

SOUNDINGS

Enforcement of Arbitration Awards in the UAE – a New Approach?

The relative ease with which arbitration awards can be enforced against parties or assets located overseas is an undeniable benefit of agreeing to arbitration for dispute resolution purposes when entering into commercial agreements. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”) provides for the recognition and enforcement of foreign arbitral awards in the jurisdictions of its signatories. This can often provide a quicker and more cost-effective enforcement process than would be the case for court judgments. Indeed, in some jurisdictions which recognise court judgments from only a limited number of countries – China being an obvious example – arbitration followed by enforcement under the New York Convention will be the only effective means of making a recovery from an entity with its domicile or assets located there.

The position in the UAE

However, in some jurisdictions enforcement may be hampered by the interplay of local law with the provisions of the New York Convention. Until recently, this has been the case in the courts of the United Arab Emirates.

The UAE ratified the New York Convention in 2006 – as such, the local courts might have been expected automatically to recognise foreign arbitration awards that met the requirements

set out in that Convention. However, before 2006, under the relevant local legislation (the UAE Civil Procedures Law) the UAE had treated foreign arbitration awards in the same manner as foreign court judgments. This meant that the UAE courts retained the right to decline to recognise foreign arbitration awards on the various grounds that appeared in the Civil Procedures Law. Most commonly, the reason stated for refusal to enforce foreign arbitration awards was any lack of reciprocity of enforcement between the country where the award was made and the UAE.

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As a result, UAE lawyers seeking to enforce a foreign arbitration award could find themselves arguing against a body of existing legal precedents in which such enforcement had been declined.

A change in approach?

Since 2006, there have been signs of a change in approach by the UAE courts in favour of an approach more in keeping with the terms of the New York Convention. Thus, in 2010 the Fujairah Court of First Instance ordered enforcement of a foreign arbitration award obtained via a judgment in default. In that case, many grounds which had previously been employed to challenge the recognition and enforcement of foreign arbitral awards were not raised.

However, the Dubai Court of Cassation more recently refused to recognise and enforce a foreign arbitration award on the basis that the UAE Civil Procedures Law did not give it jurisdiction to consider the underlying dispute, notwithstanding that the debtor had assets in the UAE. In consequence, it remained unclear which provisions prevailed in the UAE: those of the Civil Procedures Law or the New York Convention?

A corner turned?

However, a decision of the Dubai Court of Appeal in May, 2015 suggests that the UAE courts may be leaning more towards the provisions and spirit of the New York Convention when considering applications for enforcement of foreign arbitration awards. The facts of the case were as follows.

The claimant disponent owner fixed its vessel for a time charter to a Dubai-based charterer for a period of between 59 to 62 months. The charterparty provided for English law and arbitration, and had been negotiated and agreed by e-mail exchanges between the parties. However, no hard copy of the charterparty was ever signed by the parties – this is of course frequently the case, and under English law presents no obstacle to the contract being legitimate and binding.

A dispute arose between disponent owners and charterers, and London arbitration proceedings were commenced. Eventually the claimant disponent owner obtained three arbitration awards from the London tribunal, all in its favour, and in January, 2014 brought proceedings in the Dubai Court of First Instance seeking an order for the enforcement of one of the awards under the provisions of the New York Convention. This application was opposed by the Dubai-based respondent charterer.

Judgment of the Dubai Court of First Instance

The Dubai Court of First Instance rejected the application to recognise and enforce the arbitration award. The court held that no valid arbitration agreement had been entered into between the parties, finding that the e-mails negotiating the fixture had indicated that an engrossed charterparty would be produced and signed, and that the claimant disponent owners had not adduced any evidence that the charterparty had in fact been signed by the parties.

The reasoning of the Court of First Instance complied with the terms of the UAE Civil Procedures Law, which sets out similar requirements for the validity of UAE arbitration awards. Thus, the Court of First Instance was following local law, rather than the provisions of the New York Convention.

Judgment of the Dubai Court of Appeal

The claimant disponent owner's position was that in an application for enforcement of a foreign arbitration award under the New York Convention, the court must abide by the provisions of that Convention rather than local law when determining the validity of the arbitration agreement. The arbitration clause was valid under English law and hence, they argued, it was invalid to apply the provisions of the UAE Civil Procedures Law.

In May, 2015 the Dubai Court of Appeal overturned the judgment of the Court of First Instance, ordering the enforcement of the claimant disponent owner's arbitration award. The Dubai Court of Appeal found that under the terms of the New York Convention and English law, the parties had validly agreed to London arbitration when negotiating the charterparty via e-mail, and that the award should therefore be recognised in accordance with the provisions of the New York Convention. The Dubai Court of Appeal also confirmed that foreign arbitration awards should be recognised and enforced in the UAE provided that this does not contradict UAE public policy, and provided also that the subject-matter is capable of

settlement by arbitration under UAE law - these caveats are themselves to be found within the provisions of Article V.2 of the New York Convention, further indicating the move towards reliance upon that Convention when dealing with applications of this nature.

The outcome

The Dubai Court of Appeal's judgment is currently subject to appeal. However, it may represent a new spirit of adherence to the terms of the New York Convention rather than local law when determining whether foreign arbitration awards may be enforced in the UAE. This must be seen as a positive step, in keeping with the UAE's ambitions to become a major regional shipping hub, and a recognised jurisdiction for international dispute resolution in shipping-related matters. Further, if the Dubai Court of Appeal's decision is upheld on appeal, members doing business with UAE-based counterparts will enjoy greater certainty regarding the possibility of enforcement there of arbitration awards obtained in other jurisdictions, leading to a higher level of business confidence.

Members doing business with UAE-based entities should consult their usual contact at the Managers with any concerns regarding enforcement of arbitration awards in the UAE, and for updates on the current position.





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