

SWEARING AN OATH REMAINS A REQUIREMENT FOR WITNESSES IN ONSHORE UAE ARBITRATION

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International Arbitration Alert

By: Jonathan H. Sutcliffe, Mohammad Rwashdeh, Thomas Parkin

A recent judgment of the Dubai Court of Cassation confirms that it is a mandatory requirement for factual and expert witnesses in arbitration seated in the onshore United Arab Emirates (UAE) to give evidence under oath. Where an award was rendered on the basis of decisive testimony which could not be shown to have been given under oath, the Court of Cassation ruled that the award was invalid.

BACKGROUND

In recent years, it became unclear whether the traditional requirement that witness evidence in arbitration in the UAE be given under oath still applied. The old Arbitration Chapter of the Civil Procedure Code contained an express requirement that, *"The arbitrators shall cause the witnesses to take oath"* (Article 211).

The Arbitration Chapter was repealed following the adoption of the new Federal Arbitration Law (Law No. 6/2018) in June 2018. The Federal Arbitration Law does not contain a similar oath-taking requirement, giving rise to the implicit suggestion that there was no longer a requirement in law for witness evidence to be given under oath. It does, however, provide that *"Unless otherwise agreed by the Parties, the statements of the witnesses (including experts) shall be heard according to the applicable laws in the State"* (Article 33 (7)), raising questions about whether the mandatory laws of evidence in the UAE nevertheless applied this requirement to evidence in arbitration, and if so, whether that requirement could be contracted out of.

DECISION OF THE DUBAI COURT OF CASSATION

In a case recently brought before the Dubai Court of Cassation (Case Nos. 78 and 96/2022), the court was asked to consider whether the apparent failure to administer the oath to witnesses invalidated an award in an arbitration conducted under the old Dubai International Arbitration Centre (DIAC) Arbitration Rules (2007).

The court noted that the Federal Arbitration Law provides for witnesses to give testimony in accordance with the state's rules of evidence unless otherwise agreed by the parties; and that the DIAC Rules 2007 also contained a requirement that the witnesses swear an oath before giving evidence, in accordance with the mandatory rules of procedure. It also referred to Articles 41, 43, and 46 of the Federal Law of Evidence (Law No. 10/1992), which require a witness to give an oath in accordance with their religious beliefs. From 2 January 2023, the Federal Law of Evidence will be replaced by the new Federal Decree-Law No. 35/2022 Promulgating the Law of Evidence in Civil and Commercial Transactions, Articles 76 and 96 of which provide that an oath may be administered *"according to the practices observed in the witness's religion or belief, if he requests so,"* which may open the door to a non-religious oath.

However, in the case in question, the minutes of the hearing did not show that an oath had been sworn by the witnesses before giving evidence, nor was this stated in the award itself. The award did refer to the relevant witness statements as decisive evidence. Since the award was made on the basis of witness evidence not given under oath, the Court of Cassation declared it to be invalid.

IMPLICATIONS

The decision confirms the wisdom of witness evidence (including both witnesses of fact and expert witnesses) being given under oath in onshore UAE seated arbitrations notwithstanding the absence of an explicit requirement in the Federal Arbitration Law. There are some points which are not clear from the court's decision, in particular whether the outcome might have been different if the arbitration was subject to different procedural rules not requiring an oath to be given. It is certainly arguable that if the parties had expressly agreed that witness evidence would not be given in accordance with the state's law of evidence, as Article 33(7) of the Federal Arbitration Law appears to permit, then an oath would not be strictly necessary. However, the overarching point is that the onshore UAE courts are prepared to nullify an arbitral award on the basis of a technicality relating to oaths, and out of an abundance of caution, ensuring that an oath is properly administered to factual and expert witnesses is the sensible course in order to avoid the risk of invalidity of the final award.

In conclusion, this decision of the Dubai Court of Cassation indicates that the prudent course is:

- In an arbitration seated in onshore UAE, factual and expert witnesses should swear an oath in accordance with paragraph 41 of the Federal Law of Evidence.
- Both the transcript of the hearing and the arbitral award itself should record that the evidence was given under oath, to forestall any potential challenge.

KEY CONTACTS



JONATHAN H. SUTCLIFFE
PARTNER

DUBAI
+971.4.427.2747
JONATHAN.SUTCLIFFE@KLGATES.COM



MOHAMMAD RWASHDEH
SPECIAL COUNSEL

DUBAI
+971.4.427.2742
MOHAMMAD.RWASHDEH@KLGATES.COM

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