

English Court Judgment refused (again) enforcement by Dubai Courts

In a recent decision, the Dubai Supreme Court (DSC) confirmed that enforcing foreign judgments in the Emirate could be particularly challenging. In this case, the DSC ruled against the enforcement of an English judgment on the ground that the case had already been decided by Dubai courts by a judgment that became final and conclusive (*DSC, Appeal No. 419/2023 of 17 May 2023*). The case presents many peculiarities and deserves a closer look as it reinforces the general sentiment that enforcing foreign judgments - especially those rendered in non-treaty jurisdictions - is fraught with many challenges that render the enforcement process very long ... and uncertain. One needs also to consider whether some of the recent legal developments are likely to have an impact on the enforcement practice in Dubai and the UAE in general.

The case

1) Facts

The case's underlying facts show that a dispute arose out of a contractual relationship concerning the investment and subscription of shares in the purchase of a site located in London for development and resale. The original English decision shows that the parties were, on the one hand, two Saudi nationals (defendants in the UAE proceedings; hereinafter, "Y1 and 2"), and, on the other hand, six companies incorporated in Saudi Arabia, Anguilla, and England (plaintiffs in the UAE proceedings, hereinafter "*X et al.*"). The English decision also indicates that it was Y1 and 2 who brought the action against *X et al.* but lost the case. According to the Emirati records, in 2013, *X et al.* were successful in obtaining (1) a judgment from the English High Court ordering Y1 and 2 to pay a certain amount of money, including interests and litigation costs, and, in 2015, (2) an order from the same court ordering the payment of the some additional accumulated interests (hereinafter collectively "English judgment"). In 2017, *X et al.* sought the enforcement of the English judgment in Dubai.

2) The Enforcement Odyssey...

a) First Failed Attempt

i) Dubai Court of First Instance (DCFI)

First, *X et al.* brought an action to enforce the English judgment before the DCFI in accordance with the applicable rules in force at the time of the action (former art. 235 of the 1992 Federal Civil Procedure Act [“1992 FCPA”]). Based on well-established case law, the DCFI rules as follows: (i) in the absence of an applicable treaty, reciprocity should be established (interestingly, *in casu*, the DCFI considered that the UAE-UK bilateral convention on judicial assistance could not serve as a basis for enforcement since it lacked provisions on mutual recognition and enforcement); (ii) reciprocity can be established by showing that the enforcement requirements in the rendering State are “the same (identical) or less restrictive” compared to those found in the UAE; (iii) it was incumbent on the party seeking enforcement to submit proof of the content of the foreign law pursuant to the methods of proof admitted in the UAE so that the court addressed could compare the enforcement requirements in both countries. Considering that *X et al.* had failed to establish reciprocity with the United Kingdom (UK), the DCFI refused the enforcement of the English judgment (*DCFI, Case No. 574/2017 of 28 November 2017*).

X et al. appealed to the Dubai Court of Appeal.

ii) Dubai Court of Appeal (DCA)

Before the DCA, *X et al.* sought to establish reciprocity with the UK by submitting evidence on the procedural rules applicable in England. However, the DCA dismissed the appeal on the ground that the English court did not have jurisdiction. The DCA started first by confirming a longstanding position of Dubai courts, according to which the foreign court’s jurisdiction should be denied if it is established that the UAE courts had international jurisdiction, even when the jurisdiction of the rendering court could be justified based on its own rules; and that any agreement to the contrary should be declared null and void. Applying these principles to the case, the DCA found that Y1 and 2 were domiciled in Dubai. Therefore, since the international jurisdiction of Dubai courts was

established, the DCA found that the English court lacked indirect jurisdiction (*DCA, Appeal No. 10/2018 of 27 November 2018*).

Dissatisfied with the result, X et al. appealed to the Supreme Court.

iii) Dubai Supreme Court (DSC)

Before the DSC, X *et al.* argued that English courts had jurisdiction since the contractual relationship originated in England; the case concerned contracts entered into and performed in England; the parties had agreed on the exclusive jurisdiction of English court and that it was Y1 and 2 who initially brought the action against them in England. However, the DSC, particularly insensitive to the arguments put forward by X *et al.*, reiterated its longstanding position that the rendering court's indirect jurisdiction would be denied whenever the direct jurisdiction of UAE courts could be justified on any ground admitted under UAE law (*DSC, Appeal No. 52/2019 of 18 April 2019*).

b) Second Failed Attempt

The disappointing outcome of the case did not discourage X *et al.* from trying their luck again, knowing that the enforcement regime had since been (slightly) amended. Indeed, in 2018, the applicable rules - originally found in the 1992 FCPA - were moved to the 2018 Executive Regulation No. 57 of the 1992 FCPA (as subsequently amended notably by the 2021 Cabinet Decision No. 75. Later, the enforcement rules were reintroduced in the new FCPA enacted in 2022 and entered into effect in January 2023 ["2022 FCPA"]). The new rules did not fundamentally modify the existing enforcement regime but introduced two important changes.

The first concerns the enforcement procedure. According to old rules (former Art. 235 of the 1992 FCPA), the party seeking to enforce a foreign judgment needed to bring an ordinary action before the DCFI. This procedure was replaced by a more expeditious one consisting in filing a petition for an "order on motion" to the newly created Execution Court (Art. 85(2) of the 2018 Executive Regulation, now the new Art. 222(2) of the 2022 FCPA).

The second concerns indirect jurisdiction. According to the old rules (former Art. 235 of the 1992 FCPA), the enforcement of a foreign judgment should be denied if (1) UAE courts had *international jurisdiction* over the dispute; and (2) the rendering court did not have jurisdiction according to (a) its own rules of international jurisdiction *and* (b) its rules on domestic/internal jurisdiction. Now, Art. 85(2)(a) of the 2018 Executive Regulation (new Art. 222(2)(a) of the 2022 FCPA) explicitly provides that the enforcement of the foreign judgment will be refused if the UAE courts have “exclusive” jurisdiction.

Based on these new rules, X *et al.* applied in 2022 to the Execution Court for an order to enforce the English judgment, but the application was rejected. X *et al.* appealed before the DCA. However, unexpectedly, the DCA ruled in their favour and declared the English judgment enforceable. Eventually, Y1 and 2 appealed to DSC. They argued, *inter alia*, that X *et al.* had already brought an enforcement action that was dismissed by a judgment that is no longer subject to any form of appeal. The DSC agreed. It considered that X *et al.* had already brought the same action against the same parties and having the same object and that the said action was dismissed by an irrevocable judgment. Therefore, X *et al.* should be prevented from bringing a new action, the purpose of which was the re-examination of what had already been decided (*DSC, Appeal No. 419/2023 of 17 May 2023*).

Comments

1) The case is interesting in many regards. *First*, it demonstrates the difficulty of enforcing foreign judgments in the UAE in general and Dubai in particular. Indeed, UAE courts (notably Dubai courts) have often refused to enforce foreign judgments, in particular those rendered in non-treaty jurisdictions, based on the following grounds:

i) Reciprocity (see, e.g., *DSC, Appeal No. 269/2005 of 26 February 2006* [English judgment]; *DSC, Appeal No. 92/2015 of 9 July 2015* [Dutch judgment (custody)]; *DSC, Appeal No. 279/2015 of 25 February 2016* [English judgment (dissolution of marriage)]; *DSC, Appeal No. 517/2015 of 28 August 2016* [US. Californian judgment]);

ii) Indirect jurisdiction (see, e.g., *DSC, Appeal No. 114/1993 of 26 September*

1993 [Hong Kong judgment]; *DSC, Appeal No. 240/2017 of 27 July 2017* [Congo judgment]); and

iii) Public policy, especially in the field of family law, and usually based on the incompatibility of the foreign judgment with Sharia principles (see, e.g., *DSC, Appeal No. 131/2020 of 13 August 2020* [English judgment ordering the distribution of matrimonial property based on the principle of community of property]. See also, *Federal Supreme Court, Appeal No. 193/24 of 10 April 2004* [English judgment conferring the custody of a Muslim child to a non-Muslim mother]; *Abu Dhabi Supreme Court, Appeal No. 764/2011 of 14 December 2011* [English judgment order the payment of life maintenance after divorce]). Outside the field of family law, the issue of public policy was raised in particular with respect to the consistency of interests with Sharia principles, especially in the context of arbitration (see, e.g., *DSC, Appeal No. 132/2012 of 18 September 2012* finding that compound and simple interests awarded by an LCIA arbitral award did not violate Sharia. But, *c.f. Federal Supreme Court, Appeal No. 57/24 of 21 March 2006*, allowing the payment of simple interests only, but not compound interests.).

Second, the case shows that the enforcement process in the UAE, in general, and in Dubai, in particular, is challenging, and the outcome is unpredictable. This can be confirmed by comparing this case with some other similar cases. For example, in one case, the party seeking enforcement (hereinafter “X”) unsuccessfully sought the enforcement of an American (Nevada) judgment against the judgment debtor (hereinafter “Y”). The DCFI first refused to enforce the American judgment for lack of jurisdiction (Y’s domicile was in Dubai). The decision was confirmed on appeal, but on the ground that X failed to establish reciprocity. Instead of appealing to the DSC, X decided to bring a new action on the merits based on the foreign judgment. The lower courts (DCFI and DCA) dismissed the action on the ground that it was, in fact, an action for the enforcement of a foreign judgment that had already been rejected by an irrevocable judgment. However, DSC quashed the appealed decision with remand, considering that the object of the two actions was different. Insisting on its position, the DCA (as a court of remand) dismissed the action again. However, on a second appeal, the DSC overturned the contested decision, holding that the foreign judgment was sufficient proof of the existence of Y’s debt. The DSC finally ordered Y to pay the full amount indicated

in the foreign judgment with interests (*DSC, Appeal No. 125/2017 of 27 April 2017*).

However, such an approach is not always easy to pursue, as another case concerning the enforcement of a Singaporean judgment clearly shows. In this case, X (judgment creditor) applied for an enforcement order of a Singaporean judgment. The judgment was rendered in X's favour in a counterclaim to an action brought in Singapore by Y (the judgment debtor). The Execution Court, however, refused to issue the enforcement order on the ground that there was no treaty between Singapore and the UAE. Instead of filing an appeal, X brought a new action on the merits before the DCFI, using the Singaporean judgment as evidence. Not without surprise, DCFI dismissed the action accepting Y's argument that the case had already been decided by a competent court in Singapore and, therefore, the foreign judgment was conclusive (*DCFI, Case No. 968/2020 of 7 April 2021*). Steadfastly determined to obtain satisfaction, X filed a new petition to enforce the Singaporean judgment before the Execution Court, which - this time - was accepted and later upheld on appeal. Y decided to appeal to the DSC. Before the DSC, Y changed strategy and argued that the enforcement of the Singaporean judgment should be refused on the ground that the rendering foreign court lacked jurisdiction! According to Y, Dubai courts had "exclusive" jurisdiction over the subject matter of X's counterclaim because its domicile (place of business) was in Dubai. However, the DSC rejected this argument and ruled in favour of the enforcement of the Singaporean judgment (*DSC, Appeal No. 415/2021 of 30 December 2021*).

2) *From a different perspective*, one would wonder whether the recent developments observed in the UAE could alleviate the rigor of the existing practice. These developments concern, in particular, (i) the standard based on which the jurisdiction of the foreign should be examined and (ii) reciprocity.

(i) Regarding the jurisdiction of the foreign court, the new article 222(2)(a) of the 2022 FCPA (which reproduces the formulation of article 85(2)(a) of the 2018 Executive Regulation introduced in 2018) explicitly states that foreign judgments should be refused enforcement if UAE courts "have *exclusive* jurisdiction over the dispute in which the foreign judgment was rendered" (emphasis added). The new wording suggests that the foreign court's indirect jurisdiction would be denied

only if UAE courts claim “exclusive” jurisdiction over the dispute. Whether this change would have any impact on the enforcement practice remains to be seen. But one can be quite sceptical since, traditionally, UAE law ignores the distinction between “exclusive” and “concurrent” jurisdiction. In addition, UAE courts have traditionally considered the jurisdiction conferred to them as “mandatory”, thus rendering virtually all grounds of international jurisdiction “exclusive” in nature. (See, e.g., the decision of the *Abu Dhabi Supreme Court, Appeal No. 71/2019 of 15 April 2019*, in which the Court interpreted the word “exclusive” in a traditional fashion and rejected the recognition of a foreign judgment despite the fact that the rendering court’s jurisdiction was justified based on the treaty applicable to the case. But see *contra. DCFI, Case No. 968/2020 of 7 April 2021 op. cit.* which announces that a change can be expected in the future).

(ii) Regarding reciprocity, it has been widely reported that on 13 September 2022, the UAE Ministry of Justice (MOJ) sent a letter to Dubai Courts (i.e. the department responsible for the judiciary in the Emirate of Dubai) concerning the application of the reciprocity rule. According to this letter, the MOJ considered that reciprocity with the UK could be admitted since English courts had accepted to enforce UAE judgments (*de facto* reciprocity). Although this letter - which lacks legal force - has been widely hailed as announcing a turning point for the enforcement of foreign judgments in general and English judgments in particular, its practical values remain to be seen. Indeed, one should not lose sight that, according to the traditional position of Dubai courts, reciprocity can be established if the party seeking enforcement shows that the rendering State’s enforcement rules are identical to those found in the UAE or less restrictive (see *DSC, Appeal No. 517/2015 of 28 August 2016, op. cit.*). For this, the party seeking enforcement needs to prove the content of the rendering State’s law on the enforcement of foreign judgments so that the court can compare the enforcement requirement in the state of origin and in the UAE. Dubai courts usually require the submission of a complete copy of the foreign provisions applicable in the State of origin duly certified and authenticated. The submission of expert opinions (e.g., King’s Counsel opinion) or other documents showing that the enforcement of UAE judgments is possible was considered insufficient to establish reciprocity (see *DSC, Appeal No. 269/2005 of 26 February 2006, op. cit.*). The fact that the courts of the rendering State accepted to enforce a UAE judgment does not seem to be relevant as the courts usually do not mention it as a possible way to establish reciprocity. Future developments will show whether Dubai courts will admit *de*

facto reciprocity and under which conditions.

Finally, the complexity of the enforcement of foreign judgments in Dubai has led to the emergence of an original practice whereby foreign judgment holders are tempted to commence enforcement proceedings before the DIFC (Dubai International Financial Center) courts (AKA Dubai offshore courts) and then proceed with the execution of that judgment in Dubai (AKA onshore courts). However, this is a different aspect of the problem of enforcing foreign judgments in Dubai, which needs to be addressed in a separate post or paper. (On this issue, see, e.g., Harris Bor, “Conduit Enforcement”, in Rupert Reed & Tom Montagu-Smith, *DIFC Courts Practice* (Edward Elgar, 2020), pp. 30 ff; Joseph Chedrawe, “Enforcing Foreign Judgments in the UAE: The Uncertain Future of the DIFC Courts as a Conduit Jurisdiction”, *Dispute Resolution International*, Vol. 11(2), 2017, pp. 133 ff.)