

Kluwer Arbitration Blog

Dubai Court of Cassation's Recent Decision on Enforcement of Foreign Awards

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The UAE acceded to the [New York Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958](#) (“NYC”) in 2006 by virtue of [Federal Decree No. 43 of 2006](#). In recent years, the approach taken by the onshore UAE courts towards the enforcement and recognition of awards under the NYC, including the challenges of awards under the NYC, reveals their overall pro-enforcement approach. Indeed, since 2010, the UAE’s onshore courts have, notwithstanding a few isolated exceptions, consistently enforced foreign awards in compliance with the spirit and terms of the NYC.

By way of example, in [Al Reyami Group LLC v BTI Befestigungstechnik GmbH & Co KG, Case No. 434 of 2013, judgment dated 23 November 2014](#) (“**Al Reyami**”), the Dubai Court of Cassation (“DCC”) rejected the argument that distribution agreements are non-arbitrable under UAE law, and enforced the award under the NYC. This was a welcomed decision considering that before the DCC’s decision in *Al Reyami*, the UAE courts found disputes arising out of commercial agency or distributorship agreement to be non-arbitrable as a matter of UAE public policy. In another case (Case No. 693 of 2015 dated 10 April 2016), the DCC held that the issue of capacity and/or authority of the signatory of an arbitration clause of a UAE company may be assessed by reference to the law of the seat of arbitration, rather than by reference to the law of the company’s incorporation. Accordingly, the DCC dismissed the challenge to the enforcement of a foreign award that was brought on the basis that the signatory of the arbitration clause lacked the requisite authority to bind the award debtor company to the arbitration agreement.

In contrast to the above-mentioned pro-arbitration decisions, a recent judgment of the DCC reveals the very opposite. In [Case No. 790 of 2022 dated 19 October 2022](#), the DCC upheld the lower courts’ decisions to reject the enforcement of a foreign award for lack of jurisdiction over a foreign award debtor based in Qatar, with no domicile in the UAE. Whilst one may consider this decision to be unfortunate in that it essentially restricts the scope of application of the NYC to situations in which the UAE onshore courts have subject-matter or personal jurisdiction over the award debtor, the decision is not entirely surprising. It is consistent with (at least) one previous decision of the DCC in the famous [Canal de Jonglei case in Case No. 156 of 2013 dated 18 August 2013](#). In this case, the DCC refused enforcement of three ICC awards rendered in Paris against the Republic of Sudan on the basis that the UAE courts did not have jurisdiction over the award debtor, a foreigner without domicile in the UAE.

This post considers whether the DCC’s approach in Case No. 790 of 2022 is in line with the spirit

and terms of Article III of the NYC.

Article III of the NYC

Article III embodies what is known as the pro-enforcement policy of the NYC. It sets forth the general principle that “each Contracting State shall recognize arbitral awards as binding and enforce them”. This means that foreign awards are entitled to a prima facie right to recognition and enforcement in contracting states. The ease of recognition and enforcement of awards compared to court judgments in foreign courts is often seen as one of the key advantages of arbitration over state litigation in international transactions.

Article III contains two principles:

(i) While the recognition and enforcement of foreign awards under the NYC are to be conducted “in accordance with the rules of procedure of the territory where the award is relied upon”, the “conditions” under which recognition and enforcement of foreign awards can be granted are exclusively governed by the NYC.

(ii) National rules of procedure governing the recognition and enforcement of foreign awards in each contracting state shall not impose “substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”

As the [travaux préparatoires](#) make clear, the drafters of the NYC refrained from devising a harmonized set of procedural rules applicable to the recognition and enforcement of foreign awards in each contracting state because it would have been unrealistic to reach a consensus on a uniform set of rules amongst all states. As a result, the NYC does not refer to any specific set of rules, leaving it to each contracting state to define the rules of procedure applicable to the recognition and enforcement of awards in their respective territory.

Accordingly, the national laws of each contracting state govern the recognition and enforcement of foreign awards in their respective jurisdiction.

Findings of the DCC in Case No. 790 of 2022

Since [Cabinet Resolution No. 57 of 2018](#), the process for the enforcement of foreign awards before the onshore UAE courts has been relatively straightforward: it involves a direct application to the execution judge for an enforcement order (rather than having to file a standard full claim for ratification of the award before the UAE Court of First Instance as was the case under the UAE Civil Procedure Code). The enforcement order is granted once the following requirements contained within Articles 222 and 223 of Federal Decree Law No. 42/2022 are deemed to have been satisfied by the execution judge:

(i) The parties agreed to arbitration and the arbitral tribunal determined it had jurisdiction to hear the matter. The award was delivered in accordance with the rules of the presiding institution.

- (ii) The parties to the arbitration were duly notified of the arbitration in accordance with the rules of the presiding institution.
- (iii) The award is final and binding on both parties.
- (iv) The award does not conflict with the law, public policy or morals of the UAE.

In Case No. 790 of 2022, the award creditor applied to enforce a London Court of International Arbitration award against a foreign award debtor located in Qatar which had no domicile in the UAE. The award debtor sought to seize shares owned by the award debtor in two UAE incorporated companies. Despite the straight-forward process to enforce foreign awards, the execution judge rejected the application on the basis that the UAE courts did not have jurisdiction to enforce an award against a foreign party, i.e., one that had no domicile in the UAE. The award debtor challenged the execution judge's decision before the Court of Appeal and the Court of Cassation.

The award debtor sensibly argued that the lower courts erred in their application of the law on the following basis:

- (i) In accordance with the NYC, the UAE courts “implicitly accepted their jurisdiction to consider applications for enforcement of foreign arbitral decisions” pursuant to the conditions set out in the NYC.
- (ii) Article 21 of the Civil Procedures Law (now Article 20 of Federal Decree Law No. 42/2022) confirms the UAE courts' jurisdiction over non-domiciled parties in various instances. The underlying dispute in this case arose out of the sale and purchase of shares in two companies that were registered and domiciled in the UAE.
- (iii) Article 20 of the Commercial Companies Law ([Federal Decree No. 32/2021](#)) allows the creditors of a shareholder to enforce against those shareholder's shares in limited liability companies by applying to the competent court for the sale of these shares and recovery of the debt from the sale proceeds.

The DCC dismissed those arguments. Referring to Article III of the NYC, the DCC noted that an award should be enforced “in accordance with the rules of procedures applicable in the territory of enforcement with the adoption of the easiest procedures, and the exclusion of the more onerous procedures”. However, the DCC added quite generically that “procedures rules provided in the Convention mean any law regulating procedures in disputes and enforcement of judgments ... and it is not limited to the ... Civil Procedures Law ... but includes any procedural rules of disputes and enforcement of their provisions”.

The DCC further stated that: “[i]t is a rule of this Court that matters of territorial jurisdiction or subject-matter jurisdiction are matters relating to the public order”, which the UAE courts may raise on its own motion.

On that basis, the DCC decided to uphold the Dubai Court of Appeal's decision which found that “it is a rule of law that jurisdiction of the execution judge of Dubai Courts to affix the execution formula on the foreign judgment [award] and to order to execution such judgment [award] it is a condition that the domicile of the judgment debtor, the party against whom the execution is applied for, is located within the territorial jurisdiction of Dubai Courts”.

The DCC further considered that it did not matter that the two Dubai registered companies, in which the award debtor held shares, were located in Dubai as the award did not include “any ruling against the latter companies and no other judgments are issued against them”. Therefore, Article 20 of the Commercial Companies Law did not assist the award creditor.

Conclusion

While Article III of the NYC grants contracting states the freedom to apply their own national rules of procedure at the recognition and enforcement stage, national courts have applied Article III in accordance with the NYC’s policy of promoting the recognition and enforcement of awards to the highest extent possible.

Denying jurisdiction to enforce a foreign award on the basis that “matters of territorial jurisdiction or subject-matter jurisdiction are matters relating to the public order” considerably restricts the scope of application of the NYC and is not in line with the spirit and terms of Article III of the NYC.

The decision in Case No. 790 of 2022 complicates the enforcement of foreign awards in the UAE as an award creditor may be unable to enforce against assets located in the UAE if the award debtor is not itself domiciled in the UAE. The DCC’s decision is not in line with the NYC’s pro-enforcement policy as it arguably creates an additional hurdle or more onerous rules than those applicable to the enforcement of domestic awards by requiring that the award debtor be domiciled in the UAE in order for the UAE courts to have jurisdiction.

To mitigate the risks of a refusal to enforce in similar circumstances, award creditors should:

- (i) to the extent possible, ensure that the foreign award contains relevant orders in relation to existing assets in the UAE; and/or
- (ii) as an alternative to the onshore UAE courts, consider seeking enforcement through the DIFC courts, including using the DIFC courts as a “conduit jurisdiction” to ultimately enforce against assets located onshore UAE.

The recent decisions of the DCC in [Case No. 403/2020 \(judgment dated 15 April 2021\)](#) and [Case No. 109/2022 \(judgment dated 21 April 2022\)](#) are other examples of the onshore UAE courts’ failure to adhere to the spirit of the NYC. Under UAE law, an award must comply with several formalistic requirements to ensure its validity. One of these requirements is the signature of the award by the arbitrators as per Article 41(3) of the Federal Arbitration Law (“FAL”). The onshore UAE courts have consistently ruled in the context of domestic awards that (i) this requirement implies that arbitrators must sign not only the dispositive part of an award but also all the reasoning; and (ii) this signature requirement is a matter of UAE public policy. In Case Nos. 402 of 2020 and 109 of 2022, the DCC considered that the national “applicable rules of procedure” under Article III of the NYC comprise all the provisions of the FAL including Article 41(3) and refused to enforce foreign awards on grounds of public policy for lack of compliance with the signature requirement.

Those recent decisions are unfortunate as they show that the onshore UAE courts remain susceptible to deny enforcement of foreign awards on overly technical grounds.

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