

Arbitration in the UAE: Pacta Sunt Servanda

John Gaffney - Senior Counsel - Arbitration / Competition
- Abu Dhabi



Introduction

In Appeal No. 8 of 2018, which concerned a grievance against the recognition and enforcement of an arbitral award, the Dubai Court of Appeal's decision heralded a significant change in approach to arbitration-related matters under, and as a result of, the UAE Federal Arbitration Law (No. 6 of 2018) (the 'Arbitration Law'). This article reviews the Court's judgment dated 16 January 2019, and considers its potential implications for national and international arbitration in the UAE.

Background to the Judgment

The Appellant and the first-named Respondent (the 'Parties') entered into a contract (the 'Contract'), containing an arbitration agreement, the existence of which, as noted later in this article, was not in dispute. (The second-named Respondent was the arbitral tribunal (the 'Arbitral Tribunal')).

The arbitration agreement, which was contained in Clause 67(3) of the Contract, provided for arbitration of "any dispute a) in respect of which the engineer's decision, if any, has neither become final and binding under clause 67(1) and b) nor been amicably settled during the period mentioned in clause 67(2)."

The Court did not cite the entire arbitration agreement in full, but it would appear to have provided for arbitration under the DIFC-LCIA Rules of Arbitration (since the case number would appear to be formatted in line with that adopted by the DIFC-LCIA). The seat of the arbitration is not specified either, but it is assumed that Dubai was the seat, since the matter came before the Dubai Court of Appeal.

One of the parties (the 'Arbitration Claimant') commenced arbitration proceedings (the 'Arbitration') on 26 November 2017 (i.e., before the entry into force of the Arbitration Law). On 17 January 2018, the other

party (the 'Arbitration Respondent' (and Appellant)) challenged the jurisdiction of the Arbitral Tribunal (also before the entry into force of the Arbitration Law).

Later that year, after the Arbitration Law had entered into force, the Arbitral Tribunal issued its preliminary award (the 'Award') on jurisdiction on 1 November 2018, dismissing the jurisdictional objection, and finding that the Arbitration Claimant was entitled to commence arbitral proceedings under sub-clause 67(3) of the Contract.

Two weeks later, the Arbitration Respondent/Appellant challenged the Award before the Dubai Court of Appeal (the 'Grievance') and sought:

1. a summary decision staying the arbitration proceedings pending determination of the Grievance;
2. an order quashing the Award and ruling anew that the Arbitral Tribunal had no jurisdiction due to the alleged failure of the Arbitration Claimant to comply with the Contract and non-compliance with the pre-conditions to arbitration; and
3. an order obliging the Arbitration Claimant to pay the relevant court fees, costs and advocate's fees.

The Judgment

The Court dismissed the Grievance, on the following basis.

1. The effects of Article 19(2) of the Arbitration Law

The Court made two findings pursuant to Article 19(2) of the Arbitration Law, which provides in relevant part:

1. The Arbitral Tribunal shall decide on any plea as to the jurisdiction, including the plea claiming the non-existence or the invalidity of the Arbitration Agreement, or that it does not cover the subject matter of the dispute. The Arbitral Tribunal may decide on the same either in a preliminary award or in the final arbitral award issued on the subject matter of the dispute.
2. If the Arbitral Tribunal decides in a preliminary award that it is competent, any of the parties may, within fifteen (15) days from the date of being aware of that decision, request the court to rule on that matter. The court shall decide on the request within thirty (30) days from the date of its submission to the court, and its decision shall not be subject to appeal by any means. The arbitral proceedings shall be suspended until the court decides on the request unless the Arbitral Tribunal decides to continue with the proceedings at the request of one of the parties.

a. Timeliness of the Grievance

First, the learned Court held that the Appellant filed its Grievance in a timely manner, pursuant to Article 19(2), since it did so within 15 days of the date the Arbitral Tribunal issued the Award.

b. Request for a Stay on the Arbitration

Second, the Court found that "the essence of Article 19 is that arbitral proceedings are stayed by operation of law". Noting that "there is nothing on record to indicate that the Arbitral Tribunal had decided to continue with the proceedings," it held that the Appellant's request for a stay of the Arbitration was unmerited and should be disregarded.

2. The Merits of the Grievance

In considering the merits of the Grievance, the Court referred to:

- Articles 20(1) of the UAE Arbitration Law, which provides:
 - The plea as to the jurisdiction of the Arbitral Tribunal shall be filed within the period prescribed for the submission of the defence by the Respondent referred to in Article (30) of this Law. If the plea is concerned with the fact that the Arbitration Agreement does not cover the matters raised by the other party while the dispute is being entertained, the plea must be filed no later than the hearing following the hearing in which the plea is filed; otherwise, the right to file such plea shall lapse. In all cases, the Arbitral Tribunal may accept a late plea if it deems the delay to be justified.
- Article 59 of the UAE Arbitration Law, which provides:
 - The provisions of this Law shall apply to any Arbitration in progress at the time of its entry into force, even if it is based on an earlier Arbitration Agreement, provided that the proceedings carried out in accordance with the provisions of any previous legislation shall remain valid.
- Articles 1(1) and 1(3) of the Civil Procedure Law, which provide:
 - The laws on procedure shall apply to proceedings in progress, awaiting determination and to proceedings not concluded before such laws took effect.

3. Exclusions:

- New time limits applicable to the hearing and forfeiture of proceedings or other procedural time limits shall only apply from the date of coming into force of the introducing law.

a. No Restrictions Pre-Arbitration Law to Challenge Arbitral Jurisdiction

The Court first confirmed that the Arbitration Law entered into force on 16 June 2018. Noting that the jurisdictional challenge was filed before the Arbitral Tribunal before the entry into force of the UAE Arbitration Law, the Court found there were no provisions, at the time, restricting the Appellant's right to file a plea regarding the Arbitral Tribunal's jurisdiction.

b. Contractual Preconditions to Arbitration

Second, turning to the Appellant's assertion that the Arbitral Tribunal lacked jurisdiction on the ground that the Arbitration Claimant did not follow the contractually agreed procedure, the Court observed that:

- an arbitration agreement must satisfy certain substantive and formal requirements in order to be considered existent, valid and, therefore, a legally binding contract;
- it is settled that a contract is the law of the contracting parties and must be mutually honoured;
- a contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith; and
- the contract is not restricted to its express obligations - it includes that which is appurtenant to it by virtue of the law, custom, and nature of the disposition.

Hence, the Court concluded that contractual obligations are to be performed "according to the nature of the disposition and in good faith, as deduced in our discretion as fact finders."

The Court noted that "parties do not dispute the fact that their agreement calls for disputes which arise between them in relation to their contract to be resolved by arbitration nor do they dispute the fact that a dispute has arisen between them", since the Arbitration Claimant had invoked the arbitration clause in related commercial judicial proceedings.

Further, it found that the Appellant had breached the Contract on the basis that it "should give the Arbitration Claimant [...] notice of any change of engineer, which they failed to do in this instance." Therefore, the Court concluded the Appellant's "failure to comply with their agreement with the [Arbitration Claimant] by giving written notice in the engineer's name, the [Appellant's] reliance on the arbitration clause in the property dispute case would entitle the [Arbitration Claimant's] to proceed to arbitration."

Finally, and aside from the above, the Court observed that:

“the escalation of the differences between the parties and the [...] request for arbitration confirms a lack of willingness to reach an amicable settlement. To ensure the effective performance of the parties’ contract containing the arbitration clause, arbitration should be commenced after the parties invoked the arbitration clause for their dispute. Anything else would unnecessarily protract the proceedings.”

The Court thus concluded that “in taking this approach and ruling that it has jurisdiction to hear the arbitration case, the Arbitral Tribunal got it right on the facts and law, requiring that the grievance be dismissed”. It awarded costs against the Complainant pursuant to Articles 133(1) and (2), and 168 of the Civil Procedure Law (as well as advocate’s fees).

Commentary

The Court’s judgment in this case is notable not only for its strict adherence to the provisions of the Arbitration Law, but also for its willingness to embrace the spirit of the Law.

In the former respect, the Court signalled its intent to strictly apply both the time limits imposed by Article 19 of the Arbitration Law in considering grievances filed thereunder, as well as its detailed provisions in considering the scope of reliefs to be granted in connection with any such applications.

In the latter respect, the Court’s preface to its analysis of the merits of the Grievance in this case is especially notable:

“...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. The parties would determine the identities of the arbitrators or request the arbitral tribunal or a permanent arbitral institution to administer the arbitral process.

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’ 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. In all cases, the law requires that such agreement be evidenced in writing.”

These observations are significant, especially the observation that “arbitration is not an exceptional means of resolving disputes”. This differs with the general approach of the UAE courts under the former arbitration provisions of the Civil Procedure (Articles 203 to 218) that regarded arbitration as an exception to their jurisdiction (see e.g., the ruling of the Dubai Cassation Court in Appeal No. 274 of 1993, in which it held that arbitration “being an exception means of dispute resolution, the arbitration clause must be interpreted as clearly as possible”; see also, its judgment in Appeal No. 202 of 2012, and the judgment of the UAE Federal Supreme Court No. 676 of 29 commercial, issued on 18/10/2009).

It remains to be seen if the courts in the other Emirates will adopt a similarly enlightened approach to that evinced by the Dubai Court of Appeal in this case. But if followed, such an approach could have dramatic consequences for the way in which the court will construe Article 7 of the Arbitration Law, which sets out the circumstances in which a written arbitration agreement is considered to exist.

That being said, issues of capacity to agree to arbitration, which remain unaffected by the introduction of

the Arbitration Law, will likely continue to be strictly construed as a result of Article 4(1) of the Arbitration Law, which requires arbitration agreements to be signed by persons with authority to do so.

Al Tamimi & Company's [Arbitration team](#) regularly advises on a wide range of arbitration-related matters. For further information please contact John Gaffney (j.gaffney@tamimi.com).