

## inBrief



### Is Arbitration an Exceptional or Alternative Form of Dispute Resolution?

By Chatura Randeniya | 21 May 2019

The enactment of the UAE's first standalone arbitration law (Federal Law No. 6 of 2018; the **Arbitration Law**) introduced some important changes to arbitration in the UAE, such as recognising the enforceability of interim awards and significantly streamlining the enforcement of arbitral awards. However, the requirements for establishing a valid arbitration agreement (i.e. a written agreement entered into by persons with the requisite authority) remained largely unchanged under the new law, which restated the previously existing legislative requirements and codified principles established by the courts, for example recognising arbitration agreements incorporated through reference to standard terms and through electronic correspondence.

Judgments on issues of arbitration ordinarily contain a reference, if not as part of the reasoning of the judgment then at least as a preface to the reasoning, to the nature of arbitration as a form of dispute resolution. In cases decided before the Arbitration Law came into effect, arbitration was characterised as an exceptional form of dispute resolution. The characterisation of arbitration as an exceptional form of dispute resolution goes beyond mere semantics, as it formed the basis for the application of strict standards in determining whether a valid arbitration agreement existed.

It was therefore a welcome development that the Dubai Court of Appeal in a judgment issued in January 2019 characterised arbitration not as an exceptional form of dispute resolution, but as an alternative one:

*“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.”<sup>1</sup>*

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However, in its judgment issued in Cassation Petition No. 1019 of 2018 in March 2019, the Dubai Court of Cassation once again characterises arbitration as an exceptional form of dispute resolution. By way of background, Cassation Petition No. 1019 of 2018 involved a challenge to the jurisdiction of the Dubai Court based on the existence of an arbitration clause. Although several drafts of a contract containing an arbitration clause were exchanged between the parties via email, a physical copy was not signed. It is also important to note that (a) the disagreement between the parties was with respect to the commercial terms, and there was no discussion or disagreement regarding the arbitration clause in the draft agreements, (b) both parties performed certain obligations under the contract, and (c) the plaintiff in fact asked the defendant how many arbitrators should constitute the tribunal, before it instituted proceedings in Court. The Court held as follows:

*“It is also established that arbitration is an express agreement whereby parties agree on referring their disputes to an arbitrator and not to the court. The agreement on arbitration may be an arbitration clause or terms of reference, and this is only valid in writing, whether by signing an instrument between the two parties or the messages, cables or other electronic means exchanged between the parties or through any form of written correspondence. Agreement on arbitration may not be assumed or inferred from general provisions in a document or a quotation as long as the arbitration agreement is not specifically provided for in a way indicating that both parties expressly know about and accept it, because it is an exception from courts’ jurisdiction”.* (Emphasis added).

Following from its characterisation of arbitration as an exceptional form of dispute resolution, the Court of Cassation went on to hold that there is no valid arbitration agreement:

*“However, the emails do not show that the two parties agreed on the terms included in the draft contract and this is further evidenced by the two parties’ failure to sign the contract. The expert’s report, which the court believes to be correct, indicates that the two parties did not sign the contract because they were in disagreement on some of the contractual terms and that the basis of the transactions between them was the quotation. The messages exchanged between the two parties did not refer to any agreement between the parties on referring their dispute through arbitration or to the back-to-back condition, therefore, the two pleadings are baseless both in fact and law, and the court hereby dismisses them.”*

Interestingly, the Court of Cassation made no reference to the provisions of the Arbitration Law or its applicability, even though it was relied on by the parties in their written arguments.

There is no system of binding precedent in the UAE and, notwithstanding the judgment discussed above, there is still reason to believe that the Dubai Courts are getting progressively more arbitration-friendly, particularly following the enactment of the Arbitration Law. However, it appears that there still may be some instances where the courts view arbitration as an exceptional form of dispute resolution and consequently apply strict standards to determining whether a valid arbitration agreement exists. Given the circumstances, the prudent view is that parties should continue to have a signed agreement (as was the practice before the enactment of the Arbitration Law) or, at the very least ensure that there is an unequivocal agreement to arbitrate contained in the electronic correspondence they wish to rely on, which are until there is further clarity on this issue. Parties will also have to ensure that the individuals agreeing to arbitration on behalf of corporate entities must have specific authority to do so, regardless of whether the agreement is reached through a signed agreement or electronic correspondence. ■

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<sup>1</sup> Quoted from third party sources.

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