

## inBrief



## Navigating the Jurisdiction: Key UAE Court Decisions from 2023 Shaping the Arbitration Landscape

By Chatura Randeniya | 13 December 2023

The UAE's arbitration landscape continues to evolve and, as 2023 draws to a close, we summarise some of the more significant judgments issued by the UAE on-shore Courts in relation to arbitration this year. While the trend of the judgments reinforces the 'arbitration-friendly' approach of the UAE Courts of late, 2023 has not been without its outlier cases.

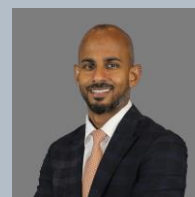
### 1. It may no longer be possible to circumvent an arbitration agreement by joining third parties to court proceedings

A popular strategy deployed by parties wishing to bypass an arbitration agreement and invoke the jurisdiction of the UAE Courts (ordinarily a claimant) is to add parties who are not party to the arbitration agreement, as in cases which involve multiple defendants, a UAE court which has jurisdiction over one defendant has jurisdiction over all the defendants.

In Dubai Court of Cassation Case No. 1078/2023, the court upheld a Court of Appeal decision rejecting this strategy. In its judgment, the Dubai Court of Appeal laid down several clear principles:

- while a claimant may add multiple defendants, and while a court which has jurisdiction over one defendant will have jurisdiction over all the defendants, there must be 'real claims' against each of the defendants;
- what constitutes 'real claims' is a matter to be determined by the trial court based on the evidence and any applicable presumptions of law (in this case, the court found that the claimant's cause of action was clearly a contractual one, and there were no 'real claims' against individuals who were not party to the contract); and
- adding parties solely for the purpose of invoking the court's jurisdiction is not permitted.

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## 2. Amendments to contracts need not expressly refer to an arbitration clause in the initial contract

In the same case, the Dubai Court of Appeal (Case No. 911/2023) also held that an amendment to a contract which contains an arbitration does not need to expressly refer to the arbitration clause in the initial contract, provided that the amendment clearly forms part and parcel of the contract which contained the arbitration clause (i.e. as opposed to standard terms or a different contract containing an arbitration clause which is incorporated by reference). However, the prudent approach remains to replicate or clearly refer to the arbitration agreement between the parties in the initial contract.

## 3. An agreement to arbitrate in a contract will extend to subsequent contracts between the same parties, provided that (a) there is a sufficiently close factual connection, and (b) there is no subsequent agreement to resolve disputes in a different forum

In Dubai Court of Cassation Case No. 828/2023, the court considered an appeal relating to a construction dispute. The parties had entered into a contract containing an arbitration clause, however, the dispute between the parties arose pursuant to purchase orders between the parties issued subsequent to the initial contract. One of the parties contended as the purchase orders do not contain an arbitration clause, disputes arising in connection with the purchase orders must be determined by the courts.

The Court of Cassation rejected this argument. After an analysis of the documents, it was determined that the arbitration clause in the initial contract applied to the purchase orders. This decision was based on the close connection between the initial contract and the purchase orders, involving not only the parties but also the subject matter of the contract. Following the ‘accessory follows the principal’ principle, the Court of Cassation held that *“based on the implicit will of the parties deduced from all previous elements, all disputes regarding subsequent contracts are subject to the arbitration clause”*. The court also took into consideration the nature of contracts entered into in the construction industry, holding that *“taking into account the technical nature of the construction industry, which makes it unlikely that the parties intended to limit arbitration to specific matters and resort to state courts in other matters, which may be technically related to the matters subject to arbitration given the single nature of the subject matter of those contracts”*.

However, the court made it clear that had there been an agreement to refer disputes to a different forum in the purchase orders, such an agreement would prevail. Where the subsequent instrument is silent, there now appears to be a presumption that the agreement of the parties to arbitrate (or other such agreement as to forum) in an earlier related contract will prevail.

However, the prudent approach remains to replicate or clearly refer to the arbitration agreement between the parties in the initial contract.

## 4. An arbitration agreement may be assigned and is binding on the assignee, even if there is no agreement in writing by the assignee to be bound by the arbitration agreement.

In March 2023, the Dubai Court of Cassation (Cassation No. 1603/2022) held that an agreement to arbitrate contained in an agreement can be assigned to a third party, even where the third party had not expressly agreed to arbitrate.

The dispute arose in the context of a reverse factoring agreement. The defendant purchased goods from a supplier and agreed to make payment within 120 days from the date of the invoice(s). The plaintiff made early payment of the invoices to the supplier on behalf of the defendant. As a result, the right to receive payments for the goods purchased by the defendant was assigned to the plaintiff and the defendant was duly notified of such assignment. The contract between the defendant and the supplier contained an agreement to arbitrate. However, there was no arbitration agreement between the plaintiff and the defendant. The point of dispute arises from the defendant’s position that as a result of the assignment of invoices to the plaintiff, the arbitration agreement has also been assigned.

The Dubai Court of Cassation held upon the assignment of the right to receive payment to the plaintiff, the arbitration agreement between the supplier and the defendant was also transferred to the plaintiff.

The rationale of the court was that the assignment does not create new rights, but merely transfers existing rights that were vested with another party. On this basis, the court held that the arbitration agreement shall also be deemed to be assigned unless the assignment agreement expressly states otherwise.

**5. An indirect claimant may rely on an arbitration agreement entered into by the party on behalf of whom the indirect claim is being made**

In a dispute involving a claim asserted by a subcontractor in the context of a construction dispute, the Abu Dhabi Court of Cassation held that the subcontractor (who was asserting an indirect claim pursuant to Articles 392 and 393 of the UAE Civil Code) could resort to arbitration under the contract between the main contractor and the employer. Article 392 provides that “*every obligee ... may exercise, in the name of the obligor, all of the rights of that obligor, save those that relate particularly to his person or which are not capable of being attached*”, and Article 393 provides that “*the obligee shall be regarded as a proxy for his obligor in exercising his rights*”.

The Abu Dhabi Court of Cassation, in interpreting and applying Articles 392 and 393, found that they extend to a right to resolve disputes through arbitration. Consequently, a party representing another's rights, in the context of Articles 392 and 393, may resort to arbitration under the original contract between the debtor and the creditor.

**6. The Dubai Court of Cassation recognized the distinction between jurisdiction and admissibility and held that a question of inadmissibility does not result in the annulment of an arbitral award**

In its judgment in Cassation Case No. 1514 of 2022 issued in July 2023, the Dubai Court of Cassation for the first time drew a distinction between the concepts of jurisdiction and admissibility.

The underlying dispute between the parties arose from an International Federation of Consulting Engineers (FIDIC) construction contract. The respondent in the arbitration sought to set aside the arbitral award against it on the basis that the claimant had failed to comply with the conditions precedent stipulated in the contract prior to referring the dispute to arbitration.

In dismissing the Respondent's appeal, the Dubai Court of Cassation held that pre-arbitral conditions precedent does not pertain to the question of jurisdiction or competence of arbitral tribunal, *i.e.*, they are not determinative of whether arbitration is the proper forum to hear the dispute or not. Rather, they go to the question of admissibility, *i.e.*, whether the claims raised can be heard at that point in time, or whether such claims have been referred for arbitration prematurely.

Significantly, the court addressed the consequences that may flow from a finding of inadmissibility. The court stated that where an issue of inadmissibility is correctly invoked, the most likely result is that the arbitration proceedings may be adjourned pending the fulfilment of the conditions precedent by the parties, though arbitration remains the proper forum to resolve the dispute (*i.e.* the tribunal remains vested with jurisdiction). This is a departure from previous cases where the courts held that the failure to follow pre-arbitral questions go to the issue of jurisdiction, and annulled awards on that basis.

**7. Non-payment of advances on costs do not result in the exhaustion of an arbitration clause**

The same judgment of the Court of Cassation is also significant as it held that the court does not become seized with jurisdiction over disputes that do not proceed to arbitration due to the parties' failure to pay advances on costs. This represents a departure from previous cases where the court held that non-payment of arbitration fees results in the exhaustion of the arbitration clause.

This was reinforced in November 2023 by Decision No. 10/2023 of the Dubai Court of Cassation which directed that the previous principle of considering an arbitration agreement be exhausted if an arbitration does not commence/proceed due to the parties' failure to pay advances on costs must no longer be followed.

#### 8. Notwithstanding the DIAC 2022 Rules, specific authority to agree costs may still be required

It is a long-settled principle of UAE law that arbitral tribunals require express authority to award legal costs. This remains the case even following the enactment of the Federal Arbitration Law, which was expected to dispense with this requirement. Possibly in response to this, the Dubai International Arbitration Centre (DIAC) Rules of 2022 (Article 36) appeared to suggest that tribunals are empowered to award legal costs by including the *"fees of the legal representative"* within the costs of arbitration. The Federal Arbitration Law does not require tribunals to possess the express authority to award the costs of the arbitration.

However, the Dubai Court of Cassation, in a matter involving the ICC Rules (in which Article 38 make provision similar to Article 36 of the DIAC Rules), set aside the part of the award in which the tribunal awarded legal costs on the basis that *"Article 38 of the International Chamber of Commerce Rules, which the arbitrator relied upon, did not explicitly empower the arbitral tribunal to decide on the legal fees of the parties' legal representatives in the arbitration."* On the face of it, this appears to be an incorrect finding by the court, as Article 38.1 of the ICC Rules expressly provides that the *"costs of the arbitration shall include the fees and expenses of the arbitrators ... and the reasonable legal and other costs incurred by the parties for the arbitration."*

Given the similarity between the DIAC 2022 Rules and the ICC Rules, there now appears to be a question whether Article 36 of the DIAC 2022 Rules (of itself and without express agreement by the parties empowering the tribunal) is sufficient to empower a tribunal to award legal costs.

#### 9. There is a risk that a finding of invalidity of a contract could extend to an arbitration clause in the contract, notwithstanding that the Federal Arbitration Law recognizes the separability of an arbitration clause.

In Court of Cassation No. 585/2023, the Dubai Court of Cassation held that a finding of invalidity of a contract extends to an arbitration clause contained in the same contract. The dispute arose in the context of a dispute between shareholders of a limited liability company established in the 1990's. As required under law at the time, the majority shareholder was an Emirati national, and this was reflected in the company's Articles of Association. However, at the same time, an addendum was executed to the Articles to provide that, among others, the Emirati national did not own any shares in the company.

The Emirati shareholder successfully asserted certain claims arising out of the addendum in an arbitration conducted under the DIAC Rules. The respondent sought to set aside the award, and the Court of Appeal set aside the award on public policy grounds as provided for in Article 53(2)(a) of the Federal Arbitration Law.

The Court of Appeal went on to hold that *"the arbitration agreement as well as filing the arbitral proceedings on the basis of such invalid contract is against public policy"* and, in doing so, appears to have linked the invalidity of the contract with the invalidity of the arbitration agreement. The judgment of the Court of Appeal was upheld by the Court of Cassation which found that a decision to invalidate a contract extends to all its terms including the arbitration clause.

This was a surprising outcome, given that the Federal Arbitration Law expressly recognizes the separability of an arbitration clause.

**10. Parties choosing to resolve disputes through arbitration under the ICC Rules in the UAE may find the ADGM deemed to be the seat of arbitration.**

Earlier this year, the Abu Dhabi courts ruled that they lacked supervisory jurisdiction over an arbitration conducted under the ICC Rules, even though the agreement stated that the seat would be in Abu Dhabi. However, the agreement did not specify whether the seat would be in the Abu Dhabi Global Market (ADGM) or on-shore Abu Dhabi. The Abu Dhabi Court of Cassation held that, because the parties chose the ICC Rules, and that because the ICC maintains a representative office in the ADGM, the ADGM should be taken to be the seat of arbitration, thereby vesting the ADGM Courts with jurisdiction to hear applications related to the arbitration. It is relevant to note that following this judgment, the ADGM Courts have accepted jurisdiction in matters arising out of arbitrations conducted under the ICC Rules and where the seat was specified to be Abu Dhabi.

A similar judgment was issued approximately two years ago by the Dubai Court of Cassation, in which it held that it had no jurisdiction over claims arising from a Dubai International Financial Centre (DIFC) and London Court of International Arbitration (LCIA) arbitration seated in Dubai and that as the DIFC-LCIA was a DIFC establishment, the DIFC Courts are the courts vested with jurisdiction. While this issue is no longer likely to arise as the DIFC-LCIA no longer exists, it highlights the need to specify the seat of arbitration with care, particularly in the Emirates of Abu Dhabi and Dubai, given that four jurisdictions exist within the two Emirates. ■

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