in particular Commercial Action No. 268/2010 – *Maxtel International FZE v. Airmec Dubai LLC*, ruling of the Dubai Court of First Instance, dated 12 January 2011, most recently affirmed by the Dubai Court of Appeal in *Airmec Dubai LLC v. Maxtel International LLC*, ruling dated 22nd February 2012), which originated a year earlier in the Fujairah Courts (see Case No. 35/2010, ruling of the Fujairah Federal Court of First Instance, dated 27 April 2010) has demonstrated the UAE courts’ incipient – yet long overdue – commitment to their enforcement obligations under the New York Convention. At the same time, it has, however, also been seen that there remains some skepticism within the UAE judiciary and that the incipient trend of enforcement under the New York Convention has not yet consolidated into established supervisory court practice (see Dubai Court of First Instance, case No. 531/2011, judgment dated 18 May 2011). Hence, the UAE courts’ current enforcement practice does not yet appear to be immune to occasional setbacks so that international award creditors cannot blindly rely upon the UAE courts’ unwavering commitment to enforcement of foreign awards against UAE-based award debtors in strict compliance with the terms of the New York Convention.

As suggested in Part I, pending these uncertainties, the Dubai International Financial Centre (the “DIFC”) may well serve as a viable – yet presently still untested – “host” or “intermediate” jurisdiction for enforcement of New York Convention awards in the UAE.

By way of reminder, the DIFC, which was established by the Government of Dubai in December 2004 (see Dubai Law No. 9 of 2004 (the “DIFC Law”)), is a geographic area carved out of the heart of Dubai and constitutes a unique autonomous jurisdiction within the UAE. It has an independent judicial system vested with its own courts modeled on the English common law. The DIFC is further governed by its own laws, including the DIFC Arbitration law of 2008 (the “DIFC Arbitration Law”), which is largely based on the UNCITRAL Model Law.

Importantly for present purposes, Article 42(1) of the DIFC Arbitration law provides that:



“An arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognized as binding within the DIFC [...] For the avoidance of doubt, where the UAE has entered into an applicable treaty for the mutual enforcement of judgments, orders or awards the DIFC Court shall comply with the terms of such treaty”.

This is further supported by Article 24(2) of DIFC Law No.10 of 2004, the DIFC Court Law, which contains provisions to the same effect. Accordingly, “[w]here the UAE has entered into an applicable treaty for the mutual enforcement of judgments, orders or awards, the [DIFC] Court of First Instance shall comply with the terms of such treaty.” As a result, the DIFC Courts have jurisdiction to hear actions for enforcement of foreign awards under the New York Convention in the DIFC. This is in particular so as a court’s proper standing under the New York Convention is determined by the simple fact of membership of the State of which it is an emanation. In other words, the UAE being a Convention State and the DIFC courts being an emanation of the UAE, the DIFC courts are bound to hear any actions for enforcement of a foreign award brought before them (irrespective e.g. of whether the award debtor in question has any assets in the DIFC and whether there is any other jurisdictional link with the DIFC). This is also confirmed by Article 24(1)(d) of the DIFC Court Law, which unambiguously ascribes to the DIFC Court of First Instance jurisdiction to ratify any foreign arbitral award, as well as Article 5(A)(1)(e) of Law No. 12 of 2004 in respect of The Judicial Authority at Dubai International Financial Centre (as amended on 31st October 2011) (the “Judicial Authority Law”), which provides that “[t]he Court of First Instance shall have exclusive jurisdiction to hear and determine ... [a]ny claim or action over which [it] ha[s] jurisdiction in accordance with DIFC Laws and DIFC Regulations”. Subject-matter jurisdiction does hence not appear to be required for the enforcement of foreign awards beyond the requirements laid down in the New York Convention proper. For the avoidance of doubt, neither does the New York Convention itself contain any particular jurisdictional requirements other than the presumption of Convention membership of the State of the competent supervisory court (see in particular Article IV of the Convention, which does not require an applicant party to submit proof of proper standing other than a duly authenticated original award and the original arbitration agreement or a duly certified copies thereof; and Article V, which does not provide for the potential lack of competence of the supervisory court as a ground of refusing recognition and enforcement of an award).

In light of the common law tradition and the general arbitration-friendliness of the DIFC judiciary, the enforcement of New York Convention awards before the DIFC Courts can be expected to be a matter of mere formality. Pursuant to Article 42(4) of the DIFC Arbitration Law, “[a]wards recognized by the DIFC Court may be enforced outside by the DIFC in accordance with the Judicial Authority Law and recognition under this Law includes ratification for the purposes of Article 7 of the Judicial Authority Law.” Article 7 of the Judicial Authority Law, in turn, provides that

“[w]here the subject matter of execution is situated outside the DIFC, the judgments, decisions and orders rendered by the Courts and the Arbitral Awards ratified by the Courts shall be executed by the competent entity having jurisdiction outside DIFC in accordance with the procedure and rules adopted by such entities in this regard, *as well as with any agreements or memoranda of understanding between the Courts and these entities.*” (emphasis added)

To note that the DIFC and Dubai courts more specifically have entered into a Memorandum of Understanding between the Dubai Courts and the DIFC Courts, which entered into force as from 16 June 2009, and the related Protocol of Enforcement between the Dubai Courts and the DIFC Courts (the “Protocol of Enforcement”), which *in toto* provide for the mutual recognition of judgments, orders and awards between the Dubai and the DIFC Courts (for a recent precedent, see the enforcement by the Dubai Courts of a DIFC-LCIA arbitration award under the Protocol as reported on the DIFC Court website on 29 March 2011, [here](#)). Essentially, the Protocol of Enforcement provides for the *pro forma* recognition by the Dubai Courts of a DIFC enforcement order of arbitration awards ratified in the DIFC, without the need for any additional measures of implementation, subject to the following cumulative conditions, which are enumerated both in Article 7 of the Judicial Authority Law and in Article 1 of the Protocol of Enforcement:

- The enforcement order must be final and executory (i.e. “appropriate for enforcement”);
- it must be translated into Arabic;
- it must bear the stamp of the DIFC Courts; and
- it must be accompanied by a letter to the Chief Justice of the Dubai Court of First Instance setting out the procedure to be followed as well as the requisite execution fees payable to the Dubai Courts.

Importantly, in this process, the Dubai Court execution judge is strictly prohibited from performing a review on the merits. This said, there is some residual doubt as to the proper meaning of the words “appropriate for enforcement”: i.e. whether appropriate for enforcement “before the DIFC Courts” or “before the Dubai Courts”. We submit that the former meaning would be somewhat meaningless as it would essentially deprive the Protocol of Enforcement and the execution provision of Article 7 of the Judicial Authority Law of their very purpose by importing through the backdoor the current uncertainties of enforcement of awards before the Dubai Courts into the enforcement practice of the DIFC Courts. The second meaning should therefore naturally prevail. Importantly, irrespective of the preferred and potentially prevailing second meaning, the notion of “public policy” as defined in the UAE arguably remains a necessary ground of consideration for the DIFC Courts in ratifying foreign awards under the New York Convention (see in particular Article 44(2)(b)(vii) of the DIFC Arbitration Law, which empowers the DIFC Courts to refuse recognition and enforcement of an award, irrespective of its country of origin, if it finds that “the enforcement of the award would be contrary to the public policy in the UAE”, read together with Article V(2)(b) of the New York Convention).

An order for enforcement issued by the Dubai Courts should, in turn, be enforceable in the other Emirates of the UAE by virtue of Article 11 of Federal Law No.11 of 1973 on Judicial Relationships Amongst Emirates, which provides for the mutual recognition of orders and judgments between the various Emirates. In the terms of Article 11, “[a]ny order deciding civil or commercial rights or damages [no doubt including an order for the enforcement of an award of damages by way of arbitration] ... issued by a juridical body in one of the emirates member of the federation, shall, according to the rules of this law be executable in any other emirate member of the federation.” Out of an abundance of procedural caution, it is recognized that proper subject-matter jurisdiction of UAE courts is based on the existence of an (elected) address or place of residence or the presence of assets in the UAE (see Articles 20 and 21 of the UAE Civil Procedures Code), although this will likely be of secondary importance in relation to recognition of Dubai

Court orders of enforcement of foreign awards, adopting reasoning analogical to that developed in relation to recognition process of the DIFC Courts.

Taking the above in the round, albeit not certain given the absence of supporting precedent, recourse to the DIFC Courts as an intermediate jurisdiction may arguably be a reliable way to circumvent the residual risk of the UAE judiciary's reliance on the by now obsolete Article 235 of the UAE Civil Procedures Code in the enforcement of foreign awards in the UAE.


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