

Dubai Court Clarifies the Competent Authority to Rule on Interim and Conservatory Measures

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Introduction

In a recent decision (hearing of 22 May 2019), the Dubai Court of Appeal applied the Federal Law No. 6 of 2018 Concerning Arbitration (the 'Federal Arbitration Law') in order to resolve a 'conflicts of jurisdiction' issue with respect to deciding which is the competent authority to rule on interim and conservatory measures in the event the parties to a dispute have a valid arbitration agreement. In its final decision, the Dubai Court of Appeal overruled the preceding decisions of the summary judge and the Dubai Court of First Instance and established that where parties have agreed to resolve their disputes by way of arbitration (and in accordance with the Federal Arbitration Law), the competent authority to rule on interim and conservatory measures shall be the arbitral tribunal or the Chief Justice of the Court of Appeal and not the summary judge.

Background

The parties entered into an agreement. The contractor (the 'Applicant') filed an application seeking an order for a precautionary attachment on a performance guarantee issued in favour of the employer (the 'Respondent') when the latter sought the liquidation of the guarantee.

In support of its application the Applicant alleged, amongst other things, the completion of the construction works in accordance with the agreement signed by the parties. The Claimant further submitted that the works were handed over to the consultant engineer free of any defects and that the completion and handover certificates were issued thereby rendering the Respondent's request to liquidate the guarantee baseless.

Procedural History

On 16 January 2019, the summary judge of the Dubai Court of First Instance granted the application and issued an order freezing the performance guarantee.

The Respondent filed a grievance against the summary judge's decision before the Dubai Court of First Instance on the basis that the agreement signed by the parties contained an arbitration clause. The summary judge, under the provisions of the Federal Arbitration Law, does not have jurisdiction to consider such matters.

On 24 March 2019, the Dubai Court of First Instance issued a decision dismissing the grievance and thereby confirming the decision of the summary judge.

Decision of the Dubai Court of Appeal

The question the Dubai Court of Appeal was faced with was: 'is the summary judge, which represents the ordinary and default judicial circuit, still competent to rule on an application seeking interim and conservatory measures when the parties have already validly agreed to submit any dispute to arbitration?'

In order to answer, what has often arisen in matters regarding conflicts of jurisdiction between, on one hand, the summary judge who forms a part of the state courts, and on the other, arbitral tribunals and the Chief Justice of the Court of Appeal since the entry into force of the Federal Arbitration Law, the Dubai Court of Appeal relied on a number of provisions of the Federal Arbitration Law.

First, and in order to reverse the previous decisions, the Dubai Court of Appeal confirmed that the Federal Arbitration Law, which came into effect prior to the issuance of the freezing order, was applied to the subject matter by relying on Article 2 of the Federal Arbitration Law, which sets out the scope of application of the Federal Arbitration Law. In particular the Dubai Court of Appeal cited the provisions of Article 2(1) and Article 2(3) of the Federal Arbitration Law which respectively provide "*this Law [Federal Arbitration Law] shall apply to (1) any arbitration conducted in the State, unless the parties have agreed that another law should govern the arbitration [...]*" and "*(3) any arbitration arising from a dispute in respect of a legal relationship, whether contractual or not, governed by laws of the State, save as excepted by a special provision.*"

Following its determination as to the application of the Federal Arbitration Law, the Dubai Court of Appeal relied on Article 8(1) of the Law which provides that "The Court, before which a dispute is brought in a matter covered by an arbitration agreement, shall declare the inadmissibility of the action, if the defendant raised such plea before any claim or defence on the merits."

In order to answer the above legal question, and reverse the earlier decisions of the summary judge and the Dubai Court of First Instance that had claimed jurisdiction over the subject matter and issued a freezing order, the Dubai Court of Appeal cited Article 18(2) and 21(1) of the Federal Arbitration Law, which respectively provide as follows:

Article 18(2) of the Federal Arbitration Law: "*The Chief Justice of the Court may, at the request of a party, or at the request of the arbitral tribunal, order such interim or conservatory measures as he may consider necessary to be taken in respect of existing or potential arbitral proceedings, whether before the commencement of the arbitral proceedings or during their course.*";

Article 21(1) of the Federal Arbitration Law: "*Subject to the provisions of Article 18 of this Law [Federal Arbitration Law], and unless otherwise agreed by the Parties, the Arbitral Tribunal may, at the request of a party or on its own motion, order any party to take such interim or conservatory measures as the arbitral tribunal may consider necessary given the nature of the dispute, in particular: [...] (c) preservation of assets and funds out of which a subsequent award may be satisfied [...] (e) an order to take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitration*

process itself.”

Based on the above, the Dubai Court of Appeal held that a freezing order is considered a conservatory measure, the purpose of which is to preserve the debtor’s assets with a view to preventing harm in the eyes of the law. In this regard, the Dubai Court of Appeal concluded that the jurisdiction with regard to considering the application for a freezing order, or *ratione materiae*, lies with the Chief Justice of the Court of Appeal or the arbitral tribunal, depending on the circumstances, and as long as the parties have not specifically agreed to the ordinary and default state court’s jurisdiction (summary judge) to issue such conservatory measures.

In the case at hand, the Dubai Court of Appeal noted that the agreement between the parties contained an arbitration clause pursuant to which the parties had clearly agreed to resort to arbitration, and not the state courts, should a dispute arise between them. Furthermore, the Dubai Court of Appeal underlined the Respondent’s defence in the state court proceedings seeking to declare the application for a conservatory measure inadmissible as a result of the parties’ arbitration agreement. As a consequence of the parties’ prior agreement, as re-iterated throughout the state court proceedings, the Dubai Court of Appeal held that the summary judge did not have jurisdiction to consider the application. In the case before it, the Dubai Court of Appeal ruled that the summary judge, and subsequently the Court of First Instance, erred in their respective application of the law and accordingly, their decisions were overturned.

Conclusion

The application of the Federal Arbitration Law (which expressly empowers arbitral tribunals with the authority to issue interim and conservatory measures) by the Dubai Court of Appeal in this case demonstrates that the scale is increasingly tilting towards providing an arbitration-friendly environment in the UAE. This decision of the Dubai Court of Appeal indicates a determined attempt to uphold the sanctity of arbitration agreements even when interim and conservatory measures, in support of an existing or prospective arbitration, are at issue: where parties have agreed to resolve their disputes through arbitration, and in accordance with the Federal Arbitration Law, the jurisdiction to rule on interim and conservatory measures shall now lie with the arbitral tribunal and the Chief Justice of the Court of Appeal, unless the parties have explicitly agreed to defer such matters to the original default jurisdiction of the summary judge. As party autonomy is safeguarded, this decision is another testament to the importance of the manner in which parties formulate their arbitration clauses, so as to ensure such clauses are in place at the outset and well before a dispute even arises.

Al Tamimi & Company’s [Dispute Resolution team](#) regularly represents clients in arbitral proceedings and arbitration-related litigation proceedings before the courts. For further information, please contact [Dr. Hassan Arab](#) (h.arab@tamimi.com) or [Sara Koleilat-Aranjo](#) (s.aranjo@tamimi.com).