The Dubai Supreme Court — Again — on the Enforcement of Canadian (Ontario) Enforcement Judgment

I. Introduction

The decision presented in this post was rendered in the context of a case previously reported here. All of the comments I made there, particularly regarding the possibility of enforcing a foreign enforcement judgment and other related issues, remain particularly relevant. However, as I have learned more about the procedural history preceding the decisions of the Dubai Supreme Court ("DSC"), which was not available to me when I posted my previous comment, greater emphasis will be placed on the general factual background of the case. The decision presented here raises a number of fundamental questions related to the proper understanding of foreign legal concepts and procedures and how they should be integrated within the framework of domestic law. Therefore, it deserves special attention.

I would like to thank Ed Morgan (Toronto, ON Canada) who, at the time when my previous comment was posted, brought to my attention the text of the Ontario judgment whose enforcement was sought in Dubai in the present case.

II. Facts:

1. Background (based on the outline provided by the DSC's decisions)

X (appellant) obtained a judgment in the United States against Y (appellee), which then sought to enforce it in Canada (Ontario) via a motion for summary judgment. After the Ontario court ordered enforcement of the American judgment, X sought enforcement of the Canadian judgment in Dubai by filing an application with the Execution Court of the Dubai Court of First Instance.

2. First Appeal: DSC, Appeal No. 1556 of 16 January 2024

The lower courts in Dubai admitted the enforceability of the Canadian judgment. Unsatisfied, Y appealed to the DSC. The DSC admitted the appeal and overturned the appealed decision, remanding the case for further review.

According to the DSC, the arguments raised by Y to resist the enforcement of the Canadian judgment – i.e. that the Court of Appeal erred in not addressing his argument that the foreign judgment was a "*summary judgment [hukm musta'jil]*[i] *declaring enforceable a rehabilitation order (hukm rad i'tibar)*[ii] *and an obligation to pay a sum of money rendered in the United States of America that cannot be enforced in the country [Dubai]*" – was a sound argument that, if true, might change the outcome of the case.

3. Second Appeal: DSC, Appeal No. 392/2024 of 4 June 2024

The case was sent back before the court of remand, which, in light of the decision of the DSC, decided to overturn the order declaring enforceable the Ontario judgment. Subsequently, X appealed to the DSC.

Before the DSC, X challenged the remand court's decision arguing that (i) the rules governing the enforcement of foreign judgments do not differentiate by types or nature of foreign judgments; (ii) that under Canadian law, "summary judgment" means a "substantive judgment on the merits"; and that (iii) Y actively participated in the proceedings and the lack of a full trial did not violate Y's rights of defense.

III. The Ruling

The DSC admitted the appeal and confirmed the order declaring enforceable the Canadian judgment.

After stating the general principles governing the enforcement of foreign judgments in the UAE and recalling some general principles of legal interpretation (such as the prohibition of personal interpretation in the presence of an absolutely unambiguous text, and the principle that legal provisions expressed in broad terms should not be interpreted restrictively), the DSC ruled as follows (all quotations inside the text below are added by the author):

"[it appears from the wording of the applicable legal provision[iii] that] *exequatur* decrees are not limited to "judgments" (*ahkam*) rendered in foreign countries but extends to foreign "orders" (*awamir*) provided that they meet the requirements for their enforcement. Furthermore, the [applicable legal provision][iv] has been put in broad terms (*'aman wa mutlaqan*), encompassing all "judgments" (*ahkam*) and "orders" (*awamir*) rendered in a foreign country without specifying their type (*naw'*) or nature (*wasf*) as long as the other requirements for their enforcement are satisfied. Moreover, there is no evidence that any other legal text pertaining to the same subject specifies limitations on the aforementioned [the applicable legal provision]. To the contrary, and unlike the situation [under the previously applicable rules],[v] the Legislator has expanded the concept of enforceable titles (*al-sanadat al-tanfidhiyya*),[vi] which now includes criminal judgments involving restitution (*radd*), compensations (*ta'widhat*), fines (*gharamat*) and other civil rights (*huquq madaniyyah*). […]

Given this, and considering that the appealed decision overturned the *exequatur* decree of the judgment in question on the ground that the [Canadian] judgment, which recognized a judgment from the United States, was a "summary judgment" (*hukm musta'jil*) enforceable only in the rendering State, despite the broad wording of [the applicable provisions],[vii] which covers all judgments (*kul al-ahkam*) rendered in a foreign State without specifying their type (*naw'*) or nature (*wasf*) provided that the other requirements are met. In the absence of any other specification by any other legal text pertaining to the same subject, the interpretation made by the appealed decision restricts the generality of [the applicable rules] and limits its scope [thereby] introducing a different rule not stipulated therein.

Moreover, the appealed decision did not clarify the basis for its conclusion that the [foreign] judgment was a "summary judgment" (*hukm musta'jil*) enforceable only in the rendering State. [This is more so], especially since the submitted documents on the Canadian civil procedure law and the Regulation No. 194 on [the Rules of Civil Procedure] show that Canadian law recognizes the system of "*Summary judgment*"[viii] for issuing judgments through expedited procedures, and that the [foreign] judgment was indeed rendered following expedited procedures after Y's participation by submitting rebuttal memoranda and hearing of the witnesses.[…]

Considering the foregoing, and upon reviewing the [Canadian] judgment…

rendered in favor of the appellant as officially authenticated, it is established that the parties (X and Y) appeared before the [Canadian] court, [where] Y presented his arguments … and the witnesses were heard. Based on these proceedings [before the Canadian court], the court decided to issue the aforementioned "summary judgment" (al-*hukm al-musta'jil*) whose enforcement is sought in [this] country. [In addition, the appellant presented] an officially authenticated certificate attesting the legal authority (*hujjiyat*) [and the finality][ix] of the [Canadian] judgment. Therefore, the requirements stipulated [in the applicable provisions][x] for its enforcement have been satisfied. In addition, it has not been established that the courts [of the UAE] have exclusive jurisdiction over the dispute subject of the foreign judgment, nor that the [foreign] judgment is [rendered] in violation of the law of the State of origin or the public policy [in the UAE], or that it is inconsistent with a judgment issued by the UAE courts. Therefore, the [Canadian] judgment is valid as a an "enforceable title" (*sanad tanfidhi*) based on which execution can be pursued.

IV Comments

The decision presented here has both positive and negative aspects. On the positive side, the DSC provides a welcome clarification regarding the meaning of "foreign judgment" for the purposes of recognition and enforcement. In this respect, the DSC aligns itself with the general principle that "foreign judgments" are entitled to enforcement regardless of their designation, as long as they qualify as a "substantive judgment on the merits". This principle has numerous explicit endorsements in international conventions dealing with the recognition and enforcement of foreign judgments[xi] and is widely recognized in national laws and practices.[xii]

However, the DSC's understanding of the Canadian proceedings and the nature of the summary judgment granted by the Canadian court, as well as its attempt to align common law concepts with those of UAE law are rather questionable. In this respect, the DSC's decision shows a degree of remarkable confusion in the using the appropriate legal terminology and understanding fundamental legal concepts. These include (i) the treatment of foreign summary enforcement judgments as ordinary "enforceable titles" (*sanadat tanfidhiyya – titres exécutoires*) under domestic law including domestic judgments rendered in criminal matters; (ii) the

assimilation between summary judgment in common law jurisdictions and *hukm musta'jil* ("summary interlocutory proceedings order" – "*jugement en référé*"); and (iii) the confusion between summary judgment based on substantive legal issues and summary judgment to enforce foreign judgments.

For the sake of brevity, only the third point will be addressed here for its relevant importance. However, before doing so, some light should be shed on the proceedings before the Canadian court.

1. The proceedings before the Canadian Court and the nature of the Canadian Judgment

The unfamiliarity with DSC with the proceedings in Canada and underlying facts is rather surprising for two reasons: i) the proceedings were initiated by the American government in the context of a bilateral cooperation in criminal matters; and ii) the Canadian proceedings was a proceeding to *enforce* a foreign judgment rendered in criminal matters and was not simply a proceeding dealing with substantive legal issues. Therefore, a detailed review of the proceedings before the Ontario is necessary to better understand the peculiarities of the case commented here.

i) Proceedings in the context of mutual cooperation in criminal matters. The case originated in Ontario-Canada as a motion brought by the United States of America represented by the Department of Justice as plaintiff for summary judgment to recognize and enforce a "Restitution Order"[xiii] made against Y (defendant). The Restitution Order was part of Y's sentence in the USA for securities fraud and money laundering. It "*included terms as to payment and listed the victims and amounts to which they were entitled under the order*" [para. 16].

The general procedural context of the Canadian judgment is of utmost relevance. Indeed, the USA sought the enforcement of the Restitution Order on the basis of the Mutual Legal Assistance in Criminal Matters Act. The Act, as it describes itself, aims "*to provide for the implementation of treaties for mutual legal assistance in criminal matters*". According to the Ontario Court, The Act is a "*Canadian domestic legislation enacted to meet Canada's treaty obligations for reciprocal enforcement in criminal matters*" [para. 6]. These treaty obligations are based on the Canada-USA Treaty on Mutual Legal Assistance in Criminal Matters

of 1990 [para. 6].

This is why, before the Canadian Court, one of the main questions [para. 25] was whether the "Restitution Order" could be regarded as "fine" within the meaning of the Act [para. 26]. If this is the case, then the Restitution Order could be enforced as a "*pecuniary penalty* determined by a court of criminal jurisdiction" in the meaning of article 9 of the Act.

On the basis of a "*broad, purposive interpretation of "fine" … aligned with Canada's*" international obligation under the Treaty, the Ontario court considered that "*proceeds of crimes, restitution to the victims of crime and the collection of fines imposed as a sentence in a criminal prosecution*" can be regarded as "fine" for the purpose of the case [para. 30]. In addition, the court characterized the restitution order as "*a pecuniary penalty determined by a court of criminal jurisdiction*" [para. 35], and also described it as an "*order made to repay the individual members of the public who were encouraged to purchase stock at an inflated price by virtue the criminal activity*" [para. 39]. The court ultimately, concluded that "*the Restitution Order made against [Y] is a "fine" within the meaning of… the Act*" [para. 41].

From a conflicts of laws perspective, the question of whether the "Restitution Order" is of a penal nature is crucial. Indeed, it is generally accepted that penal judgments are not eligible to recognition and enforcement. However, nothing prevents derogating from this principle by concluding international conventions or enforcing the civil law component of foreign judgments rendered by criminal courts in criminal proceedings, which orders the payment of civil compensation.[xiv]

Interestingly, before the Canadian court, Y argued that the "Restitution Order" made against him *was not* a "fine" because it was a "*compensatory-type*" order [para. 27]. However, it is clear that it was an attempt to exclude the enforcement of Restitution Order from the scope of application of the Mutual Legal Assistance in Criminal Matters Act. In any event, despite the crucial theoretical and practical importance of the issue, this is not the place to discuss whether the "Restitution Order" was penal or civil in nature. What matters here is the nature of the proceeding brought before the Canadian court which is a summary proceeding to recognize and enforce a foreign judgment. This leads us to the next point.

ii) Nature of the Canadian judgment. It is clear from the very beginning of the case that the USA did not bring an action on the merits but sought "an order for summary judgment *recognizing and enforcing a judgment a Restitution Order made against [Y] as part of his sentence in [the USA] for securities fraud and money laundering*" [para. 1]. Therefore, the case was about a motion for a summary judgment to *enforce a foreign judgment*. In this respect, one of the interesting aspects of the case is that Y also relied on the enforcement of foreign judgments framework and raised, *inter alia*, "a defence of public policy" at common law [para. 79] citing *Beals v, Saldanha* (2003), a leading Canadian Supreme Court judgment on the *recognition and enforcement of foreign judgments* in civil and commercial matters.[xv] The court however dismissed the argument considering that there was "*no genuine issue for trial on the question of a public policy defence against the enforcement in Canada of the Restitution Order*" [para. 82].

Accordingly, if one puts aside the question of enforceability of foreign penal judgments, it is clear that the Canadian judgment was a judgment declaring enforceable a foreign judgment. The very conclusion of the Canadian court makes it even clearer when the court granted USA's motion for summary judgment by *ordering the enforcement in Canada of the Restitution Order* [para. 84]. Accordingly, as discussed in my previous comment on this case, and taking into account the nature of the Canadian judgment, it can be safely said that the Canadian enforcement judgment cannot be eligible to recognition and enforcement elsewhere based on the adage "*exequatur sur exequatur ne vaut*".

2. No… a summary judgment to enforce a foreign judgment is not a summary judgment based on substantive legal issues!

It is widely known that the procedural aspects of the enforcement of foreign judgments largely differ across the globe. However, it is fair to say that there are, at least, two main models (although other enforcement modalities do also exist). Generally speaking, civil law jurisdictions adopt the so-called "*exequatur*" proceeding the main purpose of which is to confer executory power to the foreign judgment and transforms it into a local "enforceable title". On the other hand, in common law jurisdictions, and in the absence of applicable special regimes, the enforcement of foreign judgments is carried out by initiating a new and original

action brought before local court on the foreign judgment.[xvi] The purpose of this action is to obtain an enforceable local judgment that, while recognizing and enforcing the foreign judgment, is rendered as if it were a judgment originally issued by the local court.[xvii] Both procedures result in similar outcome:[xviii] what has been decided by the foreign court will be granted effect in the form. However, *technically*, in civil law jurisdiction it is the foreign judgment itself that is permitted to be enforced in the forum,[xix] while in common law jurisdictions, it is the local judgement alone which is enforceable in the forum.[xx]

Such an enforcement in common law jurisdictions is usually carried out by way of *summary judgment procedure*.[xxi] However, this procedure *should not* be confused with the standard summary judgment procedure used to resolve disputes on the merits within an ongoing case. In fact, it is a distinct process aimed specifically at recognizing and enforcing foreign judgments,[xxii] which is the functionally equivalent counterpart in common law jurisdictions to the *exequatur* procedure.

This is precisely the confusion that the DSC encountered. The Court regarded the Canadian summary judgment as "a civil substantive judgment on the merits", although it was not. Therefore, – and as already explained – the summary judgment rendered in result of this proceeding *cannot* be regarded as "foreign judgment" eligible for recognition and enforcement abroad in application of the principle *"exequatur sur exequatur ne vaut*".

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[i] In my previous post, I translated the term "*hukm musta'jil*" as "summary judgment to highlight the nature of the Canadian procedure. However, from the purpose of UAE law, I think it is better that this word be translated as "summary interlocutory judgment – *jugement en référé*". This being said, for the purpose of this post the terms "summary judgment" will be used to highlight the terminological confusion committed by the DSC.

[ii] In my previous post, I was misled by the inappropriate terminology used in the DSC's decision which referred to this American order as "Rehabilitation order"

(*hukm rad i'tibar*). The term "rehabilitation order" is maintained here as this is the term used by the DSC.

[iii] The DSC made reference to article 85 of Cabinet Resolution No. 57/2018 on the Executive Regulations of Law No. 11/1992 on Civil Procedure Act (hereafter "2018 Executive Regulation"), which was subsequently replaced by article 222 of New Federal Act on Civil Procedure (Legislative Decree No. 42/2022 of 3 October 2022) (hereafter "New 2022 FACP").

[iv] Ibid.

[v] The DSC referred the former Federal Act on Civil Procedure of 1992 (Federal Act No. 11/1992 of 24 February 1992)

[vi] The DSC referred to article 75(2) of the 2018 Executive Regulation as subsequently supplanted by article 212(2) of the New 2022 FACP.

[vii] *Supra* n (3).

[viii] In the original. Italic added.

[ix] In the words of the DSC, the foreign judgment "was not subject to appeal".

[x] *Supra* n (3).

[xi] See Article 3(1)(b) of the HCCH 2019 Judgments Convention; article 4(1) of the HCCH 2005 Choice of Court Convention; article 25(a) of the 1983 Riyadh Convention.

[xii] See eg. the Japanese Supreme Court Judgment of 28 April 1998 defining foreign judgment as "a final judgment rendered by a foreign court on private law relations… regardless of the name, procedure, or form of judgment" "[e]ven if the judgment is called a decision or order".

[xiii] *Supra* n (2).

[xiv] On UAE law on this issue, see my previous post here and the authorities cited therein.

[xv] On this case see, Janet Walker, "*Beals v. Saldanha:* Striking the Comity Balance Anew" 5 *Canadian International Lawyer* (2002) 28; *idem*, "The Great

Canadian Comity Experiment Continues" 120 *LQR* (2004) 365; Stephen G.A. Pitel, "Enforcement of Foreign Judgments: Where *Morguard* Stand After *Beals*" 40 *Canadian Business Law Journal* (2004) 189.

[xvi] Trevor C. Hartley, *International Commercial Litigation* (3rd ed. 2020) 435.

[xvii] Adrian Briggs, "Recognition of Foreign Judgments: A Matter of Obligation" 129 LQR (2013) 89.

[xviii] Briggs, *ibid*.

[xix] Peter Hay, *Advance Introduction to Private International Law and Procedure* (2018) 110.

[xx] Briggs, *supra* n (17).

[xxi] Adeline Chong, *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (2021)13.

[xxii] Cf. Hartley, *supra* n (16) 435 pointing out that "*Procedurally*, therefore, a new action is brought; in *substance*, however, the foreign judgment in recognized and enforced" (italic in the original).