

Challenging an Arbitral Award on Jurisdiction under UAE Law

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Introduction:

It is stated under the Model Law on International Commercial Arbitration¹, many national laws² and institutional rules³ that the arbitral tribunal can rule on its own jurisdiction as a preliminary question, i.e. before ruling on the merits, or in an award on the merits⁴. The tribunal's right to rule on its jurisdiction is known as the principle of "kompetenz-kompetenz". Presumably, if the arbitral tribunal believes that it has no jurisdiction, it will issue an award on its jurisdiction or in other words will rule on its jurisdiction as a preliminary question, as in such a case there would be no point to continue the proceedings and deal with the substantive issues in the dispute⁵. Such laws also deal with the issue of

¹ Article 16.

² See, e.g., the Egyptian (Art.22), Jordanian (Art.21) and Omani (Art.22) laws.

³ See, e.g., the LCIA Arbitration Rules (Art.23).

⁴ However, some laws have deprived the tribunal of the right to rule on its jurisdiction on its own initiative such as the Jordanian Law which provides in article 21 that the tribunal can "rule on objections" that it does not have jurisdiction which means that it is only when a party objects on the tribunal's jurisdiction that the latter can decide.

⁵ Under many laws and rules, it is the arbitral tribunal that decides whether to deal with its jurisdiction as a preliminary question or in an award on the merits. By way of comparison, section 31(4) of the English Act states that "[i]f the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly". It can be said that it is the tribunal which can more precisely assess which of these courses is more suitable to the circumstances of a particular case. Whilst this suggests that the parties should not have been given this right, it is expected that any unsuitable choice by the parties will be rejected since the parties' choice under the English Act must be consistent with what the Act states in section 33. This section provides, *inter alia*, that the tribunal shall "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined".

whether a tribunal's award on its jurisdiction can be challenged before the competent court. Whilst some of these laws permit such challenge⁶, other laws do not⁷, and whereas most of the laws which allow such challenge restrict their permission to the case in which the arbitral tribunal decides that it has jurisdiction⁸, it is permissible under some laws to challenge a negative award on jurisdiction i.e. an award that declines jurisdiction⁹. The 1992 UAE Civil Procedures Law¹⁰, which deals with arbitration in articles 203-218, does not recognize the principle of "kompetenz-kompetenz". However, UAE courts and institutional rules in the UAE do recognize the principle. The question that had remained without definite answer was whether UAE courts would accept to look into a challenge to an arbitral award that deals only with the tribunal's jurisdiction? However, on 19th January 2014, the Dubai Court of Cassation answered this question in case number 274/2013 Real Estate. A background on this case and comments on the Court's judgment are stated below.

⁶ See, e.g., the Bahraini Law (Art.16).

⁷ See, e.g., the Jordanian Law (Art.21).

⁸ See, e.g., the Bahraini Law (Art.16).

⁹ For example, section 67 of the English Act covers negative awards on jurisdiction.

The Model Law on International Commercial Arbitration does not enable the parties to challenge a negative decision by the tribunal on its jurisdiction, that is a decision declining jurisdiction. Whereas the drafters of the Model Law justified this on the basis that it would not be appropriate "to compel arbitrators...to continue the proceedings", this justification has been described as non-convincing by Sanders who rightly argues that "[i]n case of remission [under paragraph 4 of article 34] it is not felt inappropriate to remit a complete award to the arbitral tribunal in order to eliminate the grounds on which otherwise its award would be set aside". Therefore, a negative decision on the jurisdiction of the arbitral tribunal should be challengeable. This approach, as he adds, is more in line with the structure of the Model Law than to make the negative decision the final word on the jurisdiction issue. A/40/17, Commission Report, referred to by H.M. Holtzmann and J.E. Neuhaus, "A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary", (Netherlands: Kluwer Law and Taxation Publishers, 1989), p.528. P. Sanders, "UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future", 2005, 21, 4, *Arbitration International*, 452.

¹⁰ Partly amended by Law No. 10 of 2014 which does not modify articles 203-218 of the 1992 Law with the exception of paragraph 3 of article 217. The old text of paragraph 3 prevented appeals from courts' judgments that certify arbitral awards when the amount in dispute did not exceed AED 10,000. The new text has raised the limit from AED 10,000 to AED 20,000.

Background on the case:

The Plaintiff had sold a plot in Dubai to the Defendant, and a dispute arose between the two parties over the Defendant's entitlement to some damages resulting from alleged breaches to the sale and purchase agreement. The Defendant (Claimant in the arbitration) referred this dispute to arbitration pursuant to clause number 13 of the agreement which states:

(13.2 In the event of any dispute between the parties arising out of or relating to this agreement, the parties shall, within 10 working days of a written notice from any party to the other party hold a meeting at the Seller's head office in an effort to resolve the dispute.

13.3 Any dispute which is not resolved within 20 working days after the service of a notice in accordance with Clause 13.1, whether or not a meeting has been held, shall, at the request of either party made within 20 working days of the notice being given, be referred to arbitration under the rules of the Dubai Chamber of Commerce and Industry (the Rules) before a single arbitrator who shall be appointed by agreement between the parties or in the absence of agreement within 40 working days of the notice being given, by the President of the Dubai Chamber of Commerce and IndustryThe arbitration award shall be final and binding on the parties and may be enforced in any court of competent jurisdiction. The parties waive any right of application or appeal to any court from the arbitral award).

The Plaintiff (Respondent in the arbitration) raised a jurisdictional objection on the grounds that the Defendant (Claimant in the arbitration) did not resort to arbitration within the agreed time-limit. On 30 August 2012, the Arbitral Tribunal issued "Award on Jurisdiction" confirming that it had jurisdiction to decide on the dispute.

Subsequently, the Plaintiff challenged the Award before the Dubai Court of First Instance which did not accept the challenge on the basis that it was premature as the Award on Jurisdiction was not dispositive of all issues in the arbitration. Whilst this view was upheld by the Court of Appeal, the Court of Cassation thought that a party to arbitration can resort to the competent court to challenge an award on jurisdiction or to challenge a final arbitral award containing decisions on jurisdiction. Accordingly, the Court of Cassation decided to return the case to the Court of First Instance to look into the issue of whether the Arbitral Tribunal really had jurisdiction to decide on the dispute.

Comments:

The UAE legislator has, on the one hand, prevented any means of recourse against arbitral awards other than setting aside, and has, on the other hand, restricted the right to set aside with the requirement that setting aside must be based on one or more of the grounds that are stated in article 216 of the Civil Procedures Law. It is agreed that these grounds are mentioned exclusively and accordingly should not be interpreted widely¹¹.

This legislative policy of restricting the means of recourse and grounds for challenging arbitral awards is consistent with the requirements of speed on which the arbitration system is based.

It can be submitted that the Civil Procedures Law, specifically articles 203-218, does not contain any provision that can be considered as a basis for permitting a challenge to a tribunal's award on its jurisdiction.

In addition, the permission to challenge arbitral awards on jurisdiction before the Court of First Instance (And to challenge the judgment of the

¹¹ See, e.g., the Dubai Court of Cassation' judgment issued on 24/3/2009 in Case No. 270/2008 Commercial.

Court of First Instance before the Court of Appeal and the judgment of the Court of Appeal before the Court of Cassation) will be used in the UAE as a dilatory tactic by many weaker parties as it would seem that many arbitration proceedings will be stopped pending the final result of such a challenge.

In light of the above, it can be argued that the Dubai Court of Cassation's judgment that was issued on 19th January 2014 in case number 274/2013 Real Estate does not deserve support, and that any challenge to an award affirming jurisdiction must be allowed only when challenging the final award.