

Arbitration Jurisprudence in Light of UAE Federal Arbitration Law and Dubai Court of Cassation Decisions

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A. Introduction

Arbitration forms part of the alternative methods available to litigants to resolve their disputes.¹ There are several reasons why arbitration may be preferred in the UAE. These include the availability of English as the chosen language, the ability to appoint technical experts preferred by the parties to present their case, and familiarity with arbitral procedures as opposed to local court procedures. This applies particularly in Dubai, which is a trading hub with many international counterparties who prefer to have their disputes heard in a forum they are more familiar with in a language they understand.

In general, arbitration runs at the same pace as Dubai courts and at times can be more expensive than litigation. However, when compared to litigation before courts, arbitration allows for flexibility and privacy which could lead to less acrimonious relationship between the parties involved in a dispute.

Arbitration in the UAE has undergone tremendous changes over the past few years. Most recently, a stand-alone new

1 See Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 *Loy. L.A. Int'l & Comp. L. Rev.* 565, 570 (2006).

arbitration law came into existence in the year 2018,¹ effectively replacing the old arbitration regime which comprised the arbitration provisions contained in the Civil Procedures Code.² Federal Law No. 6 of 2018 on Arbitration (the **New Arbitration Law**) represented a significant progression towards making the UAE more “arbitration-friendly” jurisdiction and was largely influenced by the provisions of the UNCITRAL Model Law on International Commercial Arbitration. Some of the changes addressed the power to dismiss unmeritorious claims in arbitration proceedings, the court’s power in supporting arbitration proceedings, challenging arbitration proceedings, virtual hearings, and electronic arbitration awards.

The New Arbitration Law was nearly 10 years in the making and was eagerly anticipated by investors and practitioners as the UAE is seen as a world-class investment destination. However, the text of the New Arbitration Law is only one part of the overall picture. Crucial to the success, and understanding of the New Arbitration Law, is the UAE courts implementation of the provisions of the New Arbitration Law.

¹ See UAE Federal Law No. 6 of 2018 on Arbitration, Official Gazette No. 630 (May 15, 2018).

² See Articles 203-218 of the UAE Federal Civil Procedures Code No. 11 of 1992 and its amendments.

Dubai is considered a model and major jurisdiction for arbitration within the region.¹ Over the years, arbitration and other special tribunals have been used in Dubai to resolve disputes in an easier and practical fashion.² The quality of the New Arbitration Law would help Dubai cement its reputation as a leading seat for international arbitrations.

The Government of Dubai Legal Affairs Department, based on its mandate, represents the Dubai government and other government entities in disputes, filed by or against them, before arbitration committees and centers. In this context, the publication addresses some of the major arbitration issues that have risen through the arbitration function of the Legal Affairs Department. In addition, the publication reviews some of the most recent judicial decisions of the Dubai Courts³ concerning the provisions of the New Arbitration Law to capture the

¹ See Amer H. AL Qahtani, *The Dubai Experience: Evaluating the Effectiveness and Efficiency of International Commercial Arbitration Laws in the Gulf Arab Region*, Dissertation submitted for the Doctor of Philosophy in Law, Macquarie University, p.4 (2015).

² See Jayanth K. Krishnan and Harold Koster, *An Innovative Matrix for Dispute Resolution: The Dubai World Tribunal and the Global Insolvency crisis*, *Journal of Dispute Resolution* 387 (2016).

³ Dubai Courts mean courts established under Law on the Formation of Courts in the Emirate of Dubai No. 3 of 1992 and Law No.13 of 2016. Thus, Dubai International Financial Centre Courts are excluded from the definition "Dubai Courts". See Dr. Lothar Ludwig Hardt and *Hardt Trading F.Z.E. v DAMAC (DIFC) Company Limited et al* [2009] DIFC CFI 036.

attitude and pattern of the judiciary toward the New Arbitration Law’s main provisions.¹ The latter is important to ensure that Dubai remains consistent with modern arbitration practice across the globe.

B. Scope of application of the New Arbitration Law

In brief, Article 2 deals with the scope of application of the law. It reinforces the concept of party autonomy² but also contains interpretation issues warranting further discussion.

Article 2(1) uses the language of “conducted in the state” which has arguably led to uncertainty as to when the New Law would apply in default. In our view, there are two possible readings for Article 2(1).

¹ Cases were selected that reflect accurately the legal provisions that need to be explained or being contentious. See Mark A. Hall and Ronald F. Wright, Systematic Content Analysis of Judicial Opinions, Vol. 96.1 California Law Review 63, 70-78 (2006).

² See Dubai Court of Cassation, Commercial Case No. 272/2019 (Aug. 4, 2019); Dubai Court of Cassation, Commercial Case No. 293/2019 (June 30, 2019). No person can be forced to settle disputes through arbitration. Parties custom design arbitration by authenticating an arbitration agreement that incorporates their mutual will. Party autonomy is the source of determining issues to be arbitrated, the method of selecting the arbitrator, the language in which arbitration proceedings will be conducted, the place of arbitration, the choice of law that would govern the resolution of substantive disputes, and other related matters. See L. Ali Khan, Arbitral Autonomy, Vol. 74.1, Louisiana Law Review 1, 14 (2013).

The first reading is consistent with the ethos of the UNICITRAL Model Law to simply distinguish between international and domestic arbitration i.e. arbitrations not falling within Art. 3. On this reading, Article 2(1) would simply mean that domestic arbitrations would apply the New Law in default, unless the parties specifically chose another law to govern their arbitration. The second reading is more consistent with the actual language used and is broader than a “domestic arbitration” but it is unclear what *des minimis* threshold constitutes “conduct”? A similar issue arises in Art 3(2), where the addition of the word “conducting” after “place” makes it unclear if this is a reference to the legal seat or the physical place where an arbitration is heard. We note that the Arabic text of the UNITRAL Model Law omits the concept of “conducting”. This leads to uncertainty. For example, in the context of Article 2(1), how many hearings in Dubai would trigger Art 2(1) thus making the New Law automatically the governing law of the arbitration where the parties forgot to choose a legal seat.

In our view, it would have been ideal if the drafter had simply distinguished between the procedural rules that would apply to domestic and international arbitrations as defined, rather than introducing the concept of “conduct”. In the absence of this, our view is that courts should interpret Art 2(1) to refer to domestic arbitrations. We note that it is unlikely that

these issues will arise as the business community is now familiar with the importance of specifying their specific seat.

Moving away from the drafting issues, where the legal seat is agreed, and the legal seat is stated to be a Free Zone then in general the New Arbitration Law will not apply to arbitrations seated in a Free Zone. For instance, where the parties have agreed the legal seat to be the Dubai International Financial Centre (DIFC), then the DIFC Arbitration Law applies.¹ The issue here is that the UAE currently has only two Free Zones which have their own arbitration laws and court systems to support arbitrations: these being the Dubai International Financial Centre and the Abu Dhabi Global Market. It is therefore an open question of what would happen in the rare instance where the parties sought to commence an arbitration under a Free Zone which did not have the requisite laws and court systems to manage an arbitration.

C. Status of Arbitration: Alternative or Exceptional

In general, there exist two streams of authorities which illustrate the Dubai Courts approach to arbitration. One line of authority recognises arbitration as a valid alternative means to settle disputes among parties based on their will and

¹ See Dubai Court of Cassation, Commercial Case No. 992/2020 (Dec. 23, 2020).

agreement.¹ Arbitrators are independent and impartial parties who are selected by the disputing parties to resolve their dispute in an amicable way outside the parameters of courts,² with the impartiality and independence of arbitrators a cornerstone of arbitration.³ This is reflected in earlier dicta developed by courts in Dubai:

“... arbitration is the agreement of parties to a specific legal relationship (whether contractual or otherwise) to settle a dispute which has arisen or which may arise between them by referring it to persons selected as arbitrators... As such, arbitration is not an exceptional means of resolving disputes but an alternative means that shall be followed once its conditions are satisfied. Arbitration is a matter of the parties’

¹ See Dubai Court of Cassation, Labor Case No. 55/2020 (Feb. 4 2020); and Dubai Court of Cassation, Commercial Case No. 692/2020 (Sep. 23 2020). In the United States, the Supreme Court over the years has strongly supported arbitration as an alternative dispute resolution mechanism and adopted liberal federal policy favoring arbitration agreements. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

² See Todd B. Carver and Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, Harvard Business Review (May-June 1994).

³ See Dubai Court of Cassation, Civil Case No. 324/2020 (Nov. 25, 2020); Dubai Court of Cassation, Case No. 960/2020 (Dec. 9 2020); Dubai Court of Cassation, Commercial Case No. 1037/2020 (Dec.9 2020); and Dubai Court of Cassation, Commercial Case No. 36/2020 (Dec.7, 2020).

intent and giving expression to their intent in a written agreement, whether in the form of a separate agreement or as a clause within a contract.”¹

More recent dicta, however, in explicit terms treats arbitration as an exceptional, rather than alternative, form of dispute resolution.² In one case, the Dubai Court of Cassation decided:

“The agreement to arbitrate means waiving the right to bring an action before state courts which provides guarantees to litigants. Arbitration is an exceptional method to resolve disputes requiring special permit and clear authorization...”³

Whilst not determinative in itself, the attitude of the Dubai Courts towards arbitration provides important context for many of their decisions (discussed further below) to assess the extent the Dubai Courts have embraced the pro-arbitration spirit of the New Arbitration Law.

¹ See Dubai Court of Appeal, Case No. 8/2018 (Jan. 16, 2019).

² See Dubai Court of Cassation, Civil Case No. 261/2021 (October 7, 2021); Dubai Court of Cassation, Case No. 567/2020 (July 26, 2020); Dubai Court of Cassation, Real Estate Case No. 5/2020 (March 19, 2020); and Dubai Court of Cassation, Commercial Case No. 293/2019 (June 30, 2019).

³ See Dubai Court of Cassation, Commercial Case No. 153/2020 (March 8, 2020).

D. Dubai Court jurisdiction

The general principle has always been that the UAE Courts (including Dubai) before which an action on the merits has been initiated is obliged to dismiss that action in the event the respondent raises the existence of arbitration agreement unless the underlying arbitration agreement is found to be unenforceable, whether for being invalid or otherwise.¹

On its text, Article 8 of the New Arbitration Law has improved matters by widening the timeframe for which an objection can be filed to the courts to refer a dispute to arbitration. Previously, a disputing party had to raise the arbitration defence at the first hearing of the case. Now, a disputing party may raise this defence before making a “submission of the merits”.² As to what constitutes a “submission on the merits”, the Dubai Court of Cassation has held that submissions made before an expert is appointed to provide an expert opinion³ qualifies as “submission on the

¹ See Dubai Court of Cassation, Case No. 135/2020 (May 14, 2020); and Dubai Court of Cassation, Commercial Case No. 960/2020 (December 9, 2020).

² See Dubai Court of Cassation, Commercial Case No. 399/2019 (February 23, 2020); and Dubai Court of Cassation, Commercial Case No. 156/2020 (March 11, 2020).

³ See Dubai Court of Cassation, Commercial Case No. 604/2019 (November 24, 2019).

merits”, which is undoubtedly broader than the previous provision.

In terms of formality, the Dubai Courts have held that the following prerequisites must also be met for the courts to refer the matter to arbitration and decline jurisdiction:

- A case must be filed in court before the arbitration clause can be invoked as a defence to court proceedings. The court will not make an anticipatory ruling absent a claim.
- The arbitration agreement being relied upon must itself be valid and capable of being performed.¹
- The dispute must fall within the parameters of the arbitration agreement.²
- The party raising the arbitration defence must submit the underlying arbitration agreement with Arabic translation in case the original agreement is written in

¹ See Dubai Court of Cassation, Commercial Case No. 791/2019 (January 19, 2020). This is also required under the arbitration jurisprudence of other countries such as the U.S. See David Horton, Arbitration About Arbitration, Vol. 70 Stanford Law Review 363, 367 (February 2018).

² Dubai Court of Cassation, Commercial Case No. 1071/2019 (February 16, 2020).

a language other than Arabic.¹ There is no requirement to submit the main contract.²

In the case of a multi-party dispute, where some but not all the parties have signed the arbitration agreement, the court will assume jurisdiction on the basis that arbitration is an exceptional dispute resolution mechanism.³ In other words, if a case is filed against several parties and only some or one of them agreed to arbitration, then the dispute cannot be divided and the court will hear the dispute.⁴ Where the same parties conclude two contracts and one of them includes an arbitration clause and the other does not, then the arbitration tribunal cannot hear the dispute without the arbitration clause. In one case, the Dubai Court of Cassation decided that:

“When two parties in a particular contract agree to resolve their disputes through arbitration, this shall not affect other contracts and as such not subject to arbitration unless there is clear reference to the arbitration agreement. Whether an

¹ See Dubai Court of Cassation, Commercial Case No. 581/2019 (September 15, 2019).

² See Dubai Court of Cassation, Commercial Case No. 319/2019 (December 8, 2019).

³ See Dubai Court of Cassation, Commercial Case No. 290/2021 (April 21, 2021); Dubai Court of Cassation, Commercial Case No. 17/2020 (May 14, 2020).

⁴ See Dubai Court of Cassation, Commercial Case No. 5/2020 (March 19, 2020).

arbitration mentioned in an earlier contract shall apply to subsequent contracts is a factual matter...”.¹

In terms of public policy, unsurprisingly, the Dubai Courts still retain jurisdiction in such matters. Examples of public policy from recent case law include revocation of sale contract due to failure to register in the initial real estate registry.² This is in addition to matters reserved for the sole jurisdiction of the Dubai courts i.e. disputes arising out of commercial agency, distributorship and labour agreements and matters of public policy previously raised including personal status (marriage, inheritance and lineage) as well as provisions relation to systems of governance, freedom of trade, circulation of wealth, private ownership.

E. Arbitration Agreements

Many business contracts are entered into by incorporating by reference standard provisions included in other documents. Some of these provisions incorporated by reference are arbitration clauses.³ Disputes could arise as to the incorporation of arbitration clauses and how effective this incorporation is.

¹ See Dubai Court of Cassation, Commercial Case No. 803/2020 (October 25, 2020).

² See Dubai Court of Cassation, Real Estate Case No. 84/2020 (May 21, 2020).

³ See Domenico Di. Pietro, Incorporation of Arbitration Clauses by Reference, Vol. 21 Journal of International Arbitration 439 (2004).

Article 7.2 of the New Arbitration Law states that “An Arbitration Agreement shall be deemed to be in writing if... (b) there is reference in a written contract to any model contract, international agreement, or any other document containing an arbitration clause and the reference is such as to make that clause part of the contract”.

According to some court decisions, it is not enough that there is a reference in the written contract to a document containing an arbitration clause such as to make that clause part of the contract as this reference should be in clear and specific terms that the clause form part of the contract.¹ Therefore, a general reference to the arbitration clause may not satisfy the requirements of clear and specific terms. The reference to the arbitration clause should be clear and specific so that it does not leave any doubt as to the intention of the parties to the contract.

F. Arbitrability

The previous language of Article 203.4 of the former arbitration chapter of the Federal Procedures Law No. (11) of 1992 reads as follows:

¹ See Dubai Court of Cassation, Commercial Case No. 441/2020 (September 27, 2020); Dubai Court of Cassation, Commercial Case No. 459/2020 (September 27, 2020); Dubai Court of Cassation, Commercial Case No. 329/2020 (September 20, 2020); and Dubai Court of Cassation, Commercial Case No. 567/2020 (July 26, 2020).

“It shall not be possible to arbitrate in the matters in which the reconciliation is not possible, and it shall not be valid to agree on the arbitration unless by those who have the capacity of disposition in the litigated right”.

In a similar fashion, Article 4 of the New Arbitration Law states:

“Arbitration is not permitted in matters which do not permit compromise”

As a result of the similarities between the above provisions, courts make references to the former arbitration provisions of the Federal procedures Law No. (1) of 1992 although they were repealed by the New Arbitration Law.¹

Courts have set out examples of disputes that can and cannot be arbitrated.² For example, contractual and injurious acts can be arbitrated.³ Other disputes that can be arbitrated include the termination of sale and purchase of land

1 See Dubai Court of Cassation, Commercial Case No. 492/2020 (July 15, 2020).

2 See Chatura Randeniya and Mevan Bandara, Arbitration Procedures and Practice in the United Arab Emirates: Overview, (May 1, 2021), available at <[https://uk.practicallaw.thomsonreuters.com/6-502-3220?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/6-502-3220?transitionType=Default&contextData=(sc.Default)&firstPage=true)>.

3 See Dubai Court of Cassation, Commercial Case No. 293/2019 (June 30, 2019).

agreements.¹ On the other hand, there are certain contracts or disputes which are not arbitrable such as commercial agency, labour, and registration with respect to off-plan lands or estates.² For these latter matters, ordinary courts exercise their jurisdiction.

G. Procedural Flexibility

Article 4.3 of the New Arbitration Law states:

“Where a provision of this Law leaves the Parties free to agree on the procedure to be followed to determine a certain issue, each party may authorize a third party to choose or determine that procedure. A third party in such case includes: any natural person or Arbitration Institution inside or outside the State”

Article 4.3 clearly provides for procedural flexibility whereby the parties can select any procedural rules that control the procedure in the dispute. Based on this provision, the Dubai Court of Cassation in one case decided that the arbitrators appointed were entitled to order the arbitration procedures it deemed fit for the procedural management of the dispute and

1 See Dubai Court of Cassation, Real Estate Case No. 247/2020 (October 13, 2020); Dubai Court of Cassation, Commercial Case No. 492/2020 (July 15, 2020); and Dubai Court of Cassation, Real Estate Case No. 296/2020 (November 24, 2020).

2 See Dubai Court of Cassation, Labour Case No. 55/2020 (February 6, 2020); and Dubai Court of Cassation, Commercial Case No. 5/2020 (March 19, 2020).

were not obliged to follow UAE Civil Procedures Law.¹ Moreover, in other cases, the Dubai Court of Cassation allowed parties to select procedural rules administered by arbitration institutions such as the Arbitration Centre of the UAE Society of Engineers.² Freedom of the parties to select their own rules extend to evidence and witnesses.³

H. Interim Measures

Interim measures may be obtained under the New Arbitration Law either directly from the Courts pursuant to Article 18, or from the Tribunal pursuant to Article 21. Under Article 18, the Court's President may, at the request of either one of the parties or the Tribunal, order provisional or precautionary measures as it deems appropriate for existing, or even potential arbitral proceedings, whether prior to or during arbitration proceedings. A party's ability to seek court support after an arbitration is commenced however, is constrained by Article 21.4 which requires the Tribunal's permission. This raises important questions about the application made by the Tribunal to the Dubai Court to support an interim measure it has ordered

1 See Dubai Court of Cassation, Commercial Case No. 34/2020 (December 7, 2020).

2 See Dubai Court of Cassation, Real Estate Case No. 142/2020 (November 3, 2020); and Dubai Court of Cassation, Commercial Case No. 492/2020 (July 15, 2020).

3 See Dubai Court of Cassation, Commercial Case No. 205/2019 (June 23, 2019).

but has not been obeyed, and the level of support the Courts actually provide.

Based on Article 18.2, the chief justice of Dubai Court of Appeal is the one who has jurisdiction to hear orders for interim and conservatory measures. No other courts including the summary judge of the Dubai Court of First Instance can issue such orders.

Under Article 21, the Tribunal may itself order interim measures pursuant to a request from one party or on its own accord. Interim measures that may be granted include measures to preserve evidence that may be relevant and material to the resolution of the dispute, preserve goods which constitute part of the subject-matter of the dispute, maintain or restore the status quo pending determination of the dispute, and prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitration process itself.¹

The purpose of these interim measures is to preserve assets out of which a subsequent award may be satisfied.² In other words, a party to the arbitration procedures may request the Tribunal to take measures against assets of other parties in

¹ See UAE Federal Arbitration Law No. 6 of 2018, art. 21.

² See Lee Ana Tucker, Interim Measures under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty, Vol. 1.2 International Commercial Arbitration Brief 15 (2011)

the proceedings to ensure satisfaction of a future award against these parties.¹

Whilst the New Arbitration Law does list specific circumstances in which an interim measure may be ordered, the language used in the drafting suggests that a tribunal's power to grant an interim measure is not limited to those listed circumstances and may be tailored to fit the particular circumstances of a dispute. Article 21 states, in part:

“...take such interim or conservatory measure as the Arbitral Tribunal may consider necessary given the nature of the dispute...”

However, it is an open question whether a court will enforce a Tribunal measure which has no equivalent under the court procedures. Finally, the New Arbitration Law provides that the party requesting interim relief may be liable for any damages caused by the interim measures.²

I. Hearings

Arbitration is confidential and as such as hearings are held in private with the presence of the parties and their counsels. Indeed, the New Arbitration Law of 2018 in Article 33.1

¹ See Dubai Court of Cassation, Real Estate Case No. 252/2019 (December 25, 2019).

² *Id.* art. 21.2.

provides that arbitral hearings are to be held in camera unless the parties agree otherwise. This also has been the position adopted by Dubai Court of Cassation in its decisions.¹

COVID 19 has impacted the way court and arbitral proceedings can be conducted.² Arbitral panels have adopted the use of electronic means to conduct their hearings.³ In other words, arbitral panels can use remote hearings. This is consistent with the language used in the New Arbitration Law. Article 33.3 of the New Arbitration Law of 2018 states: “Hearings may be held through modern means of communication without the physical presence of the Parties at the hearing”.

Notwithstanding the apparent convenience of holding hearings by electronic means, feedback on its practicability has been mixed. Amongst other things, the lack of face to face interaction may lead to a lack of focus by the tribunal or the parties and cross-examination of witnesses is noted to be notoriously more difficult.

¹ See Dubai Court of Cassation, Commercial Case No. 34/2020 (December 7, 2020).

² See Neil A.F. Popović and James V. Fazio, *Insisting on Live, In-person Arbitration Hearings During The Pandemic*, Vol. XI, Number 237, *The National Law Review* (August 25, 2021).

³ See Dubai Court of Cassation, Commercial Case No. 36/2020 (December 7, 2020).

The New Arbitration Law of 2018 is flexible enough to accommodate the use of technology in conducting arbitration hearings. More specifically, Article 28.2 of the law provides that:

The Arbitral Tribunal may, unless otherwise agreed by the Parties:

“(b) hold arbitration hearings with the Parties and deliberate by modern means of communication and electronic technology. The Arbitral Tribunal shall deliver or communicate the minutes of hearing to the Parties”.

As such, arbitration tribunals can use modern technologies such as videoconference to hold hearings, deliberations, and cross-examinations of witnesses.¹ The purpose of such use is to make processes more accessible to users as well as savings and efficiencies.²

Notwithstanding the apparent convenience of holding hearings by electronic means, feedback on its practicability has been mixed. Amongst other things, the lack of face to face interaction may lead to a lack of focus by the tribunal or the

1 See Dubai Court of Cassation, Commercial Case No. 34/2020 (December 7, 2020); and Dubai Court of Cassation, Real Estate Case No. 247/2020 (October 13, 2020).

2 See Antonia Birt and Matei Purice, *New Technologies and the UAE Federal Arbitration Law* (May 24, 2021).

parties and cross-examination of witnesses is noted to be notoriously more difficult.

J. Signing of the Arbitration Award

The issue of signing an arbitration award is a hotly debated issue in UAE law and jurisprudence. Signature is not a formality but can lead to invalidity of an arbitration award.¹ In other words, if the award is not signed by an arbitrator or some of the award pages are not signed, an arbitration award can be declared invalid. Indeed, the signature requirement is considered as a matter of public policy.²

According to the old Article 212.5 of the Federal Civil Procedure Law:

“The arbitral award shall be made by a majority and shall be given in writing along with any dissenting opinion and shall, in particular, include a copy of the arbitration agreement, a summary of the arguments and documents presented by the parties, the grounds and context of the award, the date and place of issue of the award and the

1 See Matthew Heywood and Neeva Rice, The Simple Things – Enforcement of Arbitration Awards in the UAE, June 4, 2015 available at <<http://constructionblog.practicallaw.com/the-simple-things-enforcement-of-arbitration-awards-in-the-uae/>> (last visited Oct. 29, 2021)

2 See Gordon Blanke, Your Signature, Please: Recent Developments under Article 41(3) of FAL, Practical Law: Arbitration Blog (August 20, 2020).

signatures of the arbitrators. Should one or more arbitrators refuse to sign the award, this must be noted in the award; the award shall be valid if signed by a majority of the arbitrators.”

In a similar fashion, Article 41.3 of the New Federal Arbitration Law of 2018 states:

“The award shall be signed by the arbitrators and the signatures of the majority of the arbitrators shall suffice, provided that the reason for any omitted signature is stated.”

Although signing an arbitration award is mandatory, one cannot help but notice that the language used in Article 41.3 does not provide guidance and the details needed to remove any ambiguities regarding the issue of signing an arbitration award. Questions arise as to the nature of the signature and what parts of the awards should be signed. However, decisions made by the Dubai Court of Cassation helped in providing guidance.

First, there is no need to sign the cover page of the award on the condition that details such as the names and addresses of the parties, seat of the arbitration, and the rules applicable to the arbitration are included in the award.¹ In addition, signature of the arbitration award means signing both the decision itself

¹ See Dubai Court of Cassation, Real Estate Case No. 51/2020 (May 14, 2020).

and the reasoning.¹ If the reasoning is contained on a page that is separated from the substantive part of the award, all pages should be signed by the arbitrator.²

K. Challenge of Awards

Article 53 of the New Arbitration Law of 2018 provides a list of the grounds for challenge of an award. The grounds provided in article 53 are similar to the grounds stated in the repealed article 216 of UAE Federal Procedures Law No. 11 of 1992. At any rate, the grounds stated in Article 53 are procedural in nature.³ For example, an arbitration award can be challenged because no arbitration agreement exists, a party was incompetent or under some incapacity, a party to the arbitration fails to present its case because it was not given proper notice of the appointment of an arbitrator, composition of the arbitral tribunal or appointment of any arbitrator was not in accordance with the law or the parties' agreement, and arbitral proceedings were marred by irregularities that affected the award.

The Dubai Court of Cassation has issued many decisions to clarify some issues surrounding Article 53 of the New Arbitration Law of 2018. Unless proven otherwise, there is a presumption in favor of compliance in implementing an

¹ See Dubai Court of Cassation, Commercial Case No. 1083/2019 (June 14, 2020).

² *Id.*

³ See Dubai Court of Cassation, Commercial Case No. 144/2020 (March 18, 2020).

arbitration award.¹ The list of grounds for challenging the arbitration award set out in Article 53 is exhaustive.² Thus, there is no room for expanding the list or adding other reasons that are not captured in Article 53 of the UAE Federal Arbitral Law of 2018.³ In addition, there is no room to re-examine the substance of the award.⁴ According to some decisions issued by the Dubai Court of Cassation, the grounds provided in Article 53 should be construed narrowly.⁵ The challenging party should prove its case.⁶

Nullification of an arbitration award does not affect the underlying arbitration agreement.⁷ In other words, the arbitration agreement remains valid and enforceable even after a successful challenge of an award. However, nullification of an arbitration award does affect the underlying arbitration agreement if the ground for annulment is the absence,

¹ See Dubai Court of Cassation, Commercial Case No. 1003/2019 (January 1, 2020); Dubai Court of Cassation, Commercial Case No. 1013/2019 (January 19, 2020); and Dubai Court of Cassation, Commercial Case No. 735/2020 (October 4, 2020).

² See Dubai Court of Cassation, Real Estate Case No. 36/2020 (December 7, 2020); Dubai Court of Cassation, Commercial Case No. 516/2020 (July 15, 2020); and Dubai Court of Cassation, Commercial Case No. 807/2020 (October 25, 2020).

³ See Dubai Court of Cassation, Commercial Case No. 29/2020 (December 7, 2020).

⁴ See Dubai Court of Cassation, Civil Case No. 246/2020 (September 24, 2020).

⁵ See Dubai Court of Cassation, Commercial Case No. 1013/2019 (January 19, 2020); and Dubai Court of Cassation, Commercial Case No. 1118/2019 (February 19, 2020).

⁶ See Dubai Court of Cassation, Commercial Case No. 168/2020 (March 18, 2020).

⁷ See Dubai Court of Cassation, Commercial Case No. 215/2019 (July 7, 2019).

extinction, or lack of enforceability of the arbitration agreement itself.

Courts are required to give priority to upholding the procedural validity of the award over any ground for nullifying an arbitral award as mentioned in Article 54.6 of the New Arbitration Law.¹ Any challenge to the arbitration award should be brought before the courts within 30 days of the arbitral award being finalized.² The challenge can only be brought before Court of Appeal, in a writ separate from the application to ratify the award, and not Court of First Instance.³ In other words, a party to a dispute can challenge the arbitral award in a stand-alone application or while responding to an application to ratify an award by the winning party to a dispute.

M. Public Policy

There is no clear-cut definition of public policy and it remains elusive as a concept. However, some scholars tried to define public policy as a concept founded on the current needs

¹ See Dubai Court of Cassation, Commercial Case No. 1083/2019 (June 14, 2020).

² See UAE Federal Arbitration Law No. 6 of 2018, art. 54.2.

³ See A. Dimitrakopoulos, *Arbitration Practice in the UAE*, Vol. 16.4 Arab Law Quarterly, 398-403 (2001).

of the community and depends not on evidence but on judicial impression of what is or is not in the general public interest.¹

The concept of public policy is referred to in several UAE laws. For example, Article 3 of the UAE Federal Law on Civil Transactions No. 5 of 1985 provides the following “ Shall be considered of public policy, provisions relating to personal status, such as marriage, inheritance, lineage, provisions relating to systems of governance, freedom of trade, circulation of wealth, private ownership and other rules and foundations on which the society is based, provided that these provisions are not inconsistent with the imperative provisions and fundamental principles of the Islamic Shari'a”.

By its nature, public policy takes precedence over the interests of individuals.² Public policy consideration is mandatory. Parties to an arbitration agreement or any other agreement cannot by their agreement contract out of public policy.³

Article 53.2.b of the New Arbitration Law gives the court the right to set aside an arbitration award if it is in conflict with the public order and morality of the state. The New Arbitration

¹ See D Walker, *The Oxford Companion to Law*, p. 1015 (1980) (Oxford: Clarendon Press).

² Dubai Court of Cassation, Commercial Case No. 22/2019 (March 27, 2019).

³ See Dubai Court of Cassation, Commercial Case No. 1003/2019 (January 1, 2020).

Law does not provide definition of “public order” or “morality”. Nevertheless, decisions made by the Dubai Court of Cassation have shed some light on the concept of “public policy”. For instance, in one case, the Dubai Court of Cassation defined public policy to include the rules that aim to achieve the supreme interest of the country, whether in terms of political, social or economic and related to the natural, material and moral condition of an organized society.¹ In another case, the Dubai Court of Cassation ruled that because of public policy considerations issues arising out of interim property registration relating to land sale could not be arbitrated.² In another case, on the basis of public policy consideration, failure to comply with the signature requirement prompts the invalidity of an award.³ The signature of the arbitrator is the only legal confirmation of his acknowledgement and oversight of the award. As a matter of public policy, the reasoning and decision of an arbitration award must be signed by the arbitrator.⁴

Most recently, the Dubai Court of Cassation decided that a dispute was not arbitrable based on public policy consideration where a claim was brought seeking relief on a joint and several basis against two parties acting under two different contracts; one with an arbitration clause and one without arbitration

1 See Dubai Court of Cassation, Commercial Case No. 1003/2019 (January 1, 2020); and Dubai Court of Cassation, Commercial Case No. 22/2019 (March 27, 2019).

2 See Dubai Court of Cassation, Case No. 180/2011 (February 12, 2012).

³ See Dubai Court of Cassation, Case No. 1083/2019 (June 14, 2020).

⁴ See Dubai Court of Cassation, Case No. 403/2020.

clause.¹ In this particular case, the dispute cannot be split but rather should be heard in one forum as these underlying transactions are closely related.

¹ See Nasser Ali Khasawneh and Roberta Wertman, 2021 Dubai Court of Cassation Ruling: A Public Policy Exception to Arbitrability under UAE Law, Nov. 16, 2021.

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