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A Halftone Application of the New York Convention by the Qatari Supreme Court

Minas Khatchadourian (Qatar International Center for Conciliation and Arbitration) · Tuesday, April 15th, 2014

Few days ago, the Qatari Supreme Court decided to overturn an earlier judgment of the Doha court of appeal which upheld a decision of the court of first instance to set aside an ICC arbitral award as being in violation of the Qatari public policy.

The new ruling comes in rescue of the Qatari courts' image, reputation and standing which were partly criticized after a series of judgments rendered by different degrees of jurisdiction and which have set aside a large number of awards either domestic or foreign as mentioned in two earlier posts of September 2013[1)] and January 2014[2)].

This kind of *flood* started in June 2012 when the Qatari Supreme Court decided to invalidate a domestic award rendered in a disagreement which arose between the partners of a Qatari limited liability company, holding that the award violated public policy due to the fact that it was not rendered in the name of H.H. The Emir of Qatar. Since, not only the domestic awards have been invalidated but also foreign awards which were rendered under international arbitral institutions received the same judgment. For example, a ruling of the Court of first instance in Qatar invalidated an ICC award seated in Paris in a case between two Qatari Companies (contractor and sub-contractor) on the same grounds and without any application or reference to the New York Convention.

In all these unfortunate cases, the Court relied on the national provisions (articles 190-210 of the 1990 Qatari Civil Procedural Law ('The 1990 Law') and considered that:

'*the legislator qualified the decision of the arbitrator as a judgment, insisting on its binding effect on the parties and the authority of the Court to issue an execution order to implement and enforce its terms. Therefore, by virtue of Article 204 of the 1990 Law, the arbitrator's judgment (award) should be issued in the name of H.H. The Emir of Qatar*'.

The Court added:

'*[r]endering the judgment in the name of H.H. The Emir confirms that it is supported by Public Force and is enforceable as such in accordance with the public order. Any decision or judgment of the arbitral tribunal should be rendered in the name of H.H. the Emir; otherwise, it shall be considered null and void, contrary to public order and the Court may sua sponte declare it as*

such.'

It is obvious that in all these cases, Qatari judges have misconstrued the status of the Arbitrator and confused the 'permanent mandate' of the national judge to render justice by 'judgments' on one hand, and the 'temporary mission' of the arbitrator who is not part of the Judicial Authority and renders 'awards' or 'decisions' on the other hand. Part of this misperception lays in the Arabic text of the 1990 law as the Arabic language makes no distinction between the words 'award' and 'judgment'.

Background of the new ruling:

In this respect, the concerned ICC award was decided few months ago by a sole arbitrator sitting in Doha, in a dispute between a joint venture contracting company (composed of a Qatari partner and a foreign partner) ('The contracting company') on one hand and a Qatari material supplier and sub-contractor ('The supplier') on the other hand.

The award came in favor of the supplier and was considered a foreign award for the needs of its execution in Qatar. The supplier was surprised that the joint venture company decided to file an action of nullity against the foreign award relying solely on the 1990 Law provisions, which do not distinguish between a foreign award and a domestic award on the grounds for nullity.

The action for nullity was brought before the court of first instance who decided to invalidate the ICC Paris award. The supplier decided to lodge an appeal against the decision but few weeks later, the invalidation ruling for the ICC award was upheld by the Court of appeal.

Furthermore, the judges decided to refer the ICC award back to the arbitrator to repair any violations contained in it pursuant to article 209 of the 1990 Law which stipulates:

"*The Court having jurisdiction over the request for setting aside may either confirm the award, or set the award aside totally or partially. If the award is totally or partially set aside, the Court may refer the case back to the arbitrators to repair the violations contained in the award, or the Court may decide on the merits of the case itself if it hold that it has jurisdiction to do so …*".

An underwhelming ruling of the Supreme Qatari Court in respect of the New York Convention:

Brought before the highest jurisdiction of Qatar, the supplier's legal counsel defended ultimately his client's interests and requested the application of the New York Convention to which Qatar adhered in 2003. He added that there is not any provision under New York convention which imposes any further condition for the enforcement of an award (such as to be rendered like court judgments in the name of a King, a Sultan, an Emir, or similar authority). Also, he mentioned that the national procedural law may be applicable only at the enforcement phase of the foreign award.

The court, which mentioned solely the arguments of the Claimant, decided to accept them and after a long prelude of the national Qatari provisions in respect of arbitration ordered to quash the judgment of the court of appeal and that the case has to be heard again before another circuit of the court of appeal.

It is important to recall that the purpose of the Court of Cassation or Supreme Court is essentially not to rule on the merits, but to state whether the law has been correctly applied on the basis of the

facts already definitively assessed in the decisions referred to it.
In this respect, the Supreme Court stressed on the application of the New York Convention by stating:

"*that the award was rendered in accordance with the ICC arbitration law (ICC arbitration law was mentioned erroneously instead of ICC arbitration rules), that according to articles I and II (article II was mentioned erroneously instead of article III) of the New York Convention – to which Qatar adhered by virtue of the Emiri Decree 29/2003 and became applicable since 15 March 2003- each signatory state should recognize and enforce the foreign arbitral awards according to its national or internal rules of procedure, that the said Convention did not stipulate any provisions regarding the form of the award or its elements, that any foreign award is subject to the Qatari procedural law at its enforcement phase only*".

Final Comments:

In the light of this first mixed or halftone application of the New York convention by the Qatari judges, it is important to salute this positive step towards a full recognition and enforcement of foreign awards. Although the court of cassation decided – after smashing the invalidation ruling – to send the case to be heard again before the court of appeal, the new judges have received a clear message that the earlier magistrates have misapplied the Qatari law (including the international conventions to which Qatar has adhered and which forms part of the legislation). It is expected within few more weeks to see the first real enforcement of a foreign award in Qatar declared by a Qatari court after a sort of long *saga* of unfortunate rulings related to arbitration since 2012.

Dr. Minas Khatchadourian is an international arbitrator and the director of the Qatar International Center of Conciliation and Arbitration. He has an extensive experience in the Gulf & MENA Region. He can be reached at drminas@qcci.org.

References

?1 https://kluwerarbitrationblog.com/blog/2013/09/23/controversial-ruling-of-the-qatari-court-of-cassation-regarding-arbitral-awards/
?2 https://kluwerarbitrationblog.com/blog/2014/01/28/a-new-bump-on-the-qatar-new-york-road/

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