

The court's supportive role in Arbitration under the law of United Arab Emirates

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Abstract— Arbitral tribunal increasingly obtains more power and independence. This is due to the increasing confidence in this dispute resolution mechanism. Despite that independence, the need for the court's support is inevitable. State courts play various roles pre-arbitration, during arbitration proceedings and post arbitration. This paper discusses the role of UAE court in arbitration.

Keywords—Arbitration, arbitral award, court's supportive role, enforcement, Interim Measures.

I. INTRODUCTION

UAE courts play several roles to support alternative dispute resolutions (ADR), such as arbitration, mediation and adjudication. It is always believed that effective ADR mechanisms are the right means to reduce the courts' workload.

In UAE, there are federal and local laws. In cases of contradiction, federal law prevails. In Dubai, the Dubai International Financial Centre (DIFC) hosts DIFC courts that have jurisdiction over disputes involving companies registered in the DIFC. Recently, these courts' jurisdiction was widened to allow agreed jurisdiction, i.e. an agreement on their jurisdiction where the original jurisdiction is for state courts. DIFC has its own laws which are heavily influenced by common law. Arbitration bodies in UAE provide their own rules. Examples of these are Dubai International Arbitration Centre (DIAC) and London Court of International Arbitration in Dubai (DIFC-LCIA). This paper will rely heavily on such rules.

This paper will discuss the court's supportive role in arbitration. This will include pre-hearings, during hearings and post award. The recognition and enforcement of arbitration awards raised a number of questions in the past few years. The doctrine of public order has been relied on by Dubai courts to nullify an arbitration award. The tribunal's power to issue interim measures orders in UAE is still very limited. Interim measures must be ordered by competent courts. This may cause considerable delay in arbitration. The paper will look at the UNCITRAL arbitration model law to see how interim measures can be awarded.

II. INDEPENDENCE OF ARBITRATION

Under most legal systems, arbitration is independent from national courts. For example, the arbitral tribunal can decide on its own jurisdiction, parties may elect the law governing their dispute, the arbitration clause or agreement is autonomous which survives the termination of the original contract, judicial control of errors of law is abandoned in most legal systems subject to certain restrictions such as public order and the principle of fair hearing.[1]

III. THE COURT'S SUPPORTIVE ROLE AT THE BEGINNING OF THE ARBITRATION

There are three possible areas of court intervention: enforcing the arbitration agreement, establishing the arbitral tribunal and challenges to jurisdiction

3.1 Enforcing the Arbitration Agreement

A party may take the case to court despite the existence of arbitration clause or submission agreement. Here, the defendant will have two choices either to go on with litigation or to object to the court jurisdiction. If he decides to select the latter choice, he becomes when he must raise his objection.

Obviously, the model law suggests that objection to the court jurisdiction by a party cannot be raised after submitting his first statement on the substance. Unfortunately, the position under UAE is not as clear as under the model law. The defendant must object before the first hearing. The first hearing under the UAE law means the first session. This means that the defendant will still have the right to object to the jurisdiction of the court even after submitting his first statement on the substance since he can object in the first hearing.

3.2 Establishing the Arbitral Tribunal

The court will have the power to intervene upon the request of the parties if they fail to appoint the respondent's arbitrators or to appoint the sole 'chairperson' arbitrator. Parties may also challenge the impartiality of the arbitrators. Here, parties are strongly advised to select their own arbitrators and to put in place procedures to select a substitute arbitrator where a nominated arbitrator is not acting due to withdrawal, dismissal, etc. This advice is based on the fact that the court's decision in selecting the arbitrator(s) cannot be challenged. A selected arbitrator may not be the best

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choice for one of the parties. A good arbitration agreement is the one that leaves no room for such an intervention. It better includes nominated arbitrators and nominated substitute arbitrators or it put in place proper procedures for selecting the right arbitrators.

The court may also intervene upon the request of the parties to disqualify an arbitrator. Although the UAE provides for the disqualification of the arbitrator in Article 207(4) of the Federal CPL, I think it is fair to say that this is an uncommon practice in the country. The court should be cautious in deciding on arbitrators' disqualification requests; a party may tend to remove an arbitrator from the panel when he senses that this particular arbitrator may not favour his claim. This view is supported by the fact that an arbitrator cannot be dismissed unilaterally.[ii] Both parties must agree on the dismissal of a particular arbitrator. Having said so, it must be noted that a party may approve a request by one party for the dismissal of an arbitrator who wilfully neglects to act in accordance with the terms of reference.[iii]

IV. THE COURT'S SUPPORTIVE ROLE DURING THE ARBITRAL PROCEEDINGS

At the start of arbitration proceedings, the tribunal need to decide on its own jurisdiction. This is generally known as the competence-competence principle.[iv] The tribunal has such a jurisdiction which enhances its own autonomy from the court system. However, the award can be challenged on the ground that the arbitration agreement did not exist or it was invalid. Having said so, arbitrators should not act beyond the terms of reference. An award on disputed matters beyond the terms of reference may lead to nullification by the court.

Furthermore, arbitrators must examine the validity of the arbitration agreement. The arbitration agreement may be invalid due to the non-arbitrability of the disputed matters. In UAE, public order matters cannot be settled and, thus, cannot be subjected to arbitration. Recently, the Dubai Cassation Court nullified an arbitration award because it was based on a matter of public order.[v]

The court's role should be limited when the case is in the hands of the arbitrators since the purpose of arbitration is to provide an alternative to the court. However, in certain areas the tribunal may need some supports during the hearings. For example, it may need to ask the competent court to assist in taking evidence, or to make an order for the preservation of property which is the subject of the dispute, or to take some other interim measure of protection.[vi]

Interim Measures may be called as 'interim measures of protection' or 'interim or conservatory measures' or provisional or conservatory measures'. Article 24 (1-b) of the Dubai International Financial Centre Arbitration Act defines interim measure as "any temporary measure,

whether in the form of an award or in another form, made by the Arbitral Tribunal at any time prior to the issuance of the award by which the dispute is to be finally decided." Interim measures can be summarized as follows: measures relating to the attendance of witnesses; measures related to preservation of evidence; measures related to documentary disclosure; measures aimed at preserving the status quo.[vii]

The question here is whether the arbitrators in UAE can issue interim measures. The current arbitration rules do not provide much on this matter. Obviously, the power of the tribunal is limited to parties involved in arbitration. A court's support is needed to order "a third party to produce a document in his possession, being one necessary for judgment in the arbitration". For example, banks may not reveal accounts information with no court order.

Other interim measures are not covered by 209/2 of the CPL. Therefore, most interim measures need to be taken through the court. See Article 22 of the Federal CPL.[viii] In order avoid this obstacle, Dubai International Arbitration Centre (DIAC) labels interim measures as provisional award. This helps to make the interim measures directly enforced by the court.[ix]

Enforcement of arbitral interim measures, issued under the DIFC-LCIA rules, can simply be enforced by the DIFC courts. Tribunals established under DIAC rules and DIFC_LCIA rules will have the power to issue interim measures without the need for an authorization by the parties. Under Article 31 of the DIAC arbitration rules, the arbitral tribunal will have such a power by default.

Interim measures need to be always issued by the court if the tribunal itself has not been established. Interim measures may need to be ordered by the court for several other reasons. For example, New York Convention requires the finality of the arbitration award for the sake of enforcement in member states. Interim measures are not final awards. Therefore, it is better to seek a court decision here in order to enforce it in foreign states. Furthermore, a party may need to make an application *ex parte* (ie without notice to the party against whom the measure is directed). This is important in cases where there is a risk of losing the viability of an interim measure. For example, an interim measure order to freeze a bank account in order to prevent a party from transferring the money abroad may require an *ex parte* action.

Needless to say that Arbitration agreement will not be affected by enforcements of interim measures through state courts. Article 31.3 of DIAC arbitration rules allows resorting to state courts for interim measures albeit there is an arbitration agreement or even where the dispute is being arbitrated.

Furthermore, under Article 25 of the DIFC-LCIA arbitration rules, the tribunal has the power to issue interim and conservatory measures unless the parties agree otherwise. Here, it should be noted that parties

still have the right to apply to any state court for interim or conservatory measure. Lastly, one may ask whether a party can be compensated if it appears later that the interim measure requested by the other party was unnecessary and harmful. The aggrieved party may claim damages under the general rules of the CPL and the UAE Civil Transactions Code.

6. CONCLUSIONS

The courts' supportive role in arbitration is significant to enforce arbitration agreements in cases where one of the parties refuses to nominate arbitrators. The court may appoint the arbitrator where parties could not agree on a certain arbitrator. Moreover, the court will refer a case to arbitration where the defendant objects to its jurisdiction due to the existence of an arbitration clause or arbitration agreement.

During arbitration proceedings, the court may be requested to make provisional measures orders. Arbitration tribunals in UAE cannot make interim measures orders. Such measures must be sought through the state court. DIAC rules label such measures as provisional awards in order to make it possible for tribunals to issue them during proceedings.

The court has also a very significant role post-arbitration. The arbitration award requires the state court's ratification for the purpose of enforcement. The award may also be challenged by the parties. Recent cases show that Dubai states court nullifies arbitration awards when it is related to public order. In UAE, conflicts related to public order are not arbitrable.

The arbitration award may also be challenged where the arbitration agreement is invalid or where arbitrators exceeded their jurisdiction by acting beyond the terms of references. Having said so, the court may not nullify arbitration awards due to misinterpretation of law rules by the tribunal. In other words, the award cannot be nullified due to its substance unless it is concerned with public order or it decides on points beyond the terms of reference.

REFERENCES

- [1] Nigel Blackaby and Constantine Partasides; with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, Oxford University Press, 2009, p.440.
- [2]- Similarly, under section 24 of the UK Arbitration Act 1996, the court may remove an arbitrator upon the request of one of the parties. See John Murdoch and Will Hughes, *Construction contracts: law and management*, London: Taylor and Francis, 2008, p.373.
- [3] See Article 207(3) of the Federal CPL.
- [4] John Uff, *Construction Law: law and practice relating to the construction industry*, Thomson Thomson Reuters, London, 2009, pp.106-108.
- [5] Appeal No. 14/2012, Real Estate Cassation.
- [6] Jenkins, Jane and Simon Stebbings, *International construction arbitration law*, Kluwer Law International, the Netherlands, 2006, pp.174-175.
- [7] See Article 24 (1-b) of the DIFC Arbitration Act.
- [8] See Article 207(3) of the Federal CPL.
- [9] Article (31) of DIAC arbitration Rules.

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