

UAE: Attachment Orders apply while recognition is pending

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December 2014 – January 2015

The court issued the decision on 2 October in Appeal No. 519 of 2013. While there have been similar decisions from the lower courts, this is believed to be the first time a court of cassation in the United Arab Emirates has explicitly made such a declaration. It continues a line of judgments from the Abu Dhabi Court of Cassation that are supportive of arbitration, and will be welcomed by the legal community in the UAE.

Al Tamimi & Company represented the successful claimant before the Abu Dhabi courts.

Background: the UAE court system

To appreciate the significance of the judgment, it is necessary to understand the complex court structure in the UAE. The country is a federation of seven emirates, and has four main court systems: the Dubai courts, the Ras Al Khaimah courts, the Abu Dhabi courts, and the federal courts. The federal courts cover the remaining four emirates, and originally covered Abu Dhabi before that emirate set up its own courts in 2007. Within Dubai, there also exists the Dubai International Financial Centre Courts (which cover the English-language common-law freezone in Dubai known as the DIFC), which are excluded from the analysis in this article.

Each of the court systems has three levels: the court of first instance, the court of appeal, and the court of cassation. There are also summary courts, otherwise known as courts of urgent matters, which review certain applications on an urgent basis without going through the merits of the dispute. Such requests includes attachment orders and other precautionary actions.

As a civil law jurisdiction, there is no strong system of precedent, but judgments by a court of cassation are considered highly persuasive if not binding, particularly in the emirate in which they were issued. Only the judgments of the court of cassation are ever officially reported, and even this can be haphazard.

Attachment orders and arbitral awards

There are two ways that a precautionary attachment order can be sought under the UAE federal civil procedure law.

The first is where a claimant relies on article 252 of the civil procedure law by showing that it has a credible claim against the defendant and has a legitimate fear that the defendant is dissipating or may dissipate its assets to frustrate any judgment awarded to the claimant. The court's power to issue a precautionary attachment order in these circumstances is found at articles 252 to 256 of the civil procedure law.

The second way such an order can be sought is found through a combination of articles 227(2), 254(2) and 258 of the civil procedure law. Article 227(1) states that rulings may not be enforced so long as they may be contested at appeal. However, article 227(2) states that "where required, however, precautionary procedures may be taken". This means that, once the claimant has secured a favourable decision from the court of first instance, a precautionary attachment order can be granted without the need to establish a

fear that the defendant may dissipate assets. The fact that the claimant has a judgment is sufficient, even though the judgment itself may not be enforceable because it may be contested at appeal. Articles 254(2) and 258 state that where a creditor holds a ruling, even if not enforceable, a precautionary attachment order must be made. So when these three provisions are used together, the result is that the creditor can, as of right, obtain a precautionary attachment order provided there is a ruling for a specified amount, even if that ruling may still be appealed and is not capable of being executed.

Lower court decisions have sometimes interpreted article 227(2) broadly to include other deeds and instruments that establish that a debt is owed to the claimant, such as cheques and also arbitral awards. Like a decision from the court of first instance, the substance of these documents cannot be contested, but their enforcement may be challenged on certain legal grounds.

To our knowledge, the broad interpretation of article 227(2) has not been tested before the court of cassation, until now.

The facts of the case

The claimant secured a favourable arbitral award in a domestic arbitration. At the same time that the claimant filed a claim seeking ratification of the award, it also went to the Abu Dhabi Court of Urgent Matters and, without notice to the defendant, sought a precautionary attachment order over the defendant's assets. This was granted on the basis of the arbitral award.

The claimant then filed a claim before the Abu Dhabi Court of First Instance seeking the ratification of the arbitral award and confirmation that the attachment order was valid. This was resisted by the defendant, who instead sought an order for the nullification of the arbitral award and the cancellation of the attachment order.

The defendant argued that the attachment order was void because, among other things, arbitral awards are not judgments of a court and are not enforceable until a national court has ratified them. They argued that the civil procedure law only allows precautionary attachment orders to be made in respect of court judgments, and not arbitral awards before they have been ratified. The defendant further argued that there was no evidence that assets would be dissipated and so the claimant's application for the attachment order failed the test under article 252 and the order should not have been granted.

The Abu Dhabi courts' findings

The Abu Dhabi Court of First Instance ratified the arbitral award and confirmed the validity of the precautionary attachment order. The defendant filed an appeal, but the Court of Appeal found the first-instance judgment to be reasonable and in compliance with the law and so dismissed the appeal.

The defendant challenged the judgment before the Court of Cassation. The defendant repeated the same arguments presented to the lower courts (that arbitral awards cannot be considered as a judicial judgment, and so could not form the basis of a precautionary attachment order).

In Appeal No.519 of 2013, the Court of Cassation rejected the defendant's appeal and upheld the arguments presented by the claimant and the reasoning applied by the lower courts.

The Court of Cassation made the following findings:

- Although article 252 of the civil procedure law allows a creditor, as a general rule, to seek a provisional attachment order over the assets of debtor when there is a fear that assets will be dissipated, this is not the only basis on which such an order can be sought. Article 227(2) also allows such an order to be granted, and without the need to show fear of dissipation. The judge in such a case has no power to decline issuing the attachment order.
- Articles 227(2), 254(2) and 258 primarily refer to seeking an attachment order in reference to a court

judgment that is not yet enforceable (as it may be subject to appeal, such as a judgment of the Court of First Instance). Provided the judgment established the debt and the amount, an attachment order must be granted.

- Articles 227(2), 254(2) and 258, however, also apply to arbitral awards, which, like decisions of the Court of First Instance, establish that there is a debt that is not yet enforceable (as it must be ratified by the local court). This means an arbitral award can form the basis of an application for a precautionary attachment order prior to its ratification.
- The precautionary attachment order relied solely on the arbitral award that had been issued in its favour and for a specified amount. Therefore the defendant's argument that there was no evidence to justify a fear of dissipation is irrelevant.

The importance of the judgment

The judgment is important for a number of reasons.

On a practical level, it firmly clarifies that an award-creditor can seek a precautionary attachment order without needing to first ratify the award. Further, the order can be sought as of right and must be granted, with no need to show that there is a fear that assets will be dissipated.

Before the judgment parties were hesitant to seek orders on the basis of articles 227(2), 254(2) and 258 because it was not clear whether the lower courts were correct in their interpretation and a considerable risk that an application may fail. This recent judgment, however, will make parties far more confident.

On a more abstract level, the arbitral community will take heart that the Abu Dhabi Court of Cassation so unequivocally considers arbitral awards to be more than simply evidence of debt, but to have an elevated status akin to a judgment of the Court of First Instance. This is a sound endorsement of the arbitration process, and continues a series of supportive judgments from the court.

This article was first published online by Global Arbitration Review on 13 December 2013.