

Agreeing to Institutional Arbitration? Important Takeaways from the Daman - Oger Saga

Hassan Arab - Partner, Regional Head of Dispute Resolution - Litigation / Arbitration
h.arab@tamimi.com - Dubai International Financial Centre

Sara Koleilat-Aranjo - Partner, Arbitration - Arbitration / Litigation / Mediation
- Dubai International Financial Centre

Maria Darwish
m.darwish@tamimi.com - Dubai, UAE



The ‘finality’ of an arbitral award in a specific seat is often a determining factor for parties when considering and devising the dispute resolution mechanism that shall govern their prospective or ongoing dispute. Parties to a dispute are usually arguing over a right and they want to make sure that the final resulting award, of an often lengthy arbitral process, will be smoothly enforced and will therefore enable them to assert and recoup their disputed right should they prevail. While annulment grounds in the United Arab Emirates (“UAE”), under both the old and new regimes, are usually limited to procedural defects, the formalistic nature of arbitration, considered to be “an exceptional means of resolving disputes” have led us to note that annulled awards may not be that uncommon after all.

The Dubai Court of Cassation judgment in Commercial Cassation No.1042/017 (hearing of 8 April 2018), which has annulled, and after a lengthy judicial battle, the final award issued in DIAC Case No. 261/2012 provides useful insights as to how carefully arbitration agreements must be crafted well before a dispute has arisen. The thirteen page judgment is a thought-provoking piece addressing several jurisdictional issues that often arise once the arbitral process has ended. This article is limited in scope to the procedure before the Dubai courts and shall solely address the grounds for annulment perused and applied by the Dubai Court of Cassation to declare the final award annulled.

Factual Background

Daman Real Estate Capital Partners Limited (“Daman”) and Oger Dubai LLC (“Oger”) entered into a contracting agreement on 23 July 2008 through which Oger was to undertake construction works for the Burj Daman project in the Dubai International Financial Centre (“DIFC”). Pursuant to clause 67.3(b) of the contracting agreement (“Arbitration Agreement”), the parties have agreed to resolve any dispute, which cannot be amicably settled, by arbitration pursuant to the Dubai Chamber of Commerce and Industry Rules of Arbitration and Conciliation (“DCCI Rules”) by a sole arbitrator or more to be appointed in accordance with the DCCI Rules.

After a few years into the life of the contracting agreement, a dispute arose between the parties, and Oger filed a request for arbitration with DIAC. Daman raised a jurisdictional objection arguing that “DIAC lacked jurisdiction” and that the DIAC Rules were inapplicable as the Arbitration Agreement was defective on the basis that it referred to a Centre and institutional rules which were no longer in existence at the time of entering into the Arbitration Agreement.

The above factual matrix gives rise to two main legal issues. First, is the validity of an arbitration agreement compromised if it was properly entered into but referred to an arbitration centre and/or institutional rules which were no longer in existence? Second, and assuming the answer to the first question is yes, what is the weight and impact of such defects on the arbitration agreement itself, the underlying arbitral proceedings and ultimately the award?

Procedural Background

After a decision was made granting jurisdiction to the arbitral tribunal formed pursuant to the DIAC Rules, the arbitral tribunal issued an award in favour of Oger, ordering Daman to pay Oger a sum of AED 791,895,384 in relation to their claims in addition to other administrative fees, legal costs and interest (“DIAC Award”).

Upon the issuance of the award, Oger applied to the DIFC Courts in order to have it recognised and enforced, as Daman is an entity registered and located in the DIFC. The DIFC Courts issued a freezing order, winding-up order and order to cease trading against Daman.

While the DIFC Courts were hearing the matter, Daman filed a request before the Dubai Courts seeking to annul the DIAC award and requesting that the DIFC Court proceedings be stayed pending the outcome of the present annulment proceedings.

The Dubai Court of First Instance ruled that it did not have jurisdiction to hear the case on the grounds that jurisdiction belonged to the DIFC Courts. Daman appealed the decision (Commercial Appeal No. 144/2016) and lost. Daman filed for Cassation (Commercial Cassation No. 480/2016) and the Dubai Court of Cassation reversed the Court of Appeal’s decision and referred the case back to the Court of First Instance for reconsideration on the basis that Daman had then referred the dispute to the Judicial Tribunal as the competent authority to decide on conflict of jurisdiction between DIFC and Dubai Courts. In decision Cassation No.1 of 2016, the Judicial Tribunal confirmed that a conflict existed between the two jurisdictions and concluded that the Dubai Courts shall have jurisdiction to hear the annulment case filed by Daman and ordered the DIFC Courts to “cease to entertain” the dispute.

The case was therefore referred to Dubai Court of First Instance on remand. On 29 March 2017, the Dubai Court of First Instance ordered the partial annulment of the DIAC Award, awarding legal costs and expenses and upheld the remaining parts of the award.

Both Parties appealed this decision. The Dubai Court of Appeal (Commercial Appeals No.806/2017 and 830/2017) decided that the Arbitration Agreement is void as it is impossible to perform. The parties’ choice

of arbitration centre and rules were no longer in existence on the date on which the contracting agreement, and the underlying Arbitration Agreement, were entered into. The Dubai Court of Appeal therefore quashed section of the primary ruling and ordered the annulment of the DIAC Award as a result of the tainted Arbitration Agreement.

Oger filed for cassation (Commercial Cassation No. 10442/2017) on the basis of four legal grounds. On 8 April 2018, the Dubai Court of Cassation rejected Oger's cassation and reconfirmed the annulment of the DIAC Award.

Commentary

Before we outline and discuss the Court of Cassation's judgment, we shall provide a snapshot on the arbitration centres and institutional rules subject matter of this decision and how they interplay.

The DCCI Rules, which were issued pursuant to Decree No.2/1994, were in effect and applied, in the event of an agreement thereto, under the umbrella of the Dubai Chamber of Commerce and Industry's Arbitration and Conciliation Centre ("Dubai Chamber Centre"), to all arbitrations from 1994, up until the entry into force of the Dubai International Arbitration Centre ("DIAC") Rules on 7 May 2007. DIAC Statute Rules No. 10/2004, which set up DIAC, provided in its Article 26(a) that "The Centre [DIAC] established under this Statute shall replace the Conciliation and Commercial Arbitration Centre of Dubai Chamber of Commerce and Industry and shall carry out the duties of the latter. All the rights and obligations of the Conciliation and Commercial Arbitration Centre of Dubai Chamber of Commerce and Industry shall be transferred to the Centre." In relation to the application of the DIAC Rules, Article 26(b) of the DIAC Statute Rules No. 10/2004 provided that "The Centre [DIAC] shall implement the Conciliation and Commercial Arbitration Act of Dubai Chamber of Commerce and Industry No. 2 of 1994 until the Rules of Conciliation and of Arbitration are issued in accordance with Article 4 hereof."

In reaching its decision, the Dubai Court of Cassation adopts a strict and conservative approach by paradoxically basing it on the consensual nature of arbitration. The Court stated that arbitration is founded on two principles : (i) the will of the parties to agree to arbitrate and (ii) the legislator's recognition of such a will by allowing the parties to have their dispute resolved through arbitration. Since arbitration constitutes a deviation of a party's right to have its dispute heard and resolved through the state courts, the legislator has imposed certain guarantees on the validity of arbitration. The Court cites the conditions of validity of arbitration agreements as laid down in Article 203 of Federal Law No. 11 of 1992 Concerning Issuance of the Civil Procedures Code ("CPC"), such as the need for an arbitration agreement to be made in writing and between persons with the requisite authority to enter into arbitration.

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The Court of Cassation goes on to note that while there was an agreement among the parties to arbitrate,

such an agreement is null and void as it refers to an arbitration centre and rules which were no longer in existence at the time of entering into the Arbitration Agreement. In other words, and according to the Court, the *prima facie* impossibility in putting the Arbitration Agreement into execution shall command its invalidity, taint any related arbitral proceedings and lead to the annulment of the resulting award. According to the Court of Cassation, such defects may only have been cured through a subsequent express agreement among the parties to refer their dispute to the proper centre and rules.

While the agreement of the parties shapes and drives the arbitral process, it is cardinal that a distinction is made between the parties' agreement to arbitrate and if such an agreement exists, the parties' agreement to the procedural framework to govern their prospective arbitration. In the present case, the first prong appears to have been satisfied: the parties have clearly agreed to refer their prospective dispute, subject to their failure to reach an amicable settlement, to arbitration. In relation to the second prong, the parties appear to have agreed that their prospective arbitration would have to be conducted under the auspices of the Dubai Chamber Centre and the DCCI Rules at a time when such a centre and rules were no longer in existence and were replaced respectively by DIAC and the DIAC Rules. Given the consensual nature of arbitration, the good faith of the parties should command their conduct throughout the proceedings. It is our view that a party engages in a bad faith conduct when it calls for the invalidity of the arbitration agreement that it has wilfully agreed to as a result of its reference to a centre and rules which were replaced at the time of entering into the said arbitration agreement.

We are of the view that the administration of the dispute by DIAC pursuant to the DIAC Rules which merely replaced the Dubai Chamber Centre and DCCI Rules does not constitute a material attack on the sanctity of the arbitral process in the case at hand given that they tend to refer to the parties' intention. It is however regrettable that the Court had to adopt such an orthodox approach and declare the Arbitration Agreement and the resulting proceedings invalid *ab initio* when it could have safeguarded them on the basis of several grounds, including through the application of Article 4(a) of the Statute Rules of DIAC, as amended by Decree No.58/2009, which provides: "The Centre shall apply the arbitration rules that are in effect to all disputes. The same shall apply when the parties' agreement refer to the application of the Conciliation and Arbitration Rules of the Dubai Chamber of Commerce and Industry Number (12) of 1994." The Court has however chosen to conduct a limited reading of this article declaring that its application is limited in scope to the parties' agreement to apply the DCCI Rules prior to the entry into force of the DIAC Rules.

Judgment Takeaways

The judgment was issued prior to the enactment of Federal Law No. 6 of 2018 on Arbitration ("Arbitration Law"), which repealed Articles 203 - 218 of the CPC, the former UAE chapter on arbitration, that the Court in this present case relied upon to order the annulment of the DIAC Award. Given that Article 59 of the Arbitration Law provides that the new regime shall apply to "all ongoing arbitrations even if based on a prior arbitration agreement", the new regime is expected to provide more legal security and certainty in the event of a similar factual matrix. Without delving into much detail on the guarantees provided under the Arbitration Law, as these are outside the scope of this article, we note for example that Article 25 of the Arbitration Law which deems a party to have waived its right to object if such a party continues its participation in the arbitral proceedings even if it knows that there is a violation to the arbitration agreement and does not raise such an objection within the stipulated time. With that said, the Arbitration Law also provides for strict conditions on when an award can be annulled, which include instances where an arbitration agreement is either inexistent or invalid.

The approach of the UAE Courts pursuant to the new regime remain to be tested and, in order to err on the side of caution, we hereby set out some practical points, based on the case at hand, that the users may wish to consider when agreeing to arbitration or when already involved in an arbitration:

- Parties should ensure that their arbitration agreements have been entered by persons with the requisite authority to bind the relevant party to arbitration;
- While arbitration agreements do not have to be lengthy, careful thought and consideration must be taken into account when devising and shaping them;
- While the requirement that the arbitration agreements need to be in writing has been upheld under the new regime (Article 7.1 of the Arbitration Law), it is crucial that the procedural framework, e.g. institutional, ad hoc, that shall govern their prospective dispute is also reflected in writing;
- Part of the drafting of an arbitration agreement, parties are advised to conduct their due diligence on a specific centre and rules and make sure that they are making an adequate reference, both as to the name of the centre and/or rules and the version of the rules in force, in their arbitration agreement;
- If an arbitration agreement suffers from poor drafting and is missing an element or is referring wrongfully to a centre and/or rules, the parties are advised to enter into a subsequent written arbitration agreement once their dispute has arisen, either through a standalone agreement or through the terms of reference.

For further information, please contact [Dr. Hassan Arab \(h.arab@tamimi.com\)](mailto:h.arab@tamimi.com) and [Sara Koleilat-Aranjo \(s.aranjo@tamimi.com\)](mailto:s.aranjo@tamimi.com)