

Kluwer Arbitration Blog

Saudi Enforcement Court confirms that it would enforce a London ICC Award

Hosam ibn Ghaith (Allen & Overy / Khoshaim & Associates) · Wednesday, July 13th, 2016

Last month, it was announced in a legal press release (“press release”) that the Enforcement Court in Riyadh, Saudi Arabia had decided to enforce an US\$18.5 million ICC arbitral award rendered in London in favour of its client, a UAE subsidiary of a Greek telecom company. The press release stated that it believed this to be the first example of the recognition and enforcement of a foreign award in Saudi Arabia since the enactment of Saudi Arabia’s new Arbitration Law and new Enforcement Law in 2012. This blog post aims to examine what this might mean for the enforceability of foreign arbitral awards in Saudi Arabia going forward.

Background

Despite Saudi Arabia being a party to the New York Convention since 1994, parties have traditionally been wary of resorting to arbitration in Saudi Arabia or with Saudi Arabian counterparties. The 1983 Saudi Arbitration Law did not detail certain matters that arbitration parties were used to seeing and, crucially, did not set explicit limits on the scope of judicial review. This in practice allowed the Saudi Arabian courts to review the underlying dispute on the merits. For arbitral awards obtained offshore, the power to enforce such awards rested with the Board of Grievances, which required a review of the award to ensure compliance with Shari’ah law as well as proof of reciprocity between Saudi Arabia and the country where the award was rendered, and that the award did not violate Saudi Arabian public policy.

A new Arbitration Law enacted in 2012 sought to clarify various points, including an explicit prohibition on the review of the merits of the underlying dispute, though it still required the courts to exclude any element of an award that violated Shari’ah law or public policy. Moreover, a new Enforcement Law was enacted in the same year, creating specialised Enforcement Courts for the purpose of enforcing ‘executory instruments’ such as cheques, promissory notes, court judgments and arbitral awards (including judgments and awards obtained in foreign jurisdictions) in a speedier and more streamlined manner than was the case with the ordinary courts.

These reforms were widely seen as an attempt to encourage parties to resort to arbitration. However, many preferred to wait to see how the new reforms would play out in practice. The new decision – a watershed moment?

Like most judicial decisions in Saudi Arabia, the Enforcement Court’s decision is not publicly available so I cannot comment on the details of the proceedings or the court’s reasoning. However,

based on the press release, a number of comments can be made.

Speed of enforcement

According to the press release, the Enforcement Court took just three months to issue its enforcement decision. This is broadly consistent with what I have seen recently and shows that the new laws are achieving some success in streamlining the enforcement process. It should be noted, however, that an ‘enforcement decision’ by an Enforcement Judge, while considered final under the Enforcement Law (and therefore not subject to appeal) can still be stayed if the respondent successfully initiates an ‘enforcement dispute’, defined under the Enforcement Law as a dispute relating to the conditions for enforceability under the Enforcement Law. Unlike ‘enforcement decisions’, judgments issued in ‘enforcement disputes’ can be appealed to the higher courts, further increasing the length of the proceedings.

Indeed, I am aware of at least one instance where this has occurred, leading to litigation at the Enforcement Court over whether the requirements for enforcement of foreign awards under the Enforcement Law were met, despite an enforcement decision having already been issued. The additional proceedings included discussions of the merits of the underlying dispute to ensure that the award was consistent with Shari’ah principles and Saudi Arabian public policy, though the standard of review was more summary in nature than the *de novo* standard that would normally be seen before the ordinary courts.

It is not clear from the press release whether any enforcement dispute has been initiated in the present case or indeed if the award was actually paid.

Reciprocity

Saudi Arabia’s accession to the New York Convention was subject to a reservation on reciprocity. This has also been a cause for uncertainty in the past, as it was unclear whether the Board of Grievances would accept treaties such as the New York Convention as proof of reciprocity or insist on evidence of actual enforcement of Saudi Arabian awards in the relevant jurisdiction, an impossibly high barrier in many cases.

The implementing regulations to the Enforcement Law, issued by the Ministry of Justice, went some way in alleviating these concerns by requiring the Enforcement Judge to ascertain reciprocity by formally enquiring with the Ministry of Justice. According to the press release, this requirement was satisfied in its case simply by reference to the UK’s membership in the New York Convention. Again, this is consistent with my own experience, and is an encouraging sign that proof of reciprocity may no longer be the significant barrier to enforcement that it was before.

Which law applies?

One area that remains unclear is whether enforcement of foreign arbitral awards requires compliance not only with the requirements of the Enforcement Law but also the Arbitration Law of 2012, which imposes certain additional procedural formalities and contains provisions on enforcement that overlap with those contained in the Enforcement Law. The press release mentions both statutes but does not discuss to what extent the court considered the Arbitration Law to be relevant. In my experience, compliance with the Enforcement Law has been sufficient, particularly where the parties did not choose to subject the arbitration to Saudi Arabia’s Arbitration Law, but this will remain an area of uncertainty until further cases have been resolved by the Enforcement Courts or further official guidance is given by the Ministry of Justice. In the meantime, parties

seeking to resort to arbitration with Saudi Arabian counterparties should take this issue into consideration when drafting the agreement to arbitrate.

Conclusion

The decision by the Enforcement Court in Riyadh to enforce an ICC award rendered in the UK is a sign that recent reforms of Saudi Arabia's enforcement process are having a positive effect in streamlining the enforcement process. Most notably, it appears that neither the requirement of Shari'ah compliance nor the reciprocity reservation remain high barriers to issuing an enforcement decision by the Enforcement Court, at least in the first instance. Observers should be careful to note, however, that a decision by the Enforcement Court is not necessarily the final step in the process, as the respondent may still initiate an enforcement dispute proceeding, followed by an appeals process, which can further lengthen the proceedings considerably and effectively lead to a review of the merits of the underlying dispute. Whether the standard of review will be similar to that employed in ordinary proceedings or take a more summary form remains to be seen as more cases are brought before the Enforcement Court and appellate divisions.

Please note that the views expressed above in this blog post are those of the author and are not necessarily those of Khoshaim & Associates or Allen & Overy.

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