

The Dubai Court of Cassation Rules on the Effect of the Failure to Administer an Oath in Arbitral Proceedings

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Introduction

Witness evidence constitutes a valuable tool for the arbitral tribunal in its fact-finding mission. In this regard, it is no surprise that the presentation of such evidence has been addressed by the legislator.

Article 211 of Federal Law No. 11 of 1992 Concerning the Civil Procedures Code (the 'CPC'), the previous UAE Arbitration Chapter, provided that "arbitrators should administer an oath to the witnesses and whoever makes a false statement before the arbitrators shall be deemed to have committed the crime of perjury." The Dubai Court of Cassation has held that the form of such an oath shall be as prescribed by Article 41 of the Federal Law No. 10 of 1992 on Evidence in Civil and Commercial Transactions (the 'Evidence Law') otherwise the finality of the arbitral award could be compromised.

The new UAE Arbitration Chapter, which came into effect in June 2018 as a result of the enactment of Federal Law No. 6 of 2018 concerning Arbitration (the 'Federal Arbitration Law') appears to have relaxed the previous and express requirement for taking witness testimony on oath, in that it allows parties to agree to depart from the application of the provisions of the Evidence Law. Specifically, Article 33(7) of the Arbitration Law provides that "unless otherwise agreed by the parties, hearing the statements of the witnesses, including the experts, shall be carried out as per the effective laws of the State."

The effect of an arbitral tribunal's failure to administer an oath to witnesses was recently addressed by the Dubai Court of Cassation in Commercial Cassation No. 364 of 2019 (hearing of 19 May 2019).

Procedural Background

The Respondent, the award-creditor, sought and obtained a favourable order dated 14 October 2018 to ratify and enforce a Dubai International Arbitration Centre ('DIAC') arbitral award. The Appellant, the award-debtor, filed a grievance before the Dubai Court of Appeal seeking to challenge the arbitral award on several grounds including, the arbitral tribunal's failure to administer the oath to witnesses in accordance with Article 211 of the CPC.

The Dubai Court of Appeal rejected the grievance in a decision dated 20 February 2019 pursuant to which the Appellant filed for cassation.

In its cassation, the Appellant submitted that the Dubai Court of Appeal's decision to ratify the arbitral award violated the law and constituted an error in the application of the law given that, among other things, the arbitral award was null as a result of the arbitral tribunal's failure to administer the oath to the witnesses.

Decision of the Dubai Court of Cassation

The Dubai Court of Cassation rejected the Appellant's cassation and confirmed the earlier decisions. In doing so, the legal question that the Dubai Court of Cassation had to consider was whether the failure of an arbitral tribunal to administer the oath to witnesses during the proceedings shall cause the arbitral award to be ultimately annulled.

In order to answer the question laid before it at the cassation stage, the Dubai Court of Cassation first stated the legal principle pertaining to the scope of admissibility of the grounds for challenge laid before it. In particular, the Dubai Court of Cassation provided that only the reasons referred and relied upon in support of the arbitral award are admissible grounds for challenge. Reasons referred to, but not relied upon, or reasons which merely serve to corroborate the arbitral tribunal's views, and which are not indispensable, meaning that the absence thereof do not impact the dispositive section of the award, shall have no bearing on the viability of the grounds for challenge.

Furthermore, the Dubai Court of Cassation reconfirmed the principles relied upon by the Dubai Court of Appeal in the issuance of the decision against which the cassation was filed. In this regard, the mandatory legal requirement under Article 211 of the CPC for arbitrators to administer the oath to the witnesses before they testify was highlighted. Therefore, arbitrators cannot avoid their obligation to administer the oath to the witnesses even if the parties do not object to the failure to follow the oath procedure when hearing the testimony of witnesses. The failure to administer the oath to a witness constitutes a non-waivable irregularity which taints the proper conduct of the arbitration proceedings and which could ultimately render the final award null and void.

Notwithstanding, the Dubai Court of Cassation rejected the cassation on the basis that the arbitral award was not based upon the testimony of the witnesses in its reasoning or dispositive sections. Accordingly, the arbitrators' failure to administer the oath to the witnesses in the case at hand shall not have any impact on the validity of the arbitral award because it was not based on the testimony of the witnesses for which an oath was not administered by the arbitral tribunal.

Conclusion

The decision of the Dubai Court of Cassation in Commercial Cassation No. 364 of 2019 is interesting in that it deals with the application of the previous UAE Arbitration Chapter of the CPC, with regards to the question of the administration of the oath to the witnesses, after the entry into effect of the Federal Arbitration Law. Indeed, the decision confirms a shift towards a less restrictive approach. In this regard, the decision is quite insightful and promising: the arbitral tribunal's failure to administer an oath to the witnesses before they testify in arbitral proceedings could taint the validity of the arbitral award if the latter based its reasoning or ruling on the defective witness testimony. We would expect a decision to equally apply under the new UAE Arbitration Chapter absent an agreement by the parties to depart from such a requirement pursuant to Article 33(7) of the Federal Arbitration Law.

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