

Dubai: Challenging The Appointment Of An Arbitrator

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The Claimant requested an order that the Respondent pay the amount of AED1, 253,528 along with interest in addition to the value of the final certified payment certificate.

In the course of the pleadings, the Respondent amended the relief sought by requesting that the Court appoint an arbitrator to settle the dispute between the parties. Connected with this plea was a request that the action filed by the Claimant be dismissed on the basis that the Dubai Court had no jurisdiction to hear the dispute because the performance of the construction contract had occurred in the Emirate of Sharjah.

Appeals may not be filed against judgments issued pursuant to Article 204(1) of the UAE Civil Procedure Code which deal with the appointment or replacement of an arbitrator.

Procedural History:

On 28 December 2006 the Court of First Instance ordered the appointment of an accounting expert to act as an arbitrator, charged with resolving a dispute which had arisen between the parties. The Respondent appealed this judgment to the Court of Appeal, the court rejected the appeal on the basis of Article 204(2) of the UAE Civil Procedure Code. Consequently the respondent appealed this decision to the Court of Cassation. The Claimant therefore filed a memorandum in defense.

Respondent argued that the Court of Appeal erred in its reasoning. By this the Respondent was referring to its pleas before the Dubai Court of First Instance. The relevant pleas were:

- a) that Court lacked the jurisdiction to determine the Claimant's request because the construction contract had been performed in Sharjah;
- b) that the appointment of the arbitrator was incorrect and should be revoked.

The Respondent further argued that the Court of Appeal had determined the inadmissibility of its appeal without having properly examined the arguments put forward in support. Further, the Respondent argued that this was because, at least on its interpretation of the Court of Appeal's reasoning, those arguments were not admissible by virtue of Article 204(2) of the UAE Civil Procedure Code. The Respondent took the view that its arguments were essential arguments which ought to have been properly addressed. The Respondent's position was that the judgment issued by the Court of Appeal was therefore defective.

Court of Cassation held:

The Court of Cassation held that the Respondent's argument was groundless. The Court of Cassation held that it had been consistently established that orders appointing arbitrators cannot be appealed. The Court of Cassation acknowledged that this was an exception to the general rule that decisions of the Court are capable of appeal.

The Court of Cassation further re-iterated that the principle of the "unchallengeable" judgment does not

extend to other subject matters such as pleas regarding lack of jurisdiction or, importantly, judgments rejecting requests to appoint an arbitrator, or, finally, judgments determining other preliminary questions upon which the adjudication of the request to appoint or replace an arbitrator is dependant: judgments falling within these categories are subject to appeal. However, judgments appointing arbitrators are not.

It was noted by the Court of Cassation that the Respondent, in the course of defending the action initially filed by the Claimant, had in fact requested the appointment of an arbitrator to resolve the dispute which had arisen in respect of outstanding payments.

What the legislator meant by the concept of the “unchallengeable judgment” in Article 204(2) of the UAE Civil Procedure Code is that orders of the Court appointing arbitrators cannot be appealed. This is an exception to the general rule which permits the appeal of judgments by methods permitted by law. Appeals may not be filed against judgments issued pursuant to Article 204(1) of the UAE Civil Procedure Code and which deal with the appointment or replacement of an arbitrator. The principle of the “unchallengeable” judgment does not extend to other subject matter such as pleas regarding lack of jurisdiction or, importantly, judgments rejecting requests to appoint an arbitrator, or, finally, judgments determining other preliminary questions upon which the adjudication of the request to appoint or replace an arbitrator is dependant: judgments falling within these categories are capable of appeal.

The Court of Cassation, in dismissing the Companies’ appeal, emphasized that decisions to appoint or replace arbitrators made pursuant to Article 204(1) of the UAE Civil Procedure Code enjoyed the protection of the principle of the “unchallengeable judgment” contained in Article 204(2).