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A ROUND-UP OF LEGAL, FINANCE AND TAX DEVELOPMENTS ACROSS THE MIDDLE EAST

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Amendments to the UAE's Civil Procedures Law and Implementing Regulations

ARBITRATION CORNER

POWERED BY WASEL & WASEL ARBITRATOR SERVICES INC.

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WHAT NOW FOR ARBITRATION IN DUBAI?

Herbert S Wolfson, an independent arbitrator affiliated with Wasel & Wasel Arbitrator Services Inc looks at the path ahead for arbitration in Dubai following the issue of Dubai Decree No. 34/2021.

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Herbert S Wolfson

Independent Arbitrator affiliated with Wasel & Wasel Arbitrator Services Inc.

"Dubai Decree No. 34/2021 introduced significant changes to the Dubai arbitration landscape," states Herbert S Wolfson. "It abolished two existing arbitral institutions the Emirates Maritime Arbitration Centre (EMAC) and the DIFC Arbitration Institute (DAI) which operated the DIFC-LCIA Arbitration Centre. These two institutions have now been merged into the Dubai International Arbitration Centre (DIAC)."

"The Decree transferred the existing caseloads of DAI and EMAC to DIAC but their respective arbitration rules have been left in place during a transition period," Wolfson continues. "Some observers are worried that the merger might create grounds to challenge the enforceability of arbitral awards rendered by tribunals originally constituted by DAI or EMAC. It is a risk that cannot be ruled out, but should be limited in duration and might only relate to a relatively small subset of cases. The success or failure of challenges based on alleged prejudice as a result of the merger are likely to turn on the facts of the case. In addition, those who prefer not to accept DIAC administration or rules are free to choose other institutions when drafting new contracts; and to amend their pre-merger contracts which referenced EMAC or DIFC-LCIA," Wolfson adds. "So post-merger enforceability challenges are likely to arise where existing cases are transferred to DIAC administration from EMAC or DIFC-LCIA, or when new cases arise out of an unamended pre-merger contract especially after DIAC stops applying EMAC and DIFC-LCIA arbitration rules. However, this risk should diminish over time as Dubai courts begin ruling on whether the transfer has unduly prejudiced the parties' rights," Wolfson states.

"Some may also argue that a failure to amend existing dispute resolution clauses to remove references to EMAC or DIFC-LCIA could reflect parties' acquiescence to DIAC rules and administration. This argument might be premature in the immediate aftermath of the merger but may become more persuasive as time passes."

"The Decree establishes rules on deciding which courts have jurisdiction over arbitration cases. It also creates a Court of Arbitration within DIAC," Wolfson states.

"However, this is not a court which issues rulings on the merits of disputed claims. Instead, it will perform functions previously performed by DIAC's Executive Committee which include appointing arbitrators and deciding on requests to recuse or dismiss them. It will also supervise the review of draft arbitral awards before they are issued, to ensure award quality and enforceability."

"The Decree also signals an intention to enhance ethical standards in the arbitration community. In addition, it authorises DIAC to regulate third-party funding and codifies limits on liability for arbitrators serving on DIAC-appointed panels. However, it should be noted most of the significant changes were introduced through a revised set of DIAC bylaws attached as an appendix to the Decree. These replace earlier bylaws adopted by DIAC in 2019," Wolfson continues.

"These new bylaws state that arbitrators are not liable for acts or omissions arising from unintentional errors made while performing their duties," Wolfson explains. "This liability exclusion also applies to members of the DIAC Board of Directors and members of the Court of Arbitration. It should be noted this exclusion of liability could help deter lawsuits against individual arbitrators in the Dubai Courts."

ARBITRATOR SPOTLIGHT

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SAAD HEGAZY

AS AN EXPERT WITNESS WHO HAS WORKED ON ARBITRATION DISPUTES VALUED AT AROUND USD 40 MILLION, WHAT DO YOU THINK ARE THE MAJOR PITFALLS MADE BY PARTIES?

One major pitfall made by parties is the identification of issues. I have witnessed cases where parties started the dispute without fully understanding their claims and the relief they were seeking. It is vital to understand your case and to get advice from an independent expert before moving forward with any dispute. Another mistake which can be made is making the wrong choice of tribunal. Parties tend to choose tribunals which have cheaper rates or big-name arbitrators, without considering other factors like the tribunal's experience in the disputed matters or their availability.

WHAT ADVANTAGES DO YOU HAVE AS A RESULT OF YOUR KNOWLEDGE OF CONSTRUCTION, ESPECIALLY WHEN IT COMES TO ARBITRATION?

Construction is a knowledge-intensive industry and you also need to have a wide range of knowledge from many varying sources. My understanding of complex construction issues enhances my understanding of disputes, reduces risks in the arbitration process, and can lead to dispute cost reduction. Combining knowledge of engineering and law gives me various advantages in construction disputes.

WHAT ASPECTS OF CONSTRUCTION ARBITRATION ARE YOU SEEING BECOME MORE PREVALENT IN THE INDUSTRY?

I am seeing ad-hoc arbitration becoming more prevalent. In recent years, I have also seen many cases where parties prefer to use an ad-hoc arbitration, in order to avoid institutional administration costs. Document arbitrations which rely heavily on document submissions without needing hearings are also becoming more frequent. Lastly, the expert determination and other Alternative Dispute Resolution methodologies like mediation and conciliation, are being used more now because of the speed of these procedures.

Saad Hegazy is an arbitrator with experience of mediation and adjudication work with Wasel & Wasel Arbitrator Services Inc. He is a construction claims and dispute resolution expert based between Dubai and Doha, who has more than 16 years of experience in delay analysis, construction contracts, quantum, claims and disputes in projects across the GCC, Middle East, Asia, and Africa. He also has a wealth of experience having worked on projects including airports, metros, infrastructure, oil and gas, utilities and high rise buildings.

ROHAN BANSIE

DO YOU SEE ANY PARALLELS BETWEEN YOUR POSITION AS A JUDGE AND YOUR POSITION AS AN ARBITRATOR?

I see the parallels between my two roles. Arbitration is quasi-judicial. In both processes solemnity is required. In each, the local rules of evidence and associated jurisprudence also apply. Also, after formal presentation of each side's evidence, including examinations and cross-examinations a ruling or judgment or award is presented or imposed. That said, arbitration is a private, cost-effective and less formal alternative to litigation where the arbitrator, as an expert, delivers a legally binding decision. However, in my opinion in order to be successful in either role, high levels of discipline and diligence are required. Patience, curiosity and objectivity are also necessary on the part of the neutral party in both roles.

HOW MANY ARBITRATION DISPUTES HAVE YOU PRESIDED OVER IN YOUR CAREER?

As a Deputy Judge I have presided over more than 3,600 cases and as an Arbitrator I have arbitrated between 25 and 30 cases.

WHAT ADVANTAGE DOES THIS EXPERIENCE PROVIDE YOU IN YOUR WORK AS AN ARBITRATOR?

The way I have to conduct myself is essentially the same in both roles. The main advantages are the consistency of approach which allows me to hone my personal skills and levels of awareness on an ongoing basis.

Rohan Bansie is an arbitrator with Wasel & Wasel Arbitrator Services Inc, a mediator, lawyer, and Deputy Judge. He is also the principal of the alternative dispute resolution (ADR) company, Bansie Dispute Resolution Services Inc (BDRS). As a lawyer with almost 25 years' experience representing individual and institutional clients, he has appeared before all levels of court in Ontario, including the Court of Appeal. In addition to his litigation experience, Rohan has also represented athletes, artists and organisations in contract negotiations. In 2007, Rohan was appointed Deputy Judge of the Superior Court of Justice, Small Claims Court.

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ARBITRATION CASE FOCUS

RECENT KEY ARBITRATION CASES

Case No .... ACC 1173/2020 issued on 16/03/20
Jurisdiction ....Abu Dhabi
Court ....Abu Dhabi Court of Cassation
Recommended by .... Wasel & Wasel Arbitrator Services Inc.

WHAT DID THIS CASE INVOLVE?

The dispute related to additional work in a construction contract, where the Abu Dhabi Primary Court ruled in favour of the contractor for approximately 12,000,000 AED. The Abu Dhabi Appeals Court upheld the contractor's claim but reduced the quantum amount to around 8,500,000 AED.

The Abu Dhabi Appeals Court also ruled at the point at which the parties subsequently agreed any dispute would be resolved via arbitration, the agreement would then be governed by the UAE's laws.

They ruled the appendix of the construction contract between the two parties had stated in Clause 18(a) that, in arbitration, the UAE laws will be applied, and this did not indicate the two parties had agreed to resolve the dispute through arbitration so it was a suspensive condition.

In March 2021, the Abu Dhabi Court of Cassation upheld a rejection to enforce an arbitration agreement as a result of the arbitration clause which had merely stated arbitration would be governed by UAE laws, without providing any explicit scope to any disputes. The court found the wording of the clause did not provide sufficient detail to establish the consent of the parties to resort to arbitration as the dispute resolution mechanism.

In its judgment, the court found the wording was to be read as a suspensive condition which would only come into force if the parties subsequently explicitly agreed and established the scope for any dispute which was to be resolved through arbitration.

ABU DHABI COURT OF CASSATION JUDGMENT

The Abu Dhabi Court of Cassation relied on Articles 5, 6 and 7 of Federal Law No. 6/2018 (the Federal Arbitration Law) to decide that the clause wording did not provide the parties' explicit agreement to resort to arbitration to resolve any disputes.

The Court upheld the Appeals Court judgment and ruled that where the decision was made within the court's jurisdiction and in line with Article 5-7 of Federal Law No. 6/2018, in order for the court to reject their jurisdiction on a dispute an arbitration clause had to exist in order to prove the parties had agreed in writing to resort to arbitration as an exceptional means to settle disputes between them, whether this was through a special clause in the original contract or via an additional agreement. This was because consent of the parties is the basis of arbitration and the arbitrator derives their authority from the contract in which the arbitration was agreed on.

Therefore, the judge has to verify that the will of the litigants matches the arbitration agreement, the underlying dispute and the interpretation of the contract in order to identify the intent of the parties on the authority of the trial court. The disputed clause in the contract stated the governing law would be the laws of the UAE and it would govern arbitration. Therefore, it did not disclose the parties' express will in the agreement to resort to arbitration.

WHY'S IT SIGNIFICANT?

This judgment highlights the extent to which the UAE courts will investigate not just the existence of an arbitration provision but the precise wording and scope of the arbitration clause. The approach which has been confirmed by the Abu Dhabi Courts emphasises the need for parties to ensure the clear scope of applicability to their arbitration clauses.

It is important to note the UAE courts generally find an arbitration clause either binding or non-binding, but a UAE Court has seldom ordered an arbitration clause be considered a suspensive condition which is a condition which suspends the effect of a clause until a future event occurs or is realised.

The UAE Courts have previously ruled on the necessity to comply with pre-conditions to arbitrate. However, considering an arbitration clause as a suspensive condition raises questions as to the threshold the courts will require in order to accept that an arbitration agreement has been fulfilled.

Essentially, finding that an arbitration agreement could be considered a suspensive condition unless the parties explicitly state any dispute or a particular dispute will be resolved by arbitration means arbitration agreements need to include minimum standards. This includes the language of arbitration, number of arbitrators and rules which are to be followed but even in such a case the clause could nevertheless be considered a suspensive condition in the absence of an explicit agreement that disputes will be resolved via arbitration.

This judgment also creates a novel paradigm on the separability of an arbitration agreement and acknowledging an arbitration agreement, while considering it suspended. Generally, an arbitration agreement should be as detailed as possible to avoid any disagreement on its operation.

As a minimum this would include details of the seat of arbitration, the number of arbitrators, the language of arbitration, governing rules whether institutional or ad hoc and the governing law.

Parties may also apply a separate governing law to the arbitration agreement from the governing law of the substantive contract, identify any matters including those related to confidentiality, or issues on sovereign immunity. This ruling by the Abu Dhabi Court of Cassation reflects the importance of clearly drafted arbitration clauses, but also provides interesting reasoning in finding the arbitration clause was merely a suspensive condition in the absence of an explicit agreement that any dispute will be resolved by arbitration.

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