Dubai High Court denies enforcement of arbitration award against foreign party (Article III of the New York Convention)

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The Dubai Cassation Court, the highest tier of court litigation in the Emirate of Dubai, recently rendered judgment rejecting enforcement of an arbitration award against a foreign award debtor on the basis that the debtor does not have a domicile in the United Arab Emirates.

Furthermore, the Dubai Cassation Court provided an interpretation of Article III of the New York Convention in finding that its purpose is that enforcement of an award should be conducted "…*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…*".

The Dubai Cassation Court did not adopt the latter part of Article III which continues to state, "*than are imposed on the recognition or enforcement of domestic arbitral awards*", developing an interpretation of Article III to consider its second sentence requiring application of easy and non-onerous procedural rules, instead of requiring application of procedural rules that are not more onerous than those that apply to the enforcement of domestic arbitration awards.

The arbitration award:

The arbitration award was issued by the London Court of International Arbitration.

The award debtor is a foreign entity and has no domicile in the United Arab Emirates.

However, the award debtor owned shares in companies established and domiciled in the United Arab Emirates.

The award creditor applied for recognition and enforcement of the award before the Dubai Courts against the shares of the United Arab Emirates companies owned by the foreign award debtor.

The enforcement judge rejected the application on the basis that the Dubai Courts have no jurisdiction to enforce an arbitration award against a foreign party.

The award creditor challenged the finding through the courts, up to and in petitioning the Dubai Cassation Court.

The Dubai Cassation Court considered the following arguments made by the award creditor:

- Pursuant to the principle of voluntary – legislative – compliance with the accession of the United Arab Emirates and the United Kingdom to the Convention on the Recognition of Foreign Arbitral Awards (New York Convention) ratified by Federal Decree No. 43/2006, the rules of jurisdiction contained in the Federal Civil Procedures Law do not apply to the enforcement of foreign arbitral awards, considering that both the United Kingdom and the United Arab Emirates have acceded to the Convention on the Recognition of Foreign Arbitral Awards of 1958 (New York Convention) and implicitly accepted their jurisdiction to consider the application for the enforcement of foreign arbitral awards and are obligated to recognize and order their enforcement in accordance with the terms contained in the Convention.

- It is evidenced within the contract in dispute and within the arbitration award that the award debtor is the owner of shares of two companies registered in the United Arab Emirates.
- The parties to the arbitration agreed to the sale and purchase of the shares owned by the award debtor in those two companies.
- The legislator deviated from the general principle of domicile jurisdiction, allowing the creditors of a shareholder in a limited liability company to execute against the shares of a debtor shareholder by selling the shares and collecting the debts from the proceeds of the sale in accordance with Article 20 of the Federal Commercial Companies Law.

The Dubai Cassation Court rejected the petition for the following reasons:

- The text of Article III of the New York Convention of 1958 indicates that enforcement takes place in accordance with the rules of procedures followed in the territory of enforcement, with the adoption of the easiest procedures and the exclusion of the more onerous procedures.
- This matter is not limited to the general procedural law, which is the Federal Civil Procedures Law and its executive regulations, but rather includes any procedural rules for litigation and the implementation of its provisions contained in any other law that regulates these procedures, and to say otherwise is allocation without provision.
- And that it is established – in the jurisprudence of the Dubai Cassation Court – that the issue of sovereign or qualitative jurisdiction is one of the issues related to public policy and is considered to exist in any litigation and always before the court, which the court must address it on its own accord, even if none of the

litigants raise the issue.

- It is also decided – in the jurisprudence of the Dubai Cassation Court – that the company of any kind – with the exception of the joint venture company – has a legal personality and a financial liability independent of the liabilities of its shareholders, and it has the capacity to sue as a plaintiff or defendant, independently of its shareholders.
- The jurisdiction of the Dubai Courts in the enforcement of the arbitration award is not affected by the request to enforce against the shares of the award debtor in the two companies domiciled in Dubai (in the United Arab Emirates) as the arbitral award required to be enforced does not include an order against the two companies, in addition to the absence of any other rulings against them, and therefore they are not considered a party to the instrument (the arbitration award) required to be enforced.
- For the competence of the enforcement judge in the Dubai Courts to recognize (apply exequatur) and enforce a foreign award, the domicile of the award debtor against whom enforcement is requested must be within the State jurisdiction of the Dubai Courts whilst in this case the award debtor is domiciled in a foreign State.

Article III of the New York Convention

The Dubai Cassation Court cited part of Article III and supplemented its quotation with an interpretive addition to the provision while omitting the application of the latter part of Article III.

Article III of the New York Convention states:

"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

There shall not be imposed 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."

Article III is generally understood to require that State courts treat enforcement of foreign arbitration awards in the same manner as enforcement of domestic arbitration awards.

The Dubai Cassation Court provided an interpretation of Article III of the New York Convention in finding that its purpose is that enforcement of an award should be conducted "*…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…*".

In coming to its disposition, the Dubai Cassation Court did not adopt the latter part of Article III which continues to state, "*than are imposed on the recognition or enforcement of domestic arbitral awards*".

The travaux préparatoires are the official documents recording negotiations, drafting, and discussions during the process of creating a treaty. The travaux préparatoires can be consulted and taken into consideration when interpreting treaties.

According to the New York Convention travaux préparatoires, the rule under Article III of the Convention limits the Contracting States' discretion to determine the rules of procedure applicable to the recognition and enforcement of foreign arbitral awards in their territories.

The purpose of this limitation, which has been referred to as the "national treatment" or "non-discrimination" rule, is to prevent national courts from imposing "unduly complicated enforcement procedures" and insurmountable procedural hurdles at the recognition and enforcement stage.

The second sentence of Article III prevents Contracting States from discriminating against foreign arbitral awards, whilst nothing prevents Contracting States from imposing conditions to the recognition and enforcement of foreign arbitral awards that are less onerous than those imposed on domestic awards.

The Dubai Cassation Court did not adopt the latter part of Article III which continues to state, "*than are imposed on the recognition or enforcement of domestic arbitral awards*", developing an interpretation of Article III to consider its second sentence requiring application of easy and non-onerous procedural rules, instead of requiring application of procedural rules that are not more onerous than those that apply to the enforcement of domestic arbitration awards.

Contrastingly, awards issued in the UAE against foreign parties are enforceable by the Dubai Courts, which renders this novel interpretation of Article III a complex new paradigm for parties to consider when enforcing in the UAE.

Enforcement against shares (assets)

The award creditor relied on Article 20 of the Federal Commercial Companies Law which does indeed permit creditors to take action against shares. Quoted as follows:

"Article 20 – Execution against anything in lieu of the share

1- Personal creditors of a shareholder may not recover their rights out of the share of the debtor shareholder in the capital of the company. However, they may claim their rights from the share of the debtor in the profits of the company. If the company is terminated, the rights of the creditors shall be paid from the shares of the shareholder in the remaining assets thereof upon conclusion of the liquidation.

2- If the contribution of a shareholder in the company consists of shares, then the creditors thereof may, in addition to the rights set out in Clause 1 of the present

Article, file a lawsuit before the competent court to sell these shares and subsequently recover their debts out of the sale proceeds."

Notwithstanding, the Dubai Cassation Court found that this right under Article 20 of the Federal Commercial Companies Law does not manifest in part because the arbitral award does not include an order against the two companies, in addition to the absence of any other rulings against them, and therefore they are not considered a party to the instrument (the arbitration award) required to be enforced.

The finding by the Dubai Cassation Court raises the risk of extending to other assets as well that are not named in an arbitration award.

In the same vein, the arbitration award in this dispute related to the sale and purchase of the shares in the companies domiciled in the United Arab Emirates.

Whilst the Dubai Cassation Court relied on Article 21 of the Federal Civil Procedures Law, this Article 21 does nevertheless state that the Courts shall have jurisdiction if "*the action is concerned with an obligation concluded, executed, or its execution was conditioned in the state or related with a contract required to be authenticated therein*".

Deductively, the Dubai Cassation Court appears to apply more weight to whether in fact the award debtor is domiciled in the country or not, irrespective of the underlying agreement.

Takeaway and alternatives

The judgment creates two substantial considerations for award creditors seeking enforcement of a foreign arbitral award in the United Arab Emirates:

1. If the award debtor is not domiciled in the United Arab Emirates, the Courts may refuse recognition and

enforcement of the award.
2. If the award debtor assets are not named in the award, the Courts may refuse enforcement action against said assets.

Either of these risks may manifest independently, or in compound with each other.

Alternatively, arbitration award creditors can seek recognition and enforcement through other court systems in the United Arab Emirates that operate under different laws and regulations, those being the Abu Dhabi Global Market Courts which operate pursuant to English law, and the Dubai International Financial Courts which operate pursuant to common law, and each their respective independent rules and statutes.

The ADGM and DIFC Courts also provide parties with the ability to apply for Mareva Injunctions (i.e., worldwide freezing orders) even if the parties have no nexus with or assets in the ADGM or the DIFC in support of enforcement of foreign arbitration awards.

How we can assist

Wasel & Wasel has assisted domestic and international arbitration award debtors and creditors in the enforcement and set aside of arbitration awards before the various courts in the UAE (including the Dubai Courts and the DIFC Courts) on matters collectively exceeding USD 500,000,000. Our team has also acted on Mareva Injunction and Norwich Pharmacal Orders issued by the DIFC Courts, or issued abroad and enforced domestically in the United Arab Emirates, in relation to court judgments and arbitration awards.

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