



Critical analysis on the UAE Courts' reaction upon accession to the New York Convention

**تحليل نقدي لموقف محاكم دولة الإمارات العربية المتحدة
من الإنضمام لمعاهدة نيويورك**

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ABSTRACT

Despite the UAE having acceded to the New York Convention on 13 June 2006, the positive trend towards the application of its provisions by the Courts has started only in 2011. The current Courts' jurisprudence, however, is still far from settled as conflicting decisions concerning recognition and enforcement of foreign arbitral awards are being passed by the Courts. Aiming at understanding the Courts' rationale behind the negative approach towards the New York Convention, twelve Courts' rulings were thoroughly analyzed. A critical review of the analysis made leads to the conclusion that it is uncertain whether the Courts will apply the New York Convention or the local procedural rules when evaluating a request for enforcement of a foreign arbitral award as the jurisprudence in this respect is evenly divided. It shall nonetheless be noted that the Courts' negative approach towards the New York Convention might conflict with the provisions of the local rules. On the other hand, a greater compliance of the New York Convention by the Courts can be expected in view of the UAE commitment to become an arbitration-friendly State internationally recognized and the expectation of a new UAE arbitration law based on the UNCITRAL Model Law.

نبذة عامة

بالرغم من انضمام الإمارات العربية المتحدة لمعاهدة نيويورك في 13 يونيو 2006، فإن التوجه الإيجابي نحو تطبيق أحكامها من قبل المحاكم بدأ في 2011 فقط. على أن الفقه الحالي في المحاكم لا يزال بعيداً عن الاستقرار حيث القرارات المتضاربة بشأن الاعتراف وتنفيذ أحكام التحكيم الأجنبية يتم إجازتها من قبل المحاكم. مستهدفاً تفهم مفهوم المحاكم من وراء التوجه السلبي نحو معاهدة نيويورك، تم تحليل إثني عشر حكم للمحاكم بشكل دقيق. مراجعة دقيقة للتحليل تقودنا لنتيجة أنه من غير المؤكد ما إذا كانت المحاكم ستقوم بتطبيق معاهدة نيويورك أو القواعد الإجرائية المحلية عند رفع طلب بتنفيذ حكم تحكيم أجنبي، حيث أن الفقه في هذا الصدد منقسم بالتساوي. بالرغم من ذلك، من الملاحظ أن توجه المحاكم السلبي تجاه معاهدة نيويورك قد يتضارب مع أحكام القواعد المحلية. على الجانب الآخر، يمكن توقع التزام أكبر بمعاهدة نيويورك من قبل المحاكم على ضوء تعهد الإمارات العربية المتحدة بأن تصبح دولة صديقة للتحكيم معترف بها دولياً وتوقع قانون تحكيم إماراتي جديد قائم على قانون لجنة الأمم المتحدة للقانون التجاري الدولي "الأونسيترال"

DEDICATION

To my beloved husband Juliano and son Armando José for all the support and patience during the time that I have had to dedicate myself to this work.

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I. INTRODUCTION

The present Dissertation (the “Dissertation”) aims at analyzing international arbitration from the United Arab Emirate (the “UAE”)’s perspective. In this sense, the Dissertation shall demonstrate how the UAE Courts deal with foreign arbitral awards (the “Foreign Awards”) being requested to be recognized and enforced within the UAE.

Considering that the UAE has accessed to the New York Convention on Recognition and Enforcement of Arbitral Awards (the “New York Convention”) in 2006 by means of the Federal Decree No. 43 of 2006¹, the Dissertation shall comprise indications as to the procedures for recognition and enforcement of Foreign Awards in the UAE before and after its accession to the New York Convention.

In addition, the Dissertation shall study the provisions of the New York Convention as well as demonstrate in which circumstances the States members of the New York Convention shall apply its provisions and how such State members shall do so.

Upon a literary study of the New York Convention, the Dissertation shall discuss the applicability of the provisions of the New York Convention by the UAE Courts. In this respect, it shall be demonstrated hereinafter the UAE Courts’ contradictory jurisprudence concerning the applicability of the New York Convention *versus* the local procedure rules when dealing with the recognition and enforcement of Foreign Awards.

The Dissertation shall then analyze twelve rulings passed by the UAE Courts, comprising Courts of First Instance, Courts of Appeal and Court of Cassation

¹ Federal Decree No. 43 of 2006 concerning the United Arab Emirates joining the Convention of New York on Recognition and Enforcement of Foreign Arbitral Awards dated 13 June 2006.

from different Emirates of the UAE, and make an analytical study of each decision.

The negative decisions passed by the UAE will then be highlighted and discussed so as to identify the UAE Courts' rationale in each decision. Upon revision of the grounds relied upon by the UAE Courts to reject recognition and enforcement of certain Foreign Awards, the Dissertation shall make a critical analysis of such grounds and assess whether the UAE Courts have complied with the laws and regulations in force in the UAE.

Having studied twelve rulings passed by the UAE Courts, the Dissertation shall disclose the empirical results obtained through such study. The empirical results shall comprise comments on the overlapping in the grounds used by the UAE Courts to refuse recognition of Foreign Awards as well as comparison charts between positive and negative rulings.

Notwithstanding, the Dissertation shall address the existence of two different jurisdictions in Dubai, namely the Dubai Courts and the Dubai International Financial Centre (the "DIFC") Courts and the possibility of establishing an alternative and more effective route for enforcement of Foreign Awards in Dubai.

Lastly, the Dissertation shall identify and discuss the reasons for the lack of support by the UAE Courts towards the enforcement of Foreign Awards. Upon discussion of the aforesaid reasons, comments on the proper ways to improve the UAE Courts' support towards international arbitration shall be made.

II. CONSIDERATIONS

1. International Arbitration in the UAE prior to accession to the New York Convention

Prior to accession to the New York Convention by the UAE in 2006 – which was made without reservations –, the enforcement of Foreign Awards was governed by the provisions of the UAE Federal Law No. 11 of 1992 (the “Civil Procedure Law”) concerning the enforcement of foreign judgements.

In this sense, before the accession to the New York Convention by the UAE, with exception to some international treaties, there were no international rules governing the enforcement of Foreign Awards, which used to be governed by the Articles 235 to 246 of the Civil Procedure Law.²

The Riyadh Arab Agreement for Judicial Cooperation of 1983³; the Convention on Judicial Cooperation and the Recognition & Enforcement of Judgements in Civil & Commercial Matters of 1992 between France and the UAE; the Agreement on the Enforcement of Judgements, Letters Rogatory and Service of Process of 1996 between the Gulf Cooperation Council (the “GCC”) countries; and the Agreement on Legal and Judicial Cooperation in Civil and Commercial Matters, Mutual Legal Assistance in Criminal Matters & Extradition of Criminals of 2000 between India and the UAE are some examples of international rules that governed the enforcement of Foreign Awards in the UAE before the accession to the New York Convention.

Aside from the exceptions aforesaid, it is needless to say that due to the lack of qualified and comprehensive rules governing the enforcement of Foreign Awards

² J Fichte and A Tricoli, *Enforcement of Judgments, Awards & Deeds in Commercial Matters* (European Lawyer Reference Series, London 2013) 314

³ E Al Tamimi, *Practitioner’s Guide to Arbitration in the Middle East and North Africa* (JurisNet LLC, New York 2009) xi

in the UAE such procedure faced many pitfalls by the Courts in the jurisdiction, as they hardly granted the enforcement of a Foreign Award.

1.1 Enforcing a Foreign Award pursuant to the provision of the Civil Procedure Law

Prior to accession to the New York Convention, Foreign Awards were considered as foreign judgements and were enforced pursuant to the provisions of Article 235 of the Civil Procedure Law, which deals with execution of foreign judgements, orders and instruments.⁴

As per Article 236 of the Civil Procedure Law⁵, the provisions set out under Article 235 of the same law shall apply to Foreign Awards. This Article goes on and provides for that any Foreign Award must have been issued out of an arbitrable matter and must be capable of enforcement in its country of origin.

The party aiming the enforcement of a Foreign Award should bring an action before the UAE Courts requesting the ratification of such award and its ultimate enforcement. The UAE Courts would then only ratify the Foreign Award or foreign judgment upon analysis of the conditions set out in Article 235 of the Civil Procedure Law.⁶

In a nutshell, the UAE Courts could refuse enforcement of Foreign Awards based on the following grounds:

- “• the lack of proper jurisdiction of the tribunal at the place of arbitration
- the deficient issuance of the arbitral award at the place of arbitration

⁴ C Ingmire, *Construction Law and Practice* (European Lawyer Reference Series, London 2012) 245

⁵ “The provisions of the foregoing article shall apply to the awards of arbitrators made in a foreign country; the award of the arbitrators must have been made on an issue which is arbitrable under the law of the UAE, and capable of enforcement in the country in which it was issued.”

⁶ E Al Tamimi, *Practical Guide to Litigation and Arbitration in the United Arab Emirates* (Kluwer Law International, The Hague 2003) 158

- the improper summoning or representation of one of the parties in foreign arbitration proceedings
- the contradiction of the foreign award with a previous UAE judgment or its violation of public policy or bonos mores as understood in the UAE.”⁷

Notwithstanding the above, pursuant to the predicaments of Article 235(1), a Foreign Award was not required to follow the procedure of the UAE law but only the applicable procedure of the award’s country of origin. However, the UAE Courts went further in order to ensure that the Foreign Award complied with both the procedure rules of the country where it has been issued and the UAE, exceeding therefore the meaning of the aforesaid Article.

The UAE Courts tended to request evidence – from judicial authorities – as to the possibility of execution of the relevant Foreign Award in its country of origin. In addition, the UAE Courts tried to ensure that the parties involved were duly summoned and represented in the foreign arbitral proceedings, pursuant to Article 235 (2)(c).

Lastly, once the Foreign Award was successfully ratified by the UAE Courts, the same would be considered as a judgment delivered locally and would be executed as per the execution procedures of the Civil Procedure Law.

In light of the above, the pitfalls faced by parties willing to enforce their Foreign Awards in the UAE were evident prior to accession to the New York Convention by the UAE as the UAE Courts’ decisions not supporting arbitration were very common back then.

⁷ G Blanke and S Corm-Bakhos, ‘Enforcement of New York Convention Awards: Are the UAE Courts Coming of Age?’ (2012) 78(4) *Arbitration*, 359-365

2. The predicaments of the New York Convention

The New York Convention contains 16 Articles governing the recognition and enforcement of Foreign Awards, which shall be complied with by the signatory States, according to each State's reservation, if any.

As per the comments made by Jane Jenkins and Simon Stebbings to the New York Convention, "The New York Convention requires both recognition and enforcement of awards to which it relates. Contracting States bound by the New York Convention are obliged to respect the binding effect of the awards and so to enforce awards to which the New York Convention applies in accordance with their national procedures rules."⁸

Pursuant to Article III of the New York Convention, Foreign Awards shall be recognized by the contracting State, which shall enforce them in accordance with the rules of procedure of the territory where the application for enforcement is being made and as per the conditions set out in the New York Convention.

As far the requirements for the application of a request for enforcement of a Foreign Award, Article IV shall be observed. As per such Article, the applicant shall provide the Courts with "(i) the duly authenticated original award or a duly certified copy thereof; and (ii) the original arbitration agreement or a duly certified copy thereof."⁹

In the event the Foreign Award is written in a language that is considered not to be official in the jurisdiction where the enforcement is being requested, a certified translation shall be provided by the applicant¹⁰.

⁸ J Jenkins and S Stebbings, *International Construction Arbitration Law* (Kluwer Law International, The Netherlands 2006) 299

⁹ Article IV of the New York Convention.

¹⁰ Article IV of the New York Convention.

2.1 Grounds for refusal arguable by the Respondent

Upon application for enforcement of a Foreign Award, the party against whom such application is made, as known as “Respondent”, may request the Courts to refuse the enforcement sought based on the exhaustive grounds set out by Article V of the New York Convention. All options shall be discussed hereinafter.

As per item 1(a) of Article V, an application for enforcement of a Foreign Award may be refused in the event that “The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.”

The incapacity of the party referred to in this Article is related to the “incapacity” defenses, such as minority, physical incapacity, mental incompetence, lack of authority to act on behalf of someone. In a nutshell, incapacity of party shall be interpreted as lack of powers to contract, for instance when the applicable law prohibits a party from entering into an arbitration agreement in certain circumstances.

Another defense provided for in the aforesaid item 1(a) is the invalidity of the arbitration agreement. In practice, many Respondents raise this defense as a way to set aside the enforcement of a Foreign Award against them. Arguments as to the invalidity of the arbitration agreement due to the fact that the same is not “in writing”, as per Article II of the New York Convention; or disputes as to the identity of the party to the relevant arbitration agreement are common examples of the defenses raised by Respondents in such a case.

Item 1(b) of Article V provides for that an application for enforcement of a Foreign Award may also be refused in the event that “The party against whom the

award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”.

In such a case, the Respondent may argue that he was not provided with a fair opportunity to present his case and this can be grounded on the fact that (i) he failed to receive a proper notification concerning the appointment of the arbitrator and/or the arbitration proceedings; or (ii) he was, in some way, prevented from presenting his case in the arbitration proceedings. In a nutshell, the Respondent must be able to prove that he did not have the right to have his case properly heard and determined by the tribunal arbitral.¹¹

With respect to lack of proper notice of the appointment of the arbitrator and/or the arbitration proceedings, attention should be drawn to the fact that if the Respondent has actively participated in the course of the arbitration proceedings, he will not be able to raise such argument as a ground for refusal of the enforcement of the Foreign Award. On the other hand, if the arbitral award is issued in absentia against the Respondent and the Respondent is able to prove that he was not notified properly, enforcement of the Foreign Award may be denied.

Another ground for refusal of enforcement of a Foreign Award is set out under item 1(c) of Article V. This provision deals with awards which scope falls outside or beyond the scope of the submission to arbitration. In other words, this provision of the New York Convention sets out that the arbitral tribunal must keep its decision within the scope of the issues submitted to it by the parties.

According to item 1(d) of Article V, the enforcement of a Foreign Award may also be refused when either of the parties is prevented from exercising its rights of choosing the arbitral tribunal responsible for deciding the arbitration case or in the event such arbitral tribunal does not reflect the parties' agreement in the appointment of the arbitrators.

¹¹ P Sanders, *ICCA's Guide To The Interpretation Of The 1958 New York Convention: A Handbook For Judges* (International Council for Commercial Arbitration, The Hague 2011) 89

In the event the parties fail to agree upon the appointment of the arbitral tribunal, the Courts would then be eligible to check whether such appointment was in compliance with the procedure law of the jurisdiction in which the arbitration took place.

Lastly, the Courts may refuse the enforcement of a Foreign Award in case the arbitration was not conducted in accordance with the arbitral procedure – e.g. the arbitral institution’s rules or *ad hoc* arbitration – chosen by the parties.

The other option for refusal happens when “The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made”. That is what is set out under item 1(e) of Article V.

2.2 Grounds for refusal arguable *ex officio* by the Court where the recognition and enforcement is being sought

Item 2(a) and (b) of Article V of the New York Convention enables the competent authority to refuse enforcement of a Foreign Award *ex officio* in the following circumstances: (i) the subject matter in dispute is not capable to be submitted to arbitration under the local law; and (ii) the enforcement of the Foreign Award would conflict with local public policy.

Examples of non-arbitrable matters in the UAE are the ones related to employment issues, personal status, and criminal matters, among others, which fall within the exclusive jurisdiction of the UAE Courts.

With respect to public policy, Albert Jan van den Berg defines this term as follows:

“The rules of this public policy would comprise fundamental rules of natural law, the principles of universal justice, *jus cogens* in public international law and the general principles of morality accepted by what is referred to as civilized nations”.¹²

Further, attention should be drawn to the “International law association recommendations on the application of public policy as a ground for refusing recognition or enforcement of international arbitral awards” issued in 2002 (the “ILA Recommendations”), which aims at standardizing the concept of “public policy” as a guide for international courts.

The ILA Recommendations set out that “public policy” of any State shall include as follows: “(i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as “*lois de police*” or “public policy rules” and (iii) the duty of the State to respect its obligations towards other States or international organisations”.¹³

Further, the ILA Recommendations provide for that the Courts shall not refuse to recognize and enforce a Foreign Award by merely referring to item 2(b) of Article V of the New York Convention or even to the Court’s local laws or jurisprudence. ILA Recommendations recommends that the Courts substantiate their decisions so as to promote a consensus on principles and rules.¹⁴

Lastly, the ILA Recommendations also set out that a mere violation of the local mandatory rules – which does not form part of the State’s public policy – cannot

¹² A Berg, *The New York Arbitration Convention of 1985* (Kluwer Law and Taxation Publishers, The Hague 1981) 361

¹³ Article 1(d) of the ILA Recommendations

¹⁴ Article 1(g) of the ILA Recommendations sets out as follows: “If the court refuses recognition or enforcement of the arbitral award, it should not limit itself to a mere reference to Article V.2 (b) of the New York Convention 1958 or to its own statute or case law. Setting out in detail the method of its reasoning and the grounds for refusing recognition or enforcement will help to promote a more coherent practice and the development of a consensus on principles and rules which may be deemed to belong to international public policy.”

prevent the Foreign Award from being recognized and enforced by the local competent authorities.¹⁵

3. Applicability of the New York Convention by the UAE Courts

Many doubts have arisen as to the real meaning of “rules of procedure” as set out under Article III of the New York Convention, as follows:

“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.”

[Emphasis given].

Some jurisdictions, including the UAE, in some cases understood that “rules of procedure” means that the Courts of the jurisdiction where the award is being enforced are able to apply their local procedural rules in order to rule whether the Foreign Award will be enforced and ratified.

However, by following this rationale, some Courts, including the UAE Courts, are facing contradictory provisions – i.e. local procedural rules *versus* New York

¹⁵ Article 3(a) of the ILCA Recommendations sets out as follows: “An award’s violation of a mere “mandatory rule” (i.e. a rule that is mandatory but does not form part of the State's international public policy so as to compel its application in the case under consideration) should not bar its recognition or enforcement, even when said rule forms part of the law of the forum, the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration.”

Convention – and in some cases the local procedural rules end up being prevailed to the detriment of the provisions of the New York Convention.

As per the “International Council for Commercial Arbitration (ICCA)’s Guide to the Interpretation of the 1985 New York Convention: A Handbook for Judges” (the “ICCA’s Guide”)¹⁶, the wording “rules of procedure” refers only to questions concerning the request form and the competent authority, cases in which the New York Convention defers to the applicable local law.

The ICCA’s Guide goes further and states as follows: “The general rule to be followed by the courts is that the grounds for refusal defined in Article V are to be construed narrowly, which means that their existence is accepted in serious cases only. This is especially true with respect to claims of violation of public policy, which are often raised by disappointed parties but very seldom accepted by the courts. For example, although London is one of the great financial centres of the world where parties often seek enforcement, there is no recorded case of an English court ever rejecting a foreign award on the grounds of public policy [...]”.

In light of the above, the prevailing international practice follows a strong pro-enforcement bias of the New York Convention, which does not accept the application of local procedural rules when ruling on the recognition and enforcement of a Foreign Award.

The international practice has a flexible, pragmatic and non-formalist approach when it comes to the applicability of the New York Convention. However, the same approach has not been taken by the UAE Courts as the jurisdiction has witnessed conflicting decisions from the Courts, the most recent being unsupportive of arbitration.

¹⁶ P Sanders, *ICCA’s Guide To The Interpretation Of The 1958 New York Convention: A Handbook For Judges* (International Council for Commercial Arbitration, The Hague 2011) 70

4. UAE Courts' decisions on the recognition and enforceability of Foreign Awards

Despite the fact that the UAE ratified the New York Convention back in 2006, the positive trend towards the application of the provisions of the New York Convention has only started in 2011 with the Court of First Instance of Fujairah, UAE.

Notwithstanding the above, the positive trend towards the enforcement of Foreign Awards by means of the New York Convention was broken by another conservative trend which prevails the predicaments of the local procedural rules in detriment of the provisions of the New York Convention.

Unfortunately, the jurisprudence in the Courts of the UAE is far from settled as the said jurisdiction has seen conflicting decisions in this respect. Further, the fact that the UAE is a Civil Law jurisdiction – as opposite to Common Law – also makes it difficult to create a common understanding among the Courts' decisions as they are not binding.

4.1 Fujairah Court of First Instance (No. 35/2010)

In the case at hand, the Foreign Award was issued in the award creditor's favour by the London Maritime Arbitrators Association.¹⁷

By possessing the Foreign Award in its favor, the award creditor applied for the recognition and enforcement of such award before the Courts of Fujairah where the award debtor's assets were located.

¹⁷ L Williams, *Baker & McKenzie International Arbitration Yearbook 2013-2014* (JurisNet LLC, New York 2014) 348-349

The Fujairah Court of First Instance recognized and enforced the Foreign Award relying upon important principles of the New York Convention, namely (i) non-revision of the merits of the Foreign Award being considered for ratification and enforcement; and (ii) the New York Convention shall be deemed as internal legislation and shall supersede the local procedural rules with respect to the recognition and enforcement of foreign awards.

The Fujairah Court of First Instance's rationale in this respect is reproduced below:

“It is a well settled principle of judicial construction that the court would not review the substantive merits of the arbitral award when hearing an action to recognize it (Appeal No. 556-24, 19.04.05 Hearing) and that ratified treaties and conventions between the UAE and other states are applicable as internal legislation with respect to the enforcement of foreign arbitral awards subject to national courts verifying that the necessary criteria are met before confirming any award (Appeal No. 764-24 – 07.04.05 Hearing).”¹⁸

4.2 Dubai Court of Appeal (No. 531/2011)

The Foreign Award was issued in the award creditor's favour by the Singapore International Arbitration Centre (SIAC). The award creditor sought the recognition and enforcement of the said arbitral award before the Court of First Instance of Dubai, which dismissed the case. A critical analysis of the Court of First Instance's decision [Dubai Court of First Instance (Case No. 274/2011)] shall follow on the next topic.

¹⁸ H Arab, 'Dubai: The Position of the UAE Courts following Accession to the New York Convention' (2012)

The award creditor then appealed to the Dubai Court of Appeal seeking the challenge of the Court of First Instance's decision and the enforcement of the SIAC award.

Based on Article III of the New York Convention and upon review of fulfillment of all requirements laid down in the New York Convention, the Dubai Court of Appeal challenged the Court of First Instance's decision to recognize and enforce the SIAC award.

The relevant excerpt of the Court of Appeal's judgment is reproduced below:

“And whereas the Dubai Appeal Court reviewed the fulfillment of all the conditions required according to the New York Convention, it ruled that the lower Court's ruling dismissing the action is incorrect and is undermined by grounds of appeal, the ruling will thus be challenged and therefore the court rendered its judgment recognizing and enforcing the arbitral award no. 128/2009 issued by SIAC arbitrator on 28.09.10, the Respondent is to pay fees and costs.”¹⁹

4.3 Abu Dhabi Cassation Court (No. 679/2010)

In the aforementioned case, the Foreign Award was issued in France by the International Chamber of Commerce (the “ICC”).

The award creditor applied for ratification and enforcement of the aforesaid Foreign Award before the Court of First Instance in Abu Dhabi. The award debtor, in turn, requested the dismissal of the case arguing that the Foreign Award contradicted a judgment previously issued by the UAE Courts.

¹⁹ H Arab, ‘Dubai: The Position of the UAE Courts following Accession to the New York Convention’ (2012)

The Abu Dhabi Court of First Instance refused to ratify and enforce the ICC award based on the predicaments of Article 235(a) of the Civil Procedure Law, which provides for that a foreign judgment is not to be ratified and enforced in the UAE if the UAE Courts would have had jurisdiction to hear the case. The Abu Dhabi Court of First Instance's ruling was upheld by the Abu Dhabi Court of Appeal. Both decisions [Abu Dhabi Commercial Case No. 410/2008 and respective Appeal Case] will be duly analyzed from a legal standpoint in the following topic.

The award creditor then challenged the Court of Appeal's decision before the Abu Dhabi Court of Cassation, which quashed the Court of Appeal's decision to recognize and enforce the ICC award pursuant to the provisions of the New York Convention.

A summary of the above-mentioned decisions is reproduced below:

“No. 1-Court of Cassation in Abu Dhabi – Commercial Challenge No. 679/2010 – Audience of 16 June 2011 - Request to Enforce a Foreign Arbitral Award in the UAE Before the Court of First Instance – Arbitration Admissible Only Where the Emirati Courts Do not Have Jurisdiction to Rule on the Case – Emirati Courts Competent to Rule on the Dispute – Request for Enforcement Dismissed by the Court of First Instance Under Article 235 of the Code of Civil Procedure – First Instance Decision Confirmed by the Court of Appeal – Challenge of the Appeal Decision Before the Court of Cassation in Abu Dhabi – UAE is Party to the New York Convention of 1958 – The Convention Is Part of the UAE Legal System and Applicable Law of the State Even if it Contravenes to Previous Laws – Provisions of the New York Convention Applicable to the Enforcement of Foreign Arbitral Awards in the UAE – UAE Bound to Enforce Foreign Arbitral Awards that Comply with the New York Convention – UAE Precluded from Imposing Stricter Rules for the Enforcement of

Foreign Arbitral Award – Article 235 of the Code of Civil Procedure Being Stricter than the Provisions of the New York Convention – Such Article Not Applicable to the Enforcement of Foreign Arbitral Awards – Court of Appeal’s Decision to Apply Such Article Contravenes to the New York Convention – Annulment of the Decision of the Court of Appeal.”²⁰

4.4 Dubai Cassation Court (No. 132/2012)

With respect to the afore-captioned matter, two Foreign Awards were issued by DIFC-LCIA Arbitration Centre seated in London in favour of Maxtel International FZE (the “Maxtel”) against Airmech Dubai LLC (the “Airmech”). The Foreign Awards concerned respectively damages as well as arbitration and legal costs.

In possession of both Foreign Awards in its favour, Maxtel applied for the ratification and enforcement thereof before the Dubai Court of First Instance, which accepted recognition and enforcement of the two Foreign Awards. The Court of First Instance’s decision was upheld by the Dubai Court of Appeal.

Airmech then took the matter to the Dubai Court of Cassation, which confirmed the lower courts’ decisions by issuing a very comprehensive decision reflecting the provisions of the New York Convention.²¹

In brief, the Court of Cassation²²:

- Rejected Airmech’s arguments related to invalidity of the arbitration agreement as Airmech failed to prove its allegations in this respect. The

²⁰ International Journal of Arab Arbitration, volume 6, No. (2), 2014, UAE Case Law No. 1

²¹ K Hassan and M Lewis, *Handbook on Islam and Economic Life* (Edward Elgar Publishing Limited, Cheltenham 2014) 412

²² L Williams, *Baker & McKenzie International Arbitration Yearbook 2013-2014* (JurisNet LLC, New York 2014) 348-349

Court of Cassation went further to say that Article V of the New York Convention placed the burden of proof on the party seeking to stay the enforcement of a Foreign Award. However, Airmech merely alleged the invalidity of the arbitration agreement but never furnished the Court with evidences in this respect;

- Airmech's allegations regarding the lack of jurisdiction were also rejected by the Court of Cassation, which stated that such jurisdiction belonged to the arbitral tribunal that issued the Foreign Awards;
- The remaining grounds argued by Airmech in order to stay the enforcement of the Foreign Awards were based on the predicaments of the Civil Procedure Law. In this respect, the Court of Cassation affirmed that the New York Convention should be construed as internal law, pursuant to Article 238 of the Civil Procedure Law and further affirmed that the UAE Courts are obliged to abide to the New York Convention when dealing with enforcement of Foreign Awards.

4.5 Dubai Cassation Court (No. 156/2013)

Despite the fact the UAE Courts have been demonstrating its commitment towards the application of the provisions of the New York Convention when dealing with the ratification and enforcement of Foreign Awards, as commented in the decisions listed above, the most recent judgment of the Dubai Court of Cassation has impressed the arbitration practitioners worldwide.

As a background of the case, the ICC has issued two Foreign Awards concerning the merits of the dispute and costs, in favour of Construction Company International and Compagnie Francois d'Entreprises S.A, pursuant to which the opponent party – Ministry of Irrigation of the Government of Sudan – was ordered to pay certain substantial amounts to the former.

The award creditor applied for ratification and enforcement of the ICC awards in front of the Dubai Court of First Instance; however based on the ground that the UAE Courts did not have jurisdiction over the case the Court of First Instance rejected the enforcement sought by the award creditor.

The Court of First Instance's decision was upheld by the Dubai Court of Appeal. The award creditor then appealed to the Dubai Court of Cassation, which also confirmed the lower courts' decisions.²³ The aforesaid decisions [Dubai Court of First Instance (Case No. 489/2012) // Dubai Court of Appeal (Case No. 40/2013) // Dubai Court of Cassation (Case No. 156/2013)] shall be discussed on the following topic.

5. Critical analysis of the negative decisions issued by the UAE Courts

5.1 Dubai Court of First Instance (Case No. 274/2011 – Exhibit 1)

It shall be reproduced and highlighted below the most relevant stretches of the Dubai Courts' decisions in the case at hand.

“Regarding the subject matter of the case, the Court of Cassation ruled as follows: “In the third chapter of the Civil Procedures Law, the legislator organized the rules related to the arbitration in the United Arab Emirates, as well as the procedures that should be followed when the litigants request ratification or nullity of the arbitrator's ruling. Paragraph Four of Article 212 of the same Law stipulates as follows: ((The ruling of the arbitrator must be given in the State of the United Arab Emirates otherwise, the rules prescribed for the

²³ G Jones and P Pexton, *ADR and Trusts: An international guide to arbitration and mediation of trust disputes* (Spiramus Press Ltd, London 2015) 367

arbitrators' rulings, which issued in a foreign country, shall be followed)). The third Paragraph of Article 213 stipulates as follows: ((In the matter of arbitration conducted between the litigants outside the court, the arbitrators must deliver copy of the ruling to each party within five days from the date of issue of the arbitrator's decision, and the court shall examine whether to invalidate or annul such decision at the request of one of the litigants by normal litigation procedures)). The first Paragraph of Article 215 of the same Law stipulates as follows: ((The arbitrators' ruling shall not be enforced unless it is ratified by the court at the clerks department where it has been lodged. This is after perusal of the ruling and the arbitration deed and after ascertaining that there is no impediment in its enforcement)). **The said texts altogether indicate that ratification of the arbitrators' rulings, which issued in the United Arab Emirates, are the only rulings that fall under the jurisdiction of the National Courts not the arbitrators' rulings, which issued in a foreign country. Such rulings must be one of those that may be attested in the country where it has been issued.** The same shall not be affected by the two Articles 235 and 236 of the same law. The said two articles are stated in the chapter related to the arbitrators' decisions, orders and rulings, which issued in a foreign country, whereas the legislator permitted the courts in the United Arab Emirates to enforce the same in the country after the court ascertains fulfillment of the conditions stipulated in Article 235. **The reason is that the rulings stated in the said chapter relate to enforcement of the said decisions and nothing therein indicates that the jurisdiction of the national courts extends to ratify the same or examine its nullity.** Thus, it is useless that the appellant challenges by virtue of the text stated in Article 235, which mentioned hereinabove, or challenge by that the English Law does not give the British Courts the authority to ratify the arbitrator's ruling, which issued within their circuit, or non-accession to New York Convention, or lack of bilateral agreement between the United

Arab Emirates and Britain with regard to enforcement of the arbitrators' rulings. This is on the grounds that all the foregoing gave the UAE courts to ask for sanctioning the disputed arbitrator judgment issued in UK as jurisdiction basis according to articles 21 & 22 of the civil procedures law, that the law of the state in which the case is filled or in which the procedures are taken shall be valid unless there is valid international treaty valid in UAE of which its regulations contradicts same; accordingly, there is no place to reasons based on by the appellant.”

[Emphasis given]

By reviewing the Dubai Court of First Instance's reasoning in this case, we can infer that the enforcement request was rejected based on the grounds that the UAE Courts would only have jurisdiction to ratify arbitral awards issued within the UAE. In this respect, the Dubai Court of First Instance stated that Foreign Awards should be attested by the Courts of the jurisdiction where such award was issued.

The Dubai Court of First Instance then went further and stated that the provisions of Article 235 of the Civil Procedure Law relate only to the enforcement of foreign decisions and that this is not extendable to the ratification or the nullification of the said foreign decisions.

The Dubai Court of First Instance's understanding in this respect is surprising, not to say disappointing.

Regardless of the fact that the word “ratification” is not placed in Article 235 of the Civil Procedure Law, the ratification procedure is inherent to the enforcement procedure as the Court could not enforce a Foreign Award without first ratifying the same. Upon ratification of a Foreign Award, the enforcement procedure of

such award shall follow the execution procedure applicable for local judgements – judgements issued by the UAE Courts²⁴.

The Dubai Court of First Instance in this case wrongly interpreted the aforesaid Article when stating that this provision would only apply for arbitral award issued locally – i.e. within the UAE.

Having determined the wrong interpretation of Articles 215 and 235 of the Civil Procedure Law by the Dubai Court of First Instance, it is important to draw one's attention to the fact that the provisions of the Civil Procedure Law could not even have been taken into consideration in this case as this matter relates to enforcement of a Foreign Award and therefore the provisions of the New York Convention should be applied.

5.2 Abu Dhabi Commercial Case No. 410/2008 and respective Appeal Case

In the afore-captioned case, the Abu Dhabi Court of First Instance applied the provisions of the local procedure law – i.e. Article 235(a) of the Civil Procedure Law – to refuse the enforcement of an ICC Foreign Award. Pursuant to the Court's rationale in this case, foreign judgments or awards are not to be ratified and enforced in the UAE if the UAE Courts would have had jurisdiction to hear the case.

The Abu Dhabi Court of First Instance's ruling was upheld by the Abu Dhabi Court of Appeal, which confirmed the applicability of Article 235(a) of the Civil Procedure Law in this case.

²⁴ In this respect, we refer to Article 215(1) of the Civil Procedure Law, as follows: "1 - An award of the arbitrators shall not be enforced unless it is ratified by the court with whose clerk the award has been deposited, [such ratification to be made] after perusal of the award and the arbitration instrument and an ascertainment that there is no obstacle to enforcement thereof and the court shall have jurisdiction to rectify any material errors in the award of the arbitrators on the application of the persons concerned by the same means laid down for the rectification of judgments."

Upon review of the Abu Dhabi Court of First Instance's and Abu Dhabi Court of Appeal's rulings, attention should be drawn to the misuse of the UAE laws by such Courts, which completely ignored the existence of the New York Convention.

The predicaments of the Civil Procedure Law should not be applied in the case at hand as Article 238²⁵ of the said law requires that international conventions acceded by the UAE – the New York Convention in this case – shall be abided by the Courts.

In this respect, considering that the UAE has acceded to the New York Convention without reservations, the same shall be deemed as internal law and shall supersede the provisions of the local law – i.e. the Civil Procedure Law in this case.

In furtherance of the above, the Abu Dhabi Court of First Instance and the Abu Dhabi Court of Appeal should have applied the predicaments of the New York Convention in order to assess whether the ICC arbitral award was suitable for ratification and enforcement.

Luckily, the Abu Dhabi Cassation Court recognized the misuse of the UAE law by the lower Courts and quashed their decisions in order to ratify and enforce the ICC award upon review of the requirements set out by the New York Convention.

²⁵ “Article 238: The rules laid down in the foregoing articles shall be without prejudice to the provisions of conventions between the UAE and other countries in this regard.”

5.3 Dubai Court of First Instance (Case No. 489/2012) // Dubai Court of Appeal (Case No. 40/2013) // Dubai Court of Cassation (Case No. 156/2013)

It shall be reproduced and highlighted below the most relevant stretches of the Dubai Courts' decisions in the case at hand.

Upon review of the relevant stretches comprising the grounds relied upon by the Dubai Courts to reject recognition and enforcement of the ICC Foreign Awards in this case, a comprehensive analysis of the Courts' rationale in this respect shall be made.

5.3.1 Dubai Court of First Instance (Case No. 489/2012 – Exhibit 2)

“It is legally established, pursuant to Articles 21, 93/3, 33 of the Civil Procedures Law, and Articles 19/1, 20, 21 and 24 of the Civil Procedures Law, and based on the ruling of the Court of Cassation, that the International Jurisdiction of the Courts is from the Public Order, and that the Courts of the State do not have jurisdiction to examine the cases filed against the foreigner, who has no domicile or place of residence at the said State unless the case relates to an obligation made or implemented or it was conditional to implement it in the State. Or, the foreign company, which main management office is abroad, has a branch in the State, if the dispute pertains to an issue connected with such branch [Challenge No.555/2003 Civil Challenge dated 16.05.2004]. **It is legally established, pursuant to the ruling of the Court of Cassation, and according to Article 235 of the Civil Procedures Law, that it is conditional for ordering enforcement of the judgment, which is issued by foreign court, in the United Arab Emirates that the National Courts must be competent in**

examining the dispute, the subject matter of the foreign ruling.

This is pursuant to the rules of jurisdiction stipulated in the Civil Procedures Law, and that the foreign court, which issued the judgment required to be enforced, must be competent in examining the dispute on which it passed decision in accordance with the rules of the International Judicial Jurisdiction which legally stipulated. The said court must also have jurisdiction, pursuant to the provisions of the internal law in force in the said foreign country whereas the judge, prior to passing the order for enforcement, must ascertain that the foreign court passed decision on the dispute within the limits of jurisdiction, which prescribed pursuant to the rules of jurisdiction stated in the Local Law to which the dispute submits in the foreign country. If any of the said conditions is not fulfilled, the national judge may not issue an order for enforcement of such foreign judgment even if the other remaining conditions were fulfilled [Challenge No.114/1993 Civil Challenge dated 26.09.1993].

Based on the foregoing, it is evident that the Ministry of Irrigation “Defendant” in the Republic of Sudan has no domicile or place of residence in the United Arab Emirates, and that the commitment was made and implemented outside the United Arab Emirates. As such, the conditions of Article 235 of the Civil Procedures Law are not fulfilled. Therefore, the court rules lack of jurisdiction of the court, as shall be stated in the pronouncement.

Regarding the expenses inclusive of the advocacy charges, the court obligates the plaintiff company to pay the same pursuant to Article 133 of the Civil Procedures Law.

For these reasons

The court ruled, in the presence of the parties, lack of jurisdiction of the court and obligated the plaintiff to pay the expenses and the sum of one thousand dirhams as advocacy charges.”

[Emphasis given]

5.3.2 Dubai Court of Appeal (Case No. 40/2013 – Exhibit 3)

“As stated in the reasons of its ruling, which detailed by this court in its reasons; and its statement and evidence are correct and sufficient for carrying its ruling in such regard, and is based on evidence in the papers and leads to the result of his conclusion. This court add that based on the foregoing, the papers of the case are free from anything indicating that the appellee has domicile inside the State or that the agreement was made or implemented inside the State. Thus, the Courts of Dubai shall have no jurisdiction. Therefore, this court sustains the conclusion of the Court of First Instance and makes the reasons in the said conclusion as reasons for its ruling. In addition to the ruling of this court, the appeal should be rejected, and the judgment in appeal should be sustained.

Regarding the expenses and the advocacy charges, the court obligates the appellant to pay the same pursuant to Articles 168, 133 of the Civil Procedures Law.

For these reasons

The court ruled as follows:

First: Acceptance of the appeal as to the form.

Second: In the merits of the appeal, reject the same and sustain the appealed judgment. The court obligated the appellant to pay the expenses and the sum of one thousand dirhams as advocacy charges.”

5.3.3 Dubai Court of Cassation (Case No. 156/2013 – Exhibit 4)

Considering the lack of clarity in the Dubai Court of Cassation’s ruling in the case at hand, it shall be reproduced below the relevant stretch of the said ruling, together with an explanatory summary of the same so as to provide a better interpretation of the Dubai Court of Cassation’s rationale in this case.

“This indicates that enforcement of the foreign rulings and the arbitrators’ awards shall be in accordance with the procedural rules in force in the State, where it shall be enforced. Article 21 of the Civil Transactions Law stipulates as follows: ((The rules relating to jurisdiction and all procedural matters shall be governed by the law of the State in which the action is brought or in which the procedures are carried out)). Article 19/1 of the Civil Procedures Law stipulates as follows: ((The provisions of this law apply to all civil, commercial and personal cases brought before the courts of the country)). **Article 21 of the same Law stipulates as follows: ((The courts shall have jurisdiction to examine the case against an alien with no address or place of residence in the country in the following circumstances: 1- If he has an elected address in the country. 2- 3- If the case relates to an obligations concluded or executed or to be executed in the country.** In Paragraph (d) of the second clause of Article 93 of the Civil Transactions Law the juristic person must have separate place of residence. The place of residence of a juristic person shall be deemed to be the place in which it has its administrative center, and so far as concerns juristic persons whose head office is abroad but which carry

on an activity in the State, their administrative center, with regard to the law of the State, shall be deemed to be the place at which the local administration is situated)). **The foregoing, as per the ruling of this court, altogether indicates that the international jurisdiction for the courts is from the Public Order and that the Courts of the State are not competent in examining the cases, which filed against the alien who has no address or place of residence in the State, or the alien juristic person, whose head office is abroad, has a branch in the State if the dispute relates to an issue pertaining to such branch. Based on the foregoing, the First Instance Judgment, which reasons are sustained by the challenged judgment, based its ruling on non-jurisdiction of Dubai Courts in examining the case, as stated in it as follows: ((It is evident in the papers that the defendant Ministry of Irrigation (respondent) in the Republic of Sudan has no address or place of residence in the United Arab Emirates, and that the obligation was concluded and implemented outside the United Arab Emirates)). The said reasons are acceptable, supported by evidence in the papers and compatible with the proper procedural rules in force in the State and the two conventions of New York and the Judicial Cooperation with the Republic of France. Therefore, the argument under the reasons for the challenge is groundless. Based on the foregoing, the challenge must be rejected.**”

[Emphasis given]

Having revised the stretch reproduced above, it is possible to understand that the Dubai Court of Cassation based its decision on the provisions of Article III of the New York Convention as well as Article 15 of the Convention on Judicial Cooperation entered into between France and the UAE.

As per the Dubai Court of Cassation’s decision, both conventions provide for that Foreign Awards shall be enforced pursuant to the terms of the local procedure rules. In this sense, having established that the local procedure rules shall apply to the enforcement of Foreign Awards, the Court of Cassation, following the decision issued by the Court of First Instance, invoked Article 21 of the Civil Procedure Law to determine that the UAE Courts had no jurisdiction over the case and, further, stated that the Courts’ jurisdiction over foreign parties is a matter of public policy.

Article 21 of the Civil Procedure Law states as follows:

“The courts shall have jurisdiction to hear actions against a foreigner who does not have a domicile or place of residence in the State in the following circumstances:

1 - if he has an elected domicile in the State;

[...]

3 - if the action relates to an obligation entered into or performed or that is stipulated to be performed in the State or to a contract intended to be notarised therein or to an event that occurred therein

or to a bankruptcy declared in one of its courts;

[...]”.

[Emphasis given].

In this sense, considering that the Respondent did not have an elected domicile in the UAE; the obligation related to the dispute was not entered into or performed or stipulated to be performed in the UAE; and the agreement entered into by the parties was not intended to be notarized in the UAE, the Dubai Court of Cassation decided that it had no jurisdiction to hear the case – i.e. the request for enforcement of the ICC Foreign Awards against the Respondent.

5.3.4 Analysis of the Courts' rationale in the above-mentioned decisions

In a nutshell, the three rulings reproduced above with respect to the case involving the Ministry of Irrigation of the Government of Sudan are based on the ground that the said Ministry does not have a geographical nexus with the UAE and, further, that the underlying agreements entered into by Construction Company International and the Ministry were made and executed out of the UAE.

Following the above rationale, the Dubai Courts found that it did not have jurisdiction to hear the case based on the provisions of Article 21 and 235 of the Civil Procedure Law.

However, it shall be noted that the Dubai Courts' decisions above contradicted the New York Convention and even the provisions of the local laws – i.e. the Civil Procedure Law and the UAE Federal Law No. 5 of 1985 (the “Civil Law”).

As per demonstrated above, the ICCA's Guide provides for that the wording “rules of procedure” in Article III of the New York Convention refers only to questions concerning the request form and the competent authority, cases in which the New York Convention defers to the applicable local law. In other words, the recognition of a Foreign Award shall be performed by the Court where the enforcement is being sought pursuant to the terms of the New York Convention.

The provisions of the New York Convention were contradicted in the Dubai Courts' rulings as such convention does not require any geographical nexus between the jurisdiction where the enforcement is being sought and the award debtor.

With respect to the contradictions towards the local law, attention should be drawn to Article 22 of the Civil Law and Article 238 of the Civil Procedure Law.

Article 22 of the Civil Law²⁶ provides for that the provisions of the local law shall not apply in case such provisions are in conflict with the terms of any special law or international convention in force in the UAE, which is the case of the New York Convention.

Further, Article 238 of the Civil Procedure Law requires that international conventions acceded by the UAE – the New York Convention in this case – shall be abided by the Courts.

By reviewing Articles 22 of the Civil Law and Article 238 of the Civil Procedure Law there should be no room for doubts that the New York Convention shall supersede the provisions of the local laws – e.g. Articles 21 and 235 of the Civil Procedure Law – when it comes to ratification and enforcement of Foreign Awards.

The Court of Cassation’s ruling has therefore contradicted (i) the New York Convention; (ii) the procedural and civil rules of its own jurisdiction; and (iii) preceding Court of Cassation’s rulings, which despite not being binding, should be used by the Courts as guidance in order to avoid conflicts in the jurisprudence and make the Courts’ decisions consistent.

6. Empirical Results

6.1 Overlapping in the grounds for refusing recognition of Foreign Awards

Upon analysis of six negative rulings from the UAE Courts, it is possible to infer, in brief, that the UAE Courts based their rulings on the following grounds:

²⁶ “The provisions of the foregoing Articles shall not apply in cases where there is a contrary provision in a special law or in an international convention in force in the State.”

- Articles 215 and 235 of the Civil Procedure Law: in this case, the enforcement request was rejected based on the fact that the UAE Courts would not have jurisdiction to ratify Foreign Awards, but only arbitral awards rendered locally;
- Article 235(a) of the Civil Procedure Law: in this case, the Courts decided to reject the enforcement request based on the ground that foreign judgments or awards are not to be ratified and enforced in the UAE if the UAE Courts would have had jurisdiction to hear the case; and
- Article 21 and 235 of the Civil Procedure Law: the enforcement request was dismissed based on the grounds that the UAE Courts did not have jurisdiction to hear the case as the award debtor did not have an elected domicile in the UAE; the obligation related to the dispute was not entered into or performed or stipulated to be performed in the UAE; and the agreement entered into by the parties was not intended to be notarized in the UAE.

In furtherance of the above, all UAE Courts' rulings rejecting enforcement of Foreign Awards were based on the provisions of the Civil Procedure Law, more specifically related to lack of jurisdiction to enforce the said awards.

Fact is that, by rejecting the enforcement of Foreign Awards based on the provisions of the local procedure rules, regardless of the grounds relied upon by the Courts, the UAE Courts' rulings have contradicted the New York Convention, the UAE procedural and civil rules, as well as preceding rulings passed by the Court of Cassation, which accepted enforcement of Foreign Awards based on the predicaments of the New York Convention.

6.2 Comparison: Positive Rulings X Negative Rulings

Based on the review of twelve rulings of the UAE Courts, comprising decisions of the Courts of First Instance, Courts of Appeal and Cassation Courts of the Emirates of Abu Dhabi, Dubai and Fujairah, it will be demonstrated below comparison charts between favorable and unfavorable decisions.

Positive decisions	Negative decisions
6	6

Courts	Positive decisions	Negative decisions
Abu Dhabi	1	2
Dubai	4	4
Fujairah	1	0

Layers	Positive decisions	Negative decisions
Court of First Instance	2	3
Court of Appeal	2	2
Court of Cassation	2	1

The review of the comparison charts above leads to the conclusion that the jurisprudence in the UAE Courts is far from settled at this time and that it is uncertain whether the UAE Courts will apply the provisions of the New York Convention or the local procedural rules when evaluating the ratification of a Foreign Award.

It is nonetheless expected a greater compliance of the New York Convention as Judges become better trained and more familiar with the aim and text of the New York Convention. This rationale follows the UAE commitment to its international undertakings, the expectation of a new UAE arbitration law based on the

UNCITRAL Model Law²⁷, as well as the UAE's will to be recognized as an arbitration-friendly State.

7. DIFC Courts: an alternative and more effective route for enforcement of Foreign Awards in Dubai?

In a nutshell, the DIFC is one of the free zones located in Dubai. Different from other free zones, the DIFC has its own legal framework based on common law principals as well as its autonomous jurisdiction, with its own Courts.

Considering the existence of two different jurisdictions in Dubai, namely the Dubai Courts and the DIFC Courts, both Courts decided to enter into a partnership in order to enhance and expedite the execution proceedings of judgments, awards or orders issued by either of them.

As per the provisions of the Protocol of Enforcement between Dubai Courts and DIFC Courts of 2009 (the "Protocol"), the Dubai Courts shall enforce an arbitral award issued by DIFC-LCIA Arbitration Centre or a judgment of the DIFC Courts without reviewing the merits thereof. The same applies to arbitral awards ratified and judgments issued by the Dubai Courts to be enforced by the DIFC Courts.

The cooperation between both the Dubai Courts and the DIFC Courts is also established under Dubai Law No. 12 of 2004, amended by Law No. 16 of 2011 concerning the DIFC Courts (the "Judicial Authority Law")²⁸.

In this respect, it is important to draw one's attention to the latest issue that arose out of the cooperation for enforcement of judgments between both the Dubai Courts and the DIFC Courts.

²⁷ D Otto, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary*, Kluwer Law International, The Netherlands 2010) 189

²⁸ Article 7(3) and (5).

Such issue is reflected in the case of *Meydan Group LLC v Banyan Tree Corporate Pte Ltd* ruled by the DIFC Court of First Instance on 27 May 2014 and by the DIFC Court of Appeal on 3 November 2014.

The decision of the DIFC Court of First Instance confirmed its jurisdiction to rule on the enforcement request of a Foreign Award despite the fact the award-debtor has no assets located within the DIFC jurisdiction.

The conclusion given by H.E. Justice Omar Al Muhairi is reproduced below:

“Conclusion

42. As discussed above, there is no doubt that the DIFC Courts have jurisdiction under Article 5(A)(e) of the Judicial Authority Law as amended and Articles 42, 43 and 44 of the DIFC Arbitration Law to hear the recognition claim of the DIAC Award.

43. Accordingly, the Defendant’s application contesting jurisdiction is hereby dismissed.

44. In light of this decision, it is necessary to decide whether the Award should be recognised as binding within the DIFC according to Article 42(1) of the DIFC Arbitration Law No.1 of 2008. I hereby direct the parties to file submissions in this regard.”²⁹ **[Exhibit 5]**.

Upon application of an appeal by the award-debtor, the DIFC Court of Appeal rejected such appeal and confirmed that DIFC Courts have jurisdiction to enforce arbitral awards issued outside the DIFC jurisdiction, regardless of the fact that the parties to the underlying arbitration proceedings have no connection to DIFC.

²⁹ The Dubai International Financial Centre Courts, Claim No: ARB-003-2013, in the Court of First Instance before the H.E. Justice Omar Al Muhairi.

The summary of the DIFC Court of Appeal's judgment is reproduced below:

“Summary of Judgment

The Appellant, a company incorporated in the UAE engaged in real estate development, appealed against the judgment of H.E. Al Muhairi. The appeal related to the question of whether this Court had jurisdiction (or should exercise any jurisdiction) to recognise and enforce a domestic arbitration award made within the Emirate of Dubai but outside the DIFC in favour of the Respondent, a company incorporated in Singapore engaged in the management of hotels and resorts.

The Court upheld the decision of H.E. Judge Al Muhairi in the Court of First Instance that there was jurisdiction and that there were no good grounds for not exercising that jurisdiction. **As regards jurisdiction, the court rejected the submission of the Appellants that there was a requirement for the presence of the Respondents or their assets within the DIFC as a pre-requisite to recognition.** In this respect, the Court adopted and approved the decision in X. v Y., ARB -002-2013. The Court also rejected the submission that the application for recognition should be stayed on forum non conveniens grounds because the DIFC Courts had exclusive jurisdiction and thus there was no alternative forum for the determination of the issue.

Lastly, the Court rejected the submission that the application for recognition constituted an abuse of process. It had been argued that the purpose of the application was to use the judgment of the DIFC Courts to enforce the award by application to the execution judge of the Dubai Courts who would be unable to consider the judgment on the merits. Thus, the argument ran, the Appellants would or might be forced to challenge the award in the DIFC Courts in circumstances

where the court of the seat were the Dubai Courts. Either the problem would not arise because the Appellants could challenge the validity of the award in the Dubai Courts by direct proceedings or, if that could not be undertaken until the Respondents sought to enforce the award in the Dubai courts, any ensuing conflict was a matter for the Dubai Courts to resolve. An application to enforce an award in the DIFC made to the DIFC Courts which had exclusive jurisdiction could not by definition constitute an abuse.”³⁰ [Exhibit 6].

[Emphasis given].

For the sake of completeness, in the case at hand – i.e. *Meydan Group LLC v Banyan Tree Corporate Pte Ltd* – the arbitral award was rendered by the Dubai International Arbitration Centre (the “DIAC”), which is an arbitration centre located in *onshore* Dubai.

The DIFC Court of Appeal based its decision on Article 5A(1)(e) of the Judicial Authority Law as well as Article 42 of the DIFC Law No. 1 of 2008 (the “DIFC Arbitration Law”).

Pursuant to Article 5A(1)(e) of the Judicial Authority Law, the DIFC Courts shall have jurisdiction over “Any request or claim where the Courts shall have the power in hearing therein by virtue of the Laws and regulations of the Center”.

Having determined that the DIFC Courts have jurisdiction over disputes in accordance with the laws and regulations in force in DIFC, the decision went further and pointed out Article 42(1) of the DIFC Arbitration Law, which provides for that an arbitral award shall be recognized by the DIFC Courts irrespective of the jurisdiction of origin.

³⁰ The Dubai International Financial Centre Courts, Claim No: CA-005-2014, in the Court of Appeal before Justice Sir David Steel, Justice Roger Giles and H.E. Justice Ali Al Madhani.

In light of the above, despite the fact that Meydan Group LLC (the award debtor in this case) had no assets in, and any connection with, DIFC, the DIFC Courts confirmed its jurisdiction to recognize and enforce arbitral awards rendered locally (i.e. in *onshore* UAE), also known as domestic arbitral award.

In a separate case (Case No. ABR 002-2013), which is confidential, reason why the parties' name have not been disclosed, the DIFC Court of First Instance also confirmed its jurisdiction to recognize and enforce a Foreign Award against the award debtor, which is a company incorporated in *onshore* Dubai – i.e. outside DIFC – and with no assets in the DIFC jurisdiction.

The conclusion given by the Deputy Chief Justice Sir John Chadwick in the aforesaid case is reproduced below:

“Conclusion

42. As I have said, the application before the Court seeks a declaration that the DIFC Court has no jurisdiction to try this Arbitration Claim and an Order that the Arbitration Claim Form be set aside. For the reasons which I have set out, I refuse the relief sought and dismiss the application.”³¹ [Exhibit 7]

In this respect, attention should be drawn to the last paragraph of Article 42(1) of the DIFC Arbitration Law, which provides for that the DIFC Courts shall comply with any applicable treaty for the mutual enforcement of judgments, orders or awards entered into by the UAE.

In this sense, likewise the Dubai Courts, the DIFC Courts shall comply with the provisions of the New York Convention when dealing with requests for enforcement of Foreign Awards.

³¹ The Dubai International Financial Centre Courts, Claim No: ARB-002-2013, in the Court of First Instance before the Deputy Chief Justice Sir John Chadwick.

Having been confirmed the jurisdiction of the DIFC Courts to recognize and enforce UAE domestic arbitral awards and Foreign Awards irrespective of the lack of connection between the awards debtors and the DIFC jurisdiction, the next issue to be determined is the reason why the awards creditors decided to apply for enforcement of the said awards with the DIFC Courts rather than the Dubai Courts, considering that both awards debtors have assets located in *onshore* Dubai.

The most plausible reason is that of the awards creditors aim at “circumvent” the hurdles of the ratification process relied by the UAE Courts, which can be time consuming and sometimes involve review of the merits of the underlying arbitral award – despite the fact the New York Convention provides for otherwise –, as demonstrated under Chapter 2 above.

This is because the awards creditors may rely upon the predicaments of the Protocol and the Judicial Authority Law, which provide for that both the Dubai Courts and the DIFC Courts shall not review the merits of rulings issued by either of them when they are requested to enforce such rulings.

Currently, it is yet to be seen: (i) whether the DIFC Courts will accept to ratify the UAE domestic arbitral awards and Foreign Awards, pursuant to the relevant DIFC laws ³²; and (ii) whether the Dubai Courts would eventually accept to enforce the DIFC Courts’ rulings in this respect despite the fact that the awards creditors sought ratification of the underlying arbitral awards with the DIFC Courts rather than the Dubai Courts.

The correct and most appropriate reaction to be taken the Dubai Courts – in case it is requested to enforce the DIFC’s rulings in this respect – is to accept the enforcement of said DIFC’s rulings based on the provisions of Article 1(d) of the Protocol as well as Article 7(3)(c) of the Judicial Authority Law, which provides

³² Kindly note that in the aforesaid cases, the DIFC Courts have ruled on jurisdiction only and not yet on the merits of the enforcement requests.

for that the Dubai Courts shall enforce the DIFC's rulings and has no jurisdiction to review the merits of a judgment, award or order of the DIFC Courts.

Having said that, it is important to note that the aforesaid provisions – i.e. Article 1(d) of the Protocol as well as Article 7(3)(c) of the Judicial Authority Law – also provide for that the Dubai Courts shall rely upon the predicaments of the Civil Procedure Law when enforcing the DIFC's rulings.

In this sense, it might be expected that the Dubai Courts refuse to enforce the DIFC's rulings based on Article 235(a) of the Civil Procedure Law, which provides for that a foreign judgment is not to be ratified and enforced in the UAE if the UAE Courts would have had jurisdiction to hear the case.³³

On the other hand, if that approach is to be taken by the Dubai Courts towards a ruling issued by the DIFC – regardless of the matter addressed by the DIFC in such ruling –, such approach could not be deemed correct as the provisions of Article 235(a) of the Civil Procedure Law concerns enforcement of foreign judgments, which is not the case as DIFC is not a foreign jurisdiction.

In furtherance of the above, by revising the provisions of the Protocol, the Judicial Authority Law as well as the Civil Procedure Law, it is possible to infer that the Dubai Courts should enforce eventual DIFC's rulings ratifying foreign and domestic arbitral awards.

³³ **Article 235**

1 - An order may be made for the enforcement in the UAE **of judgments and orders made in a foreign country** on the same conditions laid down in the law of that country for the execution of judgments and orders issued in the UAE.

2 - An order for execution shall be applied for before the court of first instance within the jurisdiction of which it is sought to enforce, under the usual procedures for bringing a claim, and an execution order may not be made until after the following matters have been verified:

a - **that the courts of the UAE had no jurisdiction to try the dispute in which the order or judgment was made, and that the foreign courts which issued it did have jurisdiction thereover in accordance with the rules governing international judicial jurisdiction laid down in their law, [...]**

[Emphasis given]

8. Identification of reasons for the lack of support by the UAE Courts towards the enforcement of Foreign Awards and how to fix the problem

It shall be demonstrated below the experience of local and international lawyers from the private sector when dealing with the UAE Courts in order to attempt to enforce Foreign Awards. Private sector lawyers face hurdles that fall out of the scope of the New York Convention leading therefore to a bad impression of the UAE jurisdiction for international arbitration.

Practice in the UAE jurisdiction has shown the reasons for this lack of support toward international arbitration, as follows:

- (i) short experience of UAE Judges who are not well familiar with international arbitration and the New York Convention;
- (ii) lack of knowledge of international arbitrators on UAE local law and customs; and
- (iii) non-specific local legislation to enhance practice of arbitration in the UAE.

The aforesaid reasons shall be addressed hereinafter.

8.1 The short experience of UAE Judges

With respect to the lack of experience of local judges, such flaw is result of the judges' unfamiliarity with international arbitration, including the correct and appropriate use of the New York Convention. This is reflect of the fact that international arbitration is currently not being well addressed and explored in the judges' respective educational systems as well as in their training processes in the UAE.

The procedures in place in the UAE for the formation of judges are extremely weak as the training processes are almost totally academic and government related with almost no exposure to private practice experience.

Further, it is well known that international lawyers are forbidden from appearing before the UAE Courts, which only accept local and accredited lawyers dealing with judicial procedures.

The fact that the majority of the population within the UAE – especially Dubai – is foreign could serve as an incentive for the UAE Courts to accept dealing with international lawyers directly – i.e. not represented by local lawyers. This would definitely have a positive result in the local judges' experience as they would deal with international private sector lawyers. However, this change in the UAE Courts is yet to be seen.

Notwithstanding, the UAE jurisdiction is relatively new comparing to other jurisdictions in the world and this evidently has an impact in the number of years of experience of the judges as well as in the diversity of cases brought to the judges, which are extremely low in respect to international arbitration.

In light of the lack of experience/knowledge of the local judges with respect to international arbitration and, consequently, the appropriate use of the New York Convention, adjustments must be done in the formation process of the local judges.

Improving local educational systems to address in depth subjects related to international arbitration as well as reviewing the judges' training process are examples of adjustments that could be done in order to enhance the UAE Court's approach towards the enforcement of Foreign Awards and the application of the New York Convention.

In a very interesting article written by Essam Al Tamimi, from Al Tamimi & Company – Advocates and Legal Consultants³⁴, he describes the need of changes in the judicial system of Middle East countries, which includes the UAE, and, further, states how the existing approach of these middle eastern countries are affecting their images internationally.

The relevant stretches of the article are reproduced below:

“If there is to be an adjustment within Middle Eastern countries in respect of arbitration in general or the interpretation of the relevant New York Convention articles relating to enforceability of foreign arbitration awards, the adjustment must come either by developing the education standard at the university level or by overhauling the training of judges. It is time to make substantial changes to the way in which the system currently operates in order to improve the judicial system’s approach to arbitration and, more importantly, the process by which disputes move through the judicial system.

These changes are needed across the Middle East at all levels of the judicial system, from court clerks to judges, and whether relating to an application to nullify an arbitration award or to enforce an arbitration award pursuant to a country’s obligations under the New York Convention. The clash between applying the local law or the New York Convention to foreign arbitration awards is not only unacceptable, it also damages the private sector and foreign investment in that country.

Any argument that the judicial authority is trying to protect public order or policy of that country is a mere sham. History has proven,

³⁴ E Al Tamimi, ‘Enforcement of foreign arbitration awards in the Middle East’ BCDR International Arbitration Review 1, no. 1 (2014). (<http://www.tamimi.com/en/magazine/law-update/section-8/september-4/enforcement-of-foreign-arbitration-awards-in-the-middle-east.html>). Accessed on 15 March 2015

and we continue to see, that countries which are very protective of their jurisdictions and prove to be unfriendly to arbitration always lose more than they gain in protecting ‘public order’. Parties have the choice of venue, and they choose those States which are arbitration friendly. A country’s negative attitude towards arbitration also does not benefit the local legal community, as young arbitrators in the country will be prevented from emerging and developing in the arbitration community.”

8.2 Lack of knowledge of international arbitrators on UAE local law and customs

It is very common for parties to a contract to select arbitration as a method of dispute resolution and agree for the arbitration procedure to be conducted abroad – i.e. outside UAE –, while selecting UAE law as governing law of the underlying contract.

Further, it is also very common to have matters related to the UAE being arbitrated abroad with application of foreign laws. In this sense, Foreign Awards issued in such cases are likely to be enforced in the UAE.

In light of the above, international arbitrators shall have the commitment to study and understand UAE laws and customs before deciding on an arbitration that might be related to the UAE. A good example for this is when one of the parties to the arbitration has assets located in the UAE, despite the fact that the said arbitration is being conducted abroad with application of international laws.

By understanding the UAE local laws and customs, an international arbitrator is able to ensure that its award can be enforced in the UAE. Arbitrators have the duty to ensure that their arbitral awards will be enforceable.

In this respect it is important to mention that UAE procedure requirements are simple and easy to be taken into consideration by the arbitrator of a case that is somehow related to this jurisdiction. Ensuring the due process and having a witness swear an oath in the hearing is one example of such procedure requirements.

It is well known that one of the major reasons for the UAE Courts to reject enforcement of a Foreign Award is related to the lack of observance to certain procedure requirements as demonstrated above. Even though the review of such aspects could be deemed as a violation of the New York Convention's principles, the arbitrators have to be aware of the flaws of the UAE jurisdiction and comply with certain minimum requirements in order to ensure that the arbitral award is enforceable in the UAE.

8.3 The local legislation

The UAE does not currently have a comprehensive and independent arbitration law. The provisions concerning arbitration comprise only 15 Articles of the Civil Procedure Law – i.e. Article 203 to 218.

The lack of comprehensiveness of the arbitration provisions inserted in the Civil Procedure Law is one of the main reasons leading to the weakness of arbitration practice in the UAE, which therefore contributes to the non-supportive status currently given to the UAE Courts towards arbitration.

Due to the limited provisions dedicated to arbitration in the Civil Procedure Law, the Judges in the UAE do not have a great knowledge about this subject which goes far beyond the provisions set out in the local procedure rules.

The article written by Essam Al Tamimi, from Al Tamimi & Company – Advocates and Legal Consultants, also makes very interesting comments in this

respect, as it points out that the lack of a comprehensive arbitration law may lead to an uncertain and unpredictable image of the underlying State for the international arbitration's practitioners, as follows:

“The lack of a proper dedicated arbitration law (based on the UNCITRAL Model Law) could be the factor for those States that seem to be unfriendly to foreign arbitration awards or unpredictable when it comes to enforcing them. Lack of well-developed laws and practices creates a huge vacuum, provides no assistance to the judicial system and definitely establishes uncertainty on the enforcement of foreign arbitration awards, even with the New York Convention having been adopted.”³⁵

It shall nonetheless be noted that the UAE is currently working on the draft of a new arbitration law, which shall be based on the UNCITRAL Model Law. Such improvement will definitely move the UAE jurisdiction to the next level when it comes to international arbitration.

³⁵ E Al Tamimi, 'Enforcement of foreign arbitration awards in the Middle East' (2014)

III. CONCLUSION

The present Dissertation has demonstrated that despite the fact that the UAE has acceded to the New York Convention, without reservations, on 13 June 2006, the positive trend towards the application of the provisions of the New York Convention by the UAE Courts with respect to recognition and enforcement of Foreign Awards has started only in 2011.

However, the aforesaid positive trend was regrettably broken by a conservative trend which prevails the predicaments of the local procedure law in detriment of the provisions of the New York Convention.

Currently, the jurisprudence in the Courts of the UAE is far from settled as the said jurisdiction has seen conflicting decisions in this respect. Further, the fact that the UAE is a Civil Law jurisdiction – as opposite to Common Law – also makes it difficult to create a common understanding among the Courts' decisions as they are not binding.

The review of the comparison charts between positive and negative Courts' decisions under Chapter 6.2 leads to the conclusion that it is uncertain, and therefore unpredictable, whether the UAE Courts will apply the provisions of the New York Convention or the local procedural rules when evaluating the ratification of a Foreign Award.

However, it should be reinforced that the UAE Courts' decisions that relied upon the Civil Procedure Law to reject recognition and enforcement of Foreign Awards have expressly contradicted the provisions of the said local procedural rules as well as the Civil Law.

This rationale is based on the fact that Article 22 of the Civil Law provides for that the provisions of the local law shall not apply in case such provisions are in

conflict with the terms of any special law or international convention in force in the UAE, which is the case of the New York Convention.

Further, Article 238 of the Civil Procedure Law requires that international conventions acceded to by the UAE – the New York Convention in this case – shall be abided by the Courts.

It shall nonetheless be stressed that regardless of the conservative trend in some of the UAE Courts' decisions, it is expected for the future a greater compliance of the New York Convention as judges become better trained and more familiar with the aim and text of the New York Convention.

The aforesaid rationale follows the UAE commitment to its international undertakings, the expectation of a new UAE arbitration law based on the UNCITRAL Model Law, as well as the UAE's will to be recognized as an arbitration-friendly State.

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V. EXHIBITS