

Recent rulings on Arbitration by the Dubai courts

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The Dubai Court of Cassation recently issued several rulings dealing with various aspects of arbitration. The following discussion gives an overview of these rulings to keep readers apprised of the latest arbitration developments in Dubai.

The UAE is striving to become an attractive venue for regional and international arbitration, and to establish itself as the arbitration capital of the Middle East. Since the UAE ratified the New York Convention in 2006, the UAE Courts have significantly changed their approach to the recognition and enforcement of foreign arbitral awards. This provides for a positive and encouraging perspective which – in addition to the modern infrastructure of the UAE and its strategic geographic location – will likely make Dubai the venue of choice for arbitration in the Middle East.

Pre-Conditions to Arbitration

1. Commercial Appeal No. 53-2011

In Commercial Appeal No. 53-2011 (judgment dated 7 December 2011), the Dubai Court of Cassation held that an arbitration agreement, as a contract, may include any clause the parties deem appropriate provided that such clause does not violate public policy or moral norms. The parties may, for example, include a clause imposing certain pre-conditions to arbitration. The burden of proof for such pre-conditions lies with the party initiating arbitration.

In this domestic case, the parties had agreed that any dispute must be referred to a consulting engineer for amicable settlement before either party could pursue arbitration. The claimant requested the court to appoint an arbitrator on behalf of the respondent to hear the dispute. However, the Court of First Instance dismissed the action on grounds of premature commencement of the action as the claimant had failed to request a consulting engineer to adjudicate the dispute prior to arbitration. The claimant appealed and the Court of Appeal upheld the lower Court's decision.

The claimant then appealed to the Court of Cassation, arguing that the Court of Appeal erred in dismissing the action.

The Court of Cassation held that it was clear from the record that the claimant did not request the consulting engineer to adjudicate the dispute and that as a result the claimant's action for appointment of an arbitrator was premature. The claimant's grounds for appeal were held to be substantive in nature and as such could not be raised for the first time before the Court of Cassation, resulting in the dismissal of the appeal.

2. Commercial Appeal No. 188-2012

In Commercial Appeal No. 188-2012 (dated 9 October 2012), the Dubai Court of Cassation similarly ruled that an appeal should be dismissed for failure to comply with pre-arbitration requirements after the appellant had sought to enforce a domestic arbitral award against the respondent under the DIAC rules. The Court of First Instance had confirmed the award and dismissed the respondent's request to set aside the award.

The Court of Appeal upheld the ruling of the Court of First Instance confirming the award. However, when the Appeal Court decision was challenged the Court of Cassation overturned it on the basis that the pre-conditions to arbitration had not been satisfied and that the lower court had failed to review the respondent's pleas.

The Court of Cassation held that the Court of Appeal should have reviewed the arbitration file and joined it to the case file to confirm that the arbitrator had commenced proceedings only after compliance with the established pre-arbitration requirements. The case was remanded to the Court of Appeal for reconsideration. After joining the arbitration file along with a translation of its contents, the Court of Appeal overturned the decision of the Court of First Instance. It dismissed the claimant's action to enforce the arbitral award because the claimant had failed to comply with the pre-arbitration requirements. The respondent's request to set aside the award was upheld. The claimant appealed to the Court of Cassation but the appeal was dismissed. In explaining its ruling that the arbitration the Court of Cassation held as follows:

1. The general rule in contracts is that the contract is the law of the contracting parties and that parties to a contract may include any clauses in their agreement that they deem appropriate provided they do not violate public policy or moral norms.
2. Parties agreeing to arbitrate may impose pre-conditions to be fulfilled before they can initiate arbitration. The burden of proving the fulfillment of such pre-conditions lies with the party requesting the arbitration.
3. Whether a pre-arbitration provision has been satisfied is a question of fact in the discretion of the trial court based on evidence without review.
4. In this case, there was no evidence that the three pre-conditions agreed by the parties had been fulfilled.

Wrongful Inclusion of a Third Party

3. Civil Appeal No. 65-2012

In Civil Appeal No. 65-2012 (dated 27 May 2012), the Dubai Court of Cassation held that the issues adjudicated upon in an arbitral award are subject to *res judicata* upon the award's issuance, even though the award's enforcement is contingent upon its confirmation. An action to set aside an award may be filed, but the doctrine of *res judicata* precludes the parties from re-litigating issues already decided, even if there is new legal or factual evidence. The court has absolute discretion to explain the terms of the arbitration agreement and the extent to which the arbitrators have complied with such terms. However, the courts may not address the substantive aspects of the award or the extent of its conformity with the law.

In this case, the respondent sought confirmation of the award before the Dubai Court of First Instance. Under the award, the respondent was awarded payment by the claimant and another party of AED 1 million plus 9% interest and arbitration costs. The respondent instituted the action in order to confirm the award so that it could be enforced. The claimant countered that the action should be dismissed on the basis that the arbitral award was void because it included a party who was not a party to the arbitration agreement.

The Court of First Instance confirmed the award, and the claimant appealed. The Court of Appeal subsequently joined the other party to the appeal. The lower court's decision was affirmed and the claimant then appealed to the Court of Cassation on the basis that the Court of Appeal had incorrectly applied the law, and contradicted articles 216 and 217 of the Civil Procedure Law (which relate to the grounds on which an award can be set aside). The claimant argued that the Court of Appeal's retroactive exclusion of the other party from the arbitration was an invalid exercise of its supervisory authority given the prohibition on judicial review of arbitral awards on the merits.

The Court of Cassation however dismissed the claimant's argument because the Court of First Instance, and in turn the Court of Appeal, had confirmed the award based on clear evidence that the respondent was legally entitled to relief against the claimant alone. The Court of Cassation found that the Court of Appeal's confirmation of the award was within the scope of its authority to explain the terms of the arbitration agreement and the extent to which the arbitrators complied with such terms, and that the Court of Appeal had not invalidly interfered with or divided the award as argued by the claimant. The appeal was dismissed with costs.

Time limits for Issuing Awards

4. Civil Appeal No. 2-2012

In Civil Appeal No. 2-2012 (dated 7 October 2012) the Dubai Court of Cassation ruled that where the parties agree on a specific time limit for the issuance of an award, they are not precluded from agreeing, expressly or implicitly, to extend such time limit, or from authorizing the arbitral tribunal to determine such extension. The courts may, upon request of any of the parties or the arbitrator, also extend such time limit by whatever period they deem appropriate, provided that the extension begins to run after completion of the previous period and not separately.

In this case, the arbitration agreement stated:

'The arbitrators shall issue an award no later than 6 months after the first hearing. The time limit may be extended upon approval of the relevant court and is renewable for a further period(s) of similar duration without having to obtain the consent of the parties to the dispute. Interruption or suspension will not count towards the time fixed for determination of the dispute.'

The first hearing in the arbitration was held on 8 December 2007. The arbitrators then issued their decision to suspend the arbitration proceedings pending the final decision of the Court of Cassation in Civil Appeal No. 241-2007, which was dismissed on 3 March 2008. The six month period therefore expired on 17 August 2008. The arbitrators made an application to the Court on 10 June 2008 to approve an extension of the time within which to issue the award until 20 September 2008, and the application was approved on 16 June 2008.

The appellant argued that the Arbitration Agreement had lapsed with the expiration of the period within which the award should have been issued under Article 210 of the Civil Procedure Law and Clause 2 of the Arbitration Agreement. However the Court of Appeal held that the award was timely because the extension began to run after the completion of the previous period.

Additional Observations on interest claim

The Court of Cassation further ruled that while arbitrations are limited to the issues which are submitted to arbitration, the parties may raise issues incidental to and directly connected with the subject matter of the dispute which they agreed in advance to refer to arbitration. A late penalty awarded to a creditor for delay in payment is incidental to the principal debt. Therefore, an agreement to arbitrate in respect of an outstanding financial obligation necessarily includes, in addition to disputes concerning the principal, related claims for late payment of interest. This meant that the appellant's argument, that the arbitral award should have been set aside because it awarded 10% interest despite the fact that the Arbitration Agreement did not include a claim for interest, was dismissed. The Court of Cassation held that the Arbitration Agreement concerning the outstanding obligation necessarily included the related claim for interest.