Dubai Courts on the Recognition of Foreign Judgments: "Recognition" or "Enforcement"? – that's the Problem!

"Recognition" and "enforcement" are fundamental concepts when dealing with the international circulation of foreign judgments. Although they are often used interchangeably, it is generally agreed that these two notions have different purposes and, ultimately, different procedures (depending on whether the principle of *de plano* recognition is accepted or not. See Béligh Elbalti, "Spontaneous Harmonization and the Liberalization of the Recognition and Enforcement of Foreign Judgments, *Japanese Yearbook of Private International Law*, Vol. 16, 2014, p. 269).

However, in legal systems where this fundamental distinction is not well established, the amalgamation of the two notions may give rise to unnecessary complications that are likely to jeopardize the legitimate rights of the parties. The following case, very recently decided by the Dubai Supreme Court, is nothing but one of many examples which show how misconceptions and confusion regarding the notion of "recognition" would lead to unpredictable results (*cf.* e.g., Béligh Elbalti, "Perspective of Arab Countries", *in* M. Weller et al. (eds.), *The 2019 HCCH Judgments Convention – Cornerstones, Prospects, Outlook* (Hart, 2023) pp. 1983-184ff).

The case

The parties, in this case, are (1) A British Virgin Islands company (hereinafter 'X1') and its judicial liquidator (hereinafter 'X2', collectively "Xs") and (2) four companies having considerable estates in Dubai (hereinafter 'Y').

In 2021, Xs brought an action before the Dubai Court of First Instance (hereinafter "DCFI") seeking a 'declaration of validity' of a decision of the British Virgin Islands Supreme Court declaring the dissolution of X1 and appointing X2 as its judicial liquidator (hereinafter "the foreign judgment"). Xs justified their

action by stating that they intended to bring legal actions against Y for the recovery of due sums of money that they were entitled to and, eventually, would avoid their actions being dismissed for lack of standing.

The DCFI dismissed the action on the ground that Xs had failed to show that service had been duly effected and that the foreign judgment had become final according to the law of the state of origin (*DCFI, Case No. 338/2021 of 27 October 2021*). Xs appealed to the Dubai Court of Appeal (hereinafter "DCA") arguing, *inter alia*, that legal notification to the X1's creditors had been duly served through two newspapers and that, therefore, the foreign judgment should be given effect. However, without addressing the issue of the recognizability of the foreign judgment, the DCA dismissed the appeal holding that Xs had failed to prove their case (*DCA, Appeal No. 3174/2021 of 27 January 2022*).

Instead of appealing to the Supreme Court, Xs returned to the DCFI to try again to have the foreign judgment be given effect. Having learned from their first unsuccessful attempt, Xs this time ensured that they had all the necessary evidence to show that service had been duly effected, that the foreign judgment had been rendered following regular procedure, and that it had become final and no longer subject to appeal. The DCFI, however, dismissed the action considering that its subject matter concerned, in fact, the "enforcement" of the foreign judgment and, therefore, applications for enforcement should be made by filing a petition to the Execution Court and not by initiating an ordinary action before the DCFI (*DCFI, Case No. 329/2022 of 14 November 2022*).

Xs appealed to the DCA before which they argued that the foreign judgment did not order Y to perform any obligation but simply declared the dissolution of X1 and appointed X2 as judicial liquidator. Xs also argued that the DCFI had erred in characterizing their claim as a request for "enforcement" as they were not seeking to enforce the foreign judgment. Therefore, it would have been inappropriate to pursue their claim following the prescribed procedure for enforcement where the main purpose of their action is to "recognize" the foreign judgment. The DCA dismissed the appeal holding that the Xs' action lacked legal basis. According to the DCA, Xs' request for the foreign judgment to be "declared valid" was not within the jurisdiction of the UAE courts, which was limited to "enforcing" foreign judgments and not declaring them "valid". As for the enforcement procedure, the DCA considered that it was subject to the jurisdiction of the Execution Court in accordance with the procedure prescribed to that effect

(*DCA, Appeal No. 2684 of 25 January 2023*). Dissatisfied with the outcome, Xs appealed to the Supreme Court (hereinafter "DSC").

Before the DSC, Xs made the same argument as before the DCA, insisting that the purpose of their action was not to "enforce" the foreign judgment but to "recognize" it so that they could rely on it in subsequent actions against Y. The DSC rejected this argument and dismissed the appeal on the basis that the UAE courts' jurisdiction was limited only to "enforce" foreign judgments in accordance with the prescribed rules of procedure, which were of a public policy nature. The DSC also held that the lower courts were not bound by the legal characterization made by the litigants but should independently give the correct legal characterization to the actions brought before them in accordance with the rules of law in force in the State (*DSC, Appeal No. 375 of 23 May 2023*).

Comments

The case reported here is particularly interesting. It illustrates the difficulty that Dubai courts (and UAE courts in general) have in dealing with some fundamental concepts of private international law.

Unlike the international conventions ratified by the UAE, which generally distinguish between "recognition" and "enforcement" of foreign judgments", UAE domestic law refers mainly to "enforcement" but not "recognition". Moreover, as mentioned in a previous post, the procedure for enforcement has recently undergone an important change, as the former procedure based on bringing an ordinary action before the DCFI has been replaced by a more another procedure consisting of filing a petition for an "order on motion" before the Execution Court (new Art. 222 of the New Federal Civil Procedure Act [FCPA]). However, the current legislation in force says nothing about the "recognition" of foreign judgments.

If one looks at the practice of the courts, one can observe two different tendencies. One tendency, which seems to be prevailing, consists in denying effect (notably *res judicata* effect) to foreign judgments that were not declared enforceable. In some cases, UAE courts considered that foreign judgments could not be relied upon because there was no proof that they had been declared enforceable (See, e.g., *Federal Supreme Court, Appeal No 320/16 of 18 April*

1995; *Appeal No. 326/28 of 27 June 2006*) or that foreign judgments could only have legal authority (*hujjia*) after being declared enforceable and consistent with public policy (*Abu Dhabi Supreme Court, Appeal No. 31/2016 of 7 December 2016*).

Another tendency consist in admitting that foreign judgment could be granted effect. Some cases, indeed, suggest that recognition can be incidentally admitted if certain conditions are met. These include, in particular, the following: (1) that the foreign judgment is final and conclusive according to the law of the rendering state, and (2) the foreign judgment was rendered between the same parties on the same subject matter and cause of action (see, e.g., *Federal Supreme Court, Appeal No. 208/2015 of 7 October 2015*; *DSC, Appeal No. 276/2008 of 7 April 2009*; *Abu Dhabi Supreme Court, Appeal No. 106/2016 of 11 May 2016*; *Appeal No. 536/2019 of 11 December 2019.* In all these cases, recognition was not granted). Only in a few cases have the UAE courts (in particular Dubai courts) exceptionally recognized foreign judgments (*DSC, Appeal No. 16/2009 of 14 April 2009*; *Appeal No. 415/2021 of 30 December 2021* upholding the conclusions of DCFI accepting the *res judicata* effect of a foreign judgment.)

Unlike the cases cited above, the case reported here is one of the rare cases in which the parties sought to recognize a foreign judgment *by way of action*. The arguments of the Xs, in this case, were particularly convincing. According to Xs, since the foreign judgment did not order the defendants to perform any obligation and since Xs merely sought formal recognition of the foreign judgment, there was no need to have the foreign judgment declared "enforceable" in accordance with the enforcement procedure provided for in Art. 222 FCPA.

However, the decisions of the Dubai courts that UAE courts are only entitled to "enforce" foreign judgments are particularly problematic. First, it demonstrates a serious confusion of basic fundamental notions of private international law. The fact that Xs sought to have the foreign judgment "declared valid" does not mean that Dubai courts were required to consider the foreign judgment's validity *as such* but rather to consider whether the foreign judgment could be *given effect in the UAE*, and this is a matter of "recognition". Secondly, the courts seem to have forgotten that – as indicated above – they did consider whether a foreign judgment could be given effect in the UAE, albeit incidentally. The fact that such

an examination is brought before the court by way of action does not change in anything the nature of the problem in any way. Finally, in the absence of any specific provision on the recognition of foreign judgments, particularly where a party seeks to do so by way of action, there would appear to be nothing to prevent the courts from allowing an interested party to proceed by way of an ordinary action before the court of first instance since the ultimate purpose is not to declare the foreign judgment "enforceable", as this, indeed, would require compliance with the special procedure set out in Art. 222 FCPA. (For a discussion of the issue from the 2019 HCCH Judgments Conventions, see Béligh Elbalti, "Perspective of Arab Countries", *op.cit.*, pp. 183, 202, 205).