



# Cross-border disputes

Forum/jurisdiction and parallel proceedings

Choice of law/ governing law

International asset recovery/ enforcement

English Court enforces Dubai money judgment - public policy not offended despite illegality ruling in parallel arbitration and English/Dubai law differences

## A. Summary

1. In *Lenkor Energy Trading DMCC v Irfan Iqbal Puri* [2020] EWHC 75, the English High Court decided that the judgment of a Dubai Court (the “**Dubai Judgment**”) should be recognised in England, and it awarded summary judgment in respect of the Claimant (judgment creditor)’s common law claim brought on the judgment debt.
2. The Defendant (judgment debtor) had argued that it would be contrary to English public policy to recognise/enforce the Dubai Judgment:
  - in view of a finding, in parallel arbitration proceedings, that the underlying transactions to which the Dubai Judgment related were tainted by illegality;
  - since English law would not have imposed personal liability on the Defendant;
  - on the basis that the interest ordered by the Dubai Court constituted a penalty.
3. That defence failed, and summary judgment was awarded to the Claimant, for the following reasons:
  - The public policy defence only operated if the recognition/enforcement of the foreign judgment, as opposed to the underlying transaction on which it was based, offended English public policy.
  - Although there are some circumstances in which an English Court might enquire into the underlying transactions giving rise to a foreign Court judgment, no such circumstances existed here. That was because the Dubai Judgment was based on the self-contained and independent consequences of signing cheques under Dubai law for which there was a powerful rationale. Although different from English law, this did not offend any principle of English public policy.

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- Even if it were permissible to consider the underlying transactions, enforcing the Dubai Judgment would not amount to the indirect enforcement of an obligation to pay monies which, by reason of the underlying illegality, the parallel arbitration proceedings had determined did not exist.
- The fact that English law, unlike Dubai law, would not have imposed personal liability on the Defendant did not mean that English public policy would be offended by recognising/enforcing the Dubai Judgment.
- The rate and period of interest imposed by the Dubai Judgment diverged little from English law, and so it was unrealistic to characterise the interest ordered as amounting to a penalty.

### B. The Tripartite Agreement, the cheques and the disputes

4. An agreement (the "**Tripartite Agreement**") was entered into between three corporate entities:
  - Lenkor Energy Trading Limited ("**Lenkor HK**"), a Hong Kong sister company of Lenkor Energy Trading DMCC (the "**Claimant**");
  - IP Commodities DMCC ("**IPC Dubai**"); and
  - a Pakistani entity (the "**Buyer**").
5. Pursuant to the Tripartite Agreement, Lenkor HK was to sell six cargoes of gasoil to the Buyer, with IPC Dubai acting as "middleman".
6. As regards payment:
  - Paragraph 15 of the Tripartite Agreement provided for payment by Letter of Credit as to 50% of each cargo value, and by telegraphic transfer of the other 50%. Further, by paragraph 15(c), IPC Dubai was to issue a payment guarantee for 100% of the cargo value by cheque in favour of the Claimant 3 days before the vessel commenced loading.
  - Pursuant to paragraph 15(c) of the Tripartite Agreement, Mr Puri, (the "**Defendant**"), who was sole shareholder and managing director of IPC Dubai, drew two cheques in favour of the Claimant for AED 91,400,200 and AED 117,100,000 respectively.
  - The payment provisions of the Tripartite Agreement were varied such that, by agreement, payment was in fact to be made by the Buyer to IPC Dubai as Lenkor HK's nominee.
7. Two cargoes were delivered to the Buyer and, pursuant to the payment obligations as varied, the Buyer made part-payment of about US\$35m to IPC Dubai (made up of a payment of USD 4,008,900 to IPC Dubai and, at IPC Dubai's direction, PKR 3,196,855,717 to its Pakistan sister company, IP Commodities Pakistan Ltd ("**IPC Pakistan**"). Neither IPC Dubai nor IPC Pakistan paid any of this money to Lenkor HK and the Buyer also refused to pay the balance.
8. Since no payment had been received by Lenkor HK for the two cargoes, the Claimant sought to cash the cheques. However, IPC Dubai did not have sufficient funds in its account to honour them and they were not honoured. This led to criminal and civil proceedings in Dubai against the Defendant. In the criminal proceedings, he was convicted for signing the dishonoured cheques and sentenced to 3 years in prison.



### C. The Dubai Judgment in relation to the cheques

9. On 30 May 2017, the Dubai civil proceedings resulted in a judgment entered against the Defendant for AED 123,727,048 plus interest at 9% per year. Importantly, the principal sum did not represent the full value of the cheques (which would have been AED 208,500,200) but rather the total amount received by the Defendant and his company. There was an appeals process (including two visits to the highest Court of the United Arab Emirates, the Court of Cassation), but the Dubai Judgment was upheld.

### D. The parallel arbitration

10. In the meantime, Lenkor HK had initiated arbitration proceedings in London, in which the main issues were resolved by the corrected and clarified partial final award of 26 February 2018 (the "**Award**").

11. By the Award:

- IPC Dubai was found liable to pay Lenkor HK the monies which it and IPC Pakistan had received;
- the Buyer was found liable for the difference between the monies it had paid to IPC Dubai and IPC Pakistan and the actual value of the cargoes.

12. However, the arbitrator did not award Lenkor HK the full contract price of the cargoes because he found that the contract was tainted by illegality, in that:

- Lenkor HK intended to deliver, and did deliver, a type of gasoil known as "Heavy End Product" sourced from Iran rather than the "High Speed Diesel" sourced from the UAE for which the Tripartite Agreement provided;
- to that end, load port documents such as bills of lading, and load port test results, had been falsified.
- The arbitrator found that both IPC Dubai and the Defendant were complicit in that deception, although Lenkor HK was the more culpable party.

13. The arbitration award remained unsatisfied.

### E. The English proceedings to recognise/enforce the Dubai Judgment

14. There is no treaty or other understanding between England and Wales (or the UK) on the one hand and Dubai (or the United Arab Emirates) on the other in respect of the reciprocal recognition and enforcement of Court judgments<sup>1</sup>. Thus, there is no system of automatic recognition/enforcement of Dubai Court judgments in England, nor any procedure by which they may be "registered" and thus rendered enforceable is if they were judgments of the English Courts.

15. Consequently, in order to enforce the Dubai Judgment, the Claimant sued the Defendant under the common law on the judgment debt, claiming a total amount of AED 173,342,180 including interest. It then sought summary judgment.

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<sup>1</sup> There is a "Memorandum of Guidance as to Enforcement between the DIFC Courts and the Commercial Court, Queen's Bench Division, England and Wales". However, it has no binding legal effect and does not constitute a treaty or legislation. Rather, its purpose is simply "to set out the parties' understanding of the procedures for the enforcement of each party's money judgments in the other party's courts".



## F. Enforcement of a foreign Court judgment under the common law

16. In order to establish a *prima facie* right to have a foreign money judgment enforced in England under the common law, a judgment creditor must satisfy a number of criteria.
17. First, the foreign Court must have had jurisdiction to determine the dispute in question for these purposes – something which will only be satisfied if:
  - either the judgment debtor submitted to the jurisdiction of the foreign Court in one of the following ways:
    - » it was claimant in, or counterclaimed in, the foreign proceedings;
    - » it voluntarily appeared in the foreign proceedings (other than to contest jurisdiction); or
    - » it had agreed, before the commencement of the foreign proceedings and in respect of the subject matter of those proceedings, to submit to the jurisdiction of the foreign Court or the Courts of the foreign country;
  - or the judgment debtor was present/ resident in, or in the case of a corporation carried on business in, the foreign country at the time the foreign proceedings were instituted.
18. Secondly, the foreign Court judgment must be “final and conclusive” – in that in the Court by which it was pronounced, it finally and conclusively established the existence of the debt<sup>2</sup>.
19. Thirdly, the foreign Court judgment must be for a definite or calculable sum of money, not being a “tax or penalty”.<sup>3</sup>
20. In the event that these conditions are satisfied, there are limited defences that can be raised by the judgment debtor<sup>4</sup>. Amongst those are an assertion that it would be contrary to English public policy to recognise/enforce the foreign Court judgment<sup>5</sup>.

## G. The issues for the English High Court Master

21. It was common ground that the Dubai Judgment was the final and conclusive judgment of a Court of competent jurisdiction. Consequently, the *prima facie* position at common law was that the Dubai Judgment was to be recognised and that the monetary award was to be enforced in England.

<sup>2</sup> A default judgment may be “final and conclusive” however, even though it has the potential to be set aside. Further, the fact that an appeal is possible to a higher Court, or that such an appeal is actually pending, does not render the judgment not “final and conclusive”, although in a proper case a stay of execution would no doubt be ordered pending such an appeal.

<sup>3</sup> A “penalty” for these purposes normally means a sum payable to the State and not to the private claimant, so that an award of punitive or exemplary damages is not penal. However, an award of multiple damages (e.g. in an anti-trust action) might nevertheless be regarded as penal (and indeed the effect of the Protection of Trading Interests Act 1980 is that such judgments are not enforceable at common law or otherwise). If the purpose of the damages awarded is to punish the defendant, enforcement may be found to be against public policy. Thus, there is a degree of overlap between the rule against enforcing foreign penal laws and the principle that a foreign judgment will not be enforced if to do so would be contrary to English public policy.

<sup>4</sup> Generally, there will be no review of the merits or substance of the foreign Court judgment save in limited circumstances, e.g. if the judgment was obtained by fraud.

<sup>5</sup> Others include: that the above requisite criteria are not satisfied; that there exists a prior conflicting judgment of the English Courts or of a foreign Court whose judgment the English Courts recognise; that there was a breach of natural justice; that the foreign Court took jurisdiction in breach of an arbitration or jurisdiction clause; that the judgment was obtained by fraud; and that the damages awarded are unlawful.



22. However, the Defendant resisted the claim on the basis that such recognition/enforcement would be contrary to English public policy on the following three bases:
- that the finding of illegality of the underlying transaction that was made, after the Dubai Judgment, in the Award in the parallel arbitration proceedings tainted both the cheques and the claim to recognise and enforce the Dubai Judgment;
  - that the Dubai Judgment ran counter to well-recognised principles of English law by imposing an exorbitant liability on the Defendant for sums which he had not agreed to guarantee, since:
    - » it made him personally liable for the debts of IPC Dubai, which was the party (as guarantor) to the Tripartite Agreement and the holder of the account upon which the cheques were drawn; and
    - » the cheques had not been presented or had been presented out of time (or at least there was an issue about that);
  - that the interest rate of 9%, which applied from the date on which the cheques were due, was exorbitant in that it had, by the time of the hearing before the English High Court Master, added some 40% to the principal sum - and, taken in combination with the principal sum, the amount for which the Defendant was liable was exorbitant when regard was had to the Claimant's interest in the performance of the contract.
23. The English High Court Master had to decide whether summary judgment should be awarded on the Claimant's claim. The issues for his determination were therefore whether the Defendant had no real prospect of establishing that the recognition/enforcement of the Dubai Judgment would offend English public policy on the basis of his assertions that:
- the finding of illegality of the underlying transaction in the arbitral Award also tainted the cheques and the Dubai Judgment itself;
  - the personal liability of the Defendant was established in contravention of established principles of English law;
  - the interest awarded amounted to a penalty.

## H. The decision of the English High Court Master

The English High Court Master decided as follows:

### Illegality

24. The public policy defence only applied to circumstances in which the recognition/enforcement of the foreign judgment, rather than the underlying transaction on which it was based, offended English public policy.
25. There were circumstances in which an English Court might enquire into the underlying transactions which gave rise to a foreign judgment:
- examples included an award or judgment which was "infected" with the underlying public policy point or "*which contained a finding of fact of corrupt practices which would give rise to obvious public policy considerations*";
  - a further (very extreme) example was given by Counsel for the Claimant of a money judgment in respect of a "contract killing".



26. However, no such circumstances existed here. Rather:

- it was common ground that the basis of the Dubai Judgment was a Dubai statute which imposed personal liability on the drawer of a cheque where the drawer cannot prove (the burden being on him) that the account was sufficiently in funds;
- there was a powerful rationale behind that statutory liability – namely to encourage probity in cheque transactions and, although it was not the law in England, it could not be said to offend any principle of English public policy;
- English law itself recognised that a cheque gave rise to unconditional and autonomous rights and liabilities such that a cheque is treated as akin to cash, and the fact that Dubai provides for more onerous liabilities was neither surprising nor repugnant.

27. Thus, the most that could be said was that the (earlier) Dubai Judgment had not confronted the issue of the illegality, as determined in the later arbitration Award, which affected the Tripartite Agreement. However, there were two decisive answers to that:

- The Dubai Judgment did not have to confront that issue, since it was based squarely on the legal consequences of signing cheques in Dubai in circumstances in which there were insufficient funds to meet them. Thus, on the face of the Dubai Judgment, those legal consequences were self-contained and independent. The fact that an English Court might have approached matters differently was irrelevant – the Dubai Court had heard the claim applying the law of Dubai.
- Even if it was permissible to consider the underlying transactions, enforcing the Dubai Judgment would not in fact amount to the indirect enforcement of an obligation to pay monies which the parallel arbitration proceedings had determined did not exist. That was because:
  - » the Dubai Judgment was for a sum equal to the amount which the Buyer paid to IPC Dubai that was not sent on to Lenkor HK, and not the (considerably greater) contract price;
  - » thus, if the Dubai Judgment indirectly enforced any obligation, it was IPC Dubai's obligation to account to Lenkor HK for the sums it had received, which was found by the arbitrator to be an enforceable obligation both in contract and in restitution;
  - » by contrast, the underlying illegality was confined to the Buyer's obligation to pay the contract price and that obligation was not indirectly enforced by the Dubai Judgment (or its enforcement);
  - » thus, the illegality would not have been decisive of the case.

28. Such conclusions were also fair to the Defendant bearing in mind the following two points:

- The Defendant operated in Dubai and knew or must be taken to have known the consequences of putting his name to cheques there.
- IPC Dubai had been found liable by the arbitrator to pay Lenkor HK all the monies it received in respect of the two cargoes of gasoil. That was in view of the fact that IPC Dubai was privy to the deception, and the fact that the contractual claim against IPC Dubai would not amount to a profit for Lenkor, but would in substance be part restitution to it of the value of the cargoes. Since IPC Dubai was a company of which the Defendant was the managing director and sole shareholder, and thus its controlling mind and a key player in the relevant events, those factors could be applied with equal force to him.



Personal liability of Defendant (“impermissible piercing of the corporate veil”)

29. English law would not have imposed personal liability on the Defendant in the same way that Dubai law did (although that was not to say that it could offer no remedies at all in the circumstances at hand).
30. However, it did not follow that English public policy would be offended by recognising the Dubai Judgment since:
- the English rules regarding the corporate veil were English rules relating to company and commercial law, not principles of English public policy;
  - the Dubai Court proceedings were determined according to the rules which the law of Dubai applied to Dubai companies and to individuals who write cheques on Dubai accounts;
  - the Defendant operated in Dubai and knew that in writing the cheques he was subject to Dubai law;
  - there was nothing repugnant to English public policy in recognising a judgment based on the relevant Dubai law (which imposed personal liability on the drawer of a cheque where the drawer cannot prove that the account was sufficiently in funds);
  - to do so did not involve recognising that IPC Dubai’s corporate veil had been pierced - since the liability was the Defendant’s under that Dubai law as the drawer of the cheques.

Penalty

31. It was self-evident that the judgment for the principal sum could not be characterised as a penalty.
32. As regards the interest ordered thereon:
- under the English Bills of Exchange Act 1882, interest would have run from the date of presentation of the cheques, so there was little divergence from the period for which interest was ordered to run (under Dubai law);
  - as regards the interest rate, the 9% rate ordered was only 1% higher than the judgment rate in England and only 0.25% higher than the current rate under the English Late Payment of Commercial Debts (Interest) Act 1998, and as such, it was unrealistic to characterise the 9% rate as amounting to a penalty.

**I. The effect of the decision and its practical and commercial implications**

33. The judgments of foreign Courts can be recognised and enforced in England and Wales, although the procedure for so doing, the types of remedy which may be enforced, and the criteria to be satisfied and the defences that might be deployed differ, depending upon the country in which the foreign Court judgment originates.
34. In the absence of a treaty or other understanding between England and Wales or the UK and the country in question as to the reciprocal recognition/enforcement of Court judgments, the means for enforcing a foreign Court judgment is to sue the judgment debtor on the foreign judgment debt under the common law. In such an instance:
- only a money judgment for a definite or calculable sum (not being a “tax or penalty”) may be enforced, and only then if certain other criteria (concerning the jurisdiction of the foreign Court and the finality/conclusiveness of its judgment) are met;

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- if the judgment debtor does not file an acknowledgement of service and defend the claim, it may be possible to enter judgment in default;
- if the judgment debtor does contest the recognition/enforcement proceedings, the defences it can raise are limited in scope and it may be possible to seek summary judgment;
- one such defence is that the recognition/enforcement of the foreign Court judgment would be contrary to English public policy – however, such an assertion would only succeed in limited circumstances, and it would be insufficient, for example, for the judgment debtor simply to show that a different conclusion to that of the foreign Court would have been reached under English law;
- additional complexities can sometimes arise where an award or judgment has also been given in a related parallel proceeding, particularly where the decisions conflict - although those complexities are not limited to arguments connected with public policy.

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### Daniel Hart

Counsel, London

Commercial Litigation, International Arbitration and Dispute Resolution

Direct Line: +44 20 3130 3219

Email: [dhart@mayerbrown.com](mailto:dhart@mayerbrown.com)

### Alain Farhad

Partner, Dubai

Commercial Litigation, International Arbitration and Dispute Resolution

Direct Line: +971 4 375 7160

Email: [afarhad@mayerbrown.com](mailto:afarhad@mayerbrown.com)

[www.mayerbrown.com](http://www.mayerbrown.com)



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