# ARBITRATION CORNER

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# WARNINGS FROM THE COMMON LAW COURTS

**Donny Surtani** of Crown Office Chambers and arbitrator with Wasel & Wasel Arbitrator Services Inc. shows common law arbitration centres' deference to arbitrators' autonomy is not unlimited.



**Donny Surtani**
Barrister
Crown Office Chambers

Arbitrator
Wasel & Wasel Arbitrator Services Inc.

In Doglemor v Caledor [2020] EWHC 3342 (Comm), the English Court set aside a damages award in an LCIA arbitration involving the valuation of a logistics business," states Surtani. "Both sides had served expert evidence, and the tribunal asked the parties to provide an Excel spreadsheet, so they could input their findings on the various issues and arrive at a damages figure. However, the tribunal erroneously entered a tax liability as a positive and not a negative figure. Correcting this error would change the damages from $58 million to $4 million. However, the tribunal refused an application to correct the award, stating the damages award was an 'iterative' process in which the output of the model was 'itself taken into consideration at earlier stages of the tribunal's determination on individual issues'. It stated the other inputs were not 'cast in stone' and the $58 million figure remained their assessment of the loss. The court disagreed finding this was a rare case of a serious irregularity in an award," states Surtani.

"It remitted the award, with clear directions limiting the tribunal to correcting the computational error, re-considering just one of the model's inputs, and re-calculating damages. This case shows the dangers of having tribunals run calculations and producing awards without first having the calculations checked. A safer approach would have been to ask the parties' experts to produce an agreed calculation based on the tribunal's indicative findings on the model inputs, and then incorporate that figure into the final award."

## RIGHT TO BE HEARD

"In CBS v CBP [2021] SGCA 4, the Singapore courts set aside an award under Singapore Chamber of Maritime Arbitration (SCMA) Rules due to a breach of natural justice," states Surtani. "The claim arose from a sale coal contract, where proceeds were to be collected by a bank and the bank commenced arbitration to collect unpaid amounts. After various delay tactics, the buyer submitted their defence very late with a list of seven proposed witnesses, alleging the contract had been orally varied. The buyer sought an oral hearing of their witness evidence, while the bank sought a documents-only approach or a hearing for submissions only. Before deciding the issue, the tribunal asked the buyer to produce detailed written witness statements. The buyer objected, stating this was a breach of natural justice. Rule 28.1 of the SCMA Rules stated that unless parties had agreed on a documents-only arbitration or that no hearing should be held, the Tribunal should hold a hearing so witnesses, including expert witnesses could present evidence or for oral submissions. The tribunal had decided the last four words meant they could hold a hearing for submissions only. The courts disagreed at first instance and on appeal. They decided the Rules required the tribunal to hold a hearing so witnesses could be heard unless the parties had agreed otherwise. This shows tribunals' case management powers are broad, but not unfettered. Claimants should not push tribunals too far on due process matters."

## INCONSISTENT AWARDS

In W v AW [2021] HKCFI 1701, the Hong Kong court found an HKIAC award could not be enforced, because it was inconsistent with an earlier award involving the same parties," states Surtani. "They had entered into a redemption agreement, and were the only parties to it, as well as a framework agreement with other parties. W had began arbitration under the framework agreement, and AW began a separate claim under the redemption agreement. AW raised issues of misrepresentation in both arbitrations and nominated the same arbitrator to both tribunals."

"In the first arbitration, AW's allegations were dismissed but in the second they were upheld. W tried to set aside the second award on public policy grounds arguing the second tribunal should have recognised an issue estoppel arising from the first award. The court agreed, stating the common arbitrator should have at least invited submissions on issue estoppel, and his findings in the two arbitrations were inconsistent. The facts were unusual but this case shows the need for multi-contract transactions to have provisions for consolidated arbitrations to avoid multiplicity of proceedings."

# ARBITRATOR SPOTLIGHT

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## IBRAHIM SHEHATA

### WHAT DO YOU LIKE MOST ABOUT ARBITRATION?

Arbitration has a number of features I think are particularly good. These include confidentiality, flexibility, subject-matter expertise, and tailored procedural processes. However, the one I think is the most important must be the ease of cross-border enforceability of arbitral awards under the umbrella of the New York Convention. This gives arbitration a major advantage when compared to other dispute resolution mechanisms.

### TELL US ABOUT YOUR MOST RECENT PUBLICATION?

I recently wrote a book for arbitration practitioners (whether they are counsels or arbitrators) and those involved in arbitral proceedings in other capacities in Egypt. I spent a whole year collecting almost all the arbitration decisions which had been rendered by Egyptian Courts (around 2,500 decisions in total). The aim of the book is to provide a comprehensive overview of the arbitration process in Egypt, starting from the arbitration agreement and ending with recognition and enforcement of arbitral awards. The book also provides practical guidance which tailored to arbitration in these specific areas of law. I believe it is the first in-depth study of arbitration in any Arab jurisdiction.

### WHAT ARBITRATION DEVELOPMENTS WOULD YOU LIKE TO SEE IN THE REGION?

There are many arbitration developments I would like to see in the region. For example, I would like a specialist court to be set up here to review arbitral awards at both the annulment or enforcement stages. I also believe that we need to provide more training to the judges and the lawyers in the arbitration field in this region in order to cement the position of this dispute resolution mechanism here. In addition, I think it is about time to remedy the enforcement procedures for arbitral awards and treat them in the same manner in which local court judgments are treated, and this comes hand in hand with providing a more robust mechanism for attaching assets in the case of arbitral awards.

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**Ibrahim Shehata** is an arbitrator with Wasel & Wasel Arbitrator Services Inc. and the partner and head of the international arbitration practice at Shehata & Partners Law Firm. He has extensive experience in international commercial arbitration, arbitration-related litigation, and complex banking and finance litigation. He has participated in a range of arbitration cases seated in Cairo, Dubai, and Paris under various institutional rules including those of ICC, LCIA, DIFC-LCIA and DIAC.

## PRAVEEN SANDHU

### WHEN DID YOU START PRACTISING AS AN ARBITRATOR?

I gained my Qualified Arbitrator status with the Alternative Dispute Resolution Institute of Canada in March 2021. My first appointment as a sole arbitrator was on 30 March 2021. In the four months after becoming a Qualified Arbitrator I was nominated as the sole arbitrator for five arbitrations. I appreciate the speed with which people placed their confidence in me in this new role.

### WHAT KEY ELEMENTS CONTRIBUTED TO THIS SUCCESS?

I think one of the main reasons for this was my genuine enthusiasm for this type of work. I believe, fundamentally, in a process that allows parties to select the person who will decide on their dispute. This enthusiasm coupled with a reputation for being a successful capable lawyer and having the trust and confidence of people who have come to know me in my professional work over the years has had an impact as they have seen my integrity and commitment to fairness. Basically, my enthusiasm, and capability combined with trust and confidence made the difference.

### WHAT ADVICE WOULD YOU GIVE TO UP AND COMING ARBITRATORS?

Reputation and capability are important factors. It is important to remember every action you take, whether it is seen or unseen, contributes to building your reputation. If you show sincerity in your work, this will be palpable to those around you and it also results in high quality work. Get involved in the ADR community too, even if it means volunteering. In January I began volunteering on the organisation of an online ADR Symposium which was held in June. The resulting experience, connections and learning were well worth all the time and effort.

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**Praveen Sandhu** is an arbitrator with Wasel & Wasel Arbitrator Services Inc. and has been a practising litigator in British Columbia, Canada since 2004. She is also the founder of her own litigation practice. Praveen is a Qualified Arbitrator with the ADR Institute of Ontario.

**Wasel & Wasel Arbitrator Services Inc.**
First Canadian Place
100 King Street West, Suite 5700
Toronto, Ontario, M5X 1C7
Email: inquiry@waselandwasel.ca
Tel: +1 416 900 1213
Web: www.waselandwasel.ca

# ARBITRATION CASE FOCUS

## RECENT KEY ARBITRATION CASES

Case No .... DCC 122/2021 (Commercial)
Jurisdiction ....Dubai (uae)
Court ....Dubai Court of Cassation
Recommended by .... Wasel & Wasel Arbitrator Services Inc.

### WHAT DID THIS CASE INVOLVE?

A recent Dubai Court of Cassation judgment, clarified the procedure for challenging arbitration-related interim and precautionary orders issued by the competent court or the arbitral tribunal (or arbitrator).

The plaintiff was a beneficiary of a bank guarantee which had been provided by the defendant. The contract between the two parties was governed by an arbitration clause. The plaintiff submitted a petition to the President of the Dubai Appeals Court requesting a precautionary order to seize the bank guarantee in line with the provisions of the UAE Arbitration Law, Federal Law No. 6/2018. However, the defendant challenged the precautionary order before the Dubai Primary Court. The Dubai Primary Court then accepted the challenge and nullified the precautionary order.

However, the plaintiff did not appeal the Dubai Primary Court judgment, instead, they decided to revert to the President of the Appeals Court and requested the reinstatement of the precautionary order to seize the bank guarantee. The President of the Appeals Court accepted this request and reinstated the precautionary order.

The defendant argued that Federal Law No. 6/2018 did not describe the procedures under which a precautionary order could be challenged. Therefore, a party wishing to challenge a precautionary order which had been issued in relation to arbitration proceedings should be in line with Article 114 of the Executive Regulations to the Civil Procedures Law.

The defendant also argued that the plaintiff had failed to comply with the requirements of Article 114(2) of the Executive Regulations to the Civil Procedures Law which stated that, 'The attachor shall, within no later than eight days from the date of issue of the attachment decision, file a claim of right before the competent court, in the cases where the attachment is ordered by the judge of summary proceedings. Otherwise, the attachment shall be considered as if not made.'

The Appeals Court rejected the challenge on the basis that the defendant had not complied with the required procedures in the first instance when the defendant had initiated their original suit before the Dubai Primary Court requesting nullification of the precautionary order. The defendant went on to appeal the judgment before the Dubai Court of Cassation.

### DUBAI COURT OF CASSATION DECISION

The Dubai Court of Cassation based its reasoning on Article 21(1) of Federal Law No. 6/2018 which stated that unless otherwise agreed by the parties, arbitral tribunals may, on request of a party, or on their own initiative, order either one to take interim or precautionary measures as they deem necessary and as required by the nature of the dispute, including necessary measures to preserve goods which constitute part of the subject-matter of the dispute, such as an order to deposit with third parties or sell perishable goods, and preserve assets and property of which a subsequent award may be enforced, and taking action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself.

The Court also referred to Article 21(4) of Federal Law No. 6/2018 which permits a party in whose interest an interim order is granted and on written authorisation from the arbitral tribunal, to request the competent court to grant an order for the enforcement of the order issued by the tribunal or any part of it, within 15 days after having received the request.

The Court relied on Article 18(2) and (4) of Federal Law No. 6/2018 on the powers of the competent court President (i.e. the Appeal Court), to order, on request of a party or request of the arbitral tribunal, interim or precautionary measures, they deem necessary, for current or future arbitration proceedings, whether before or in the course of the arbitration proceeding. The effects of this order shall not terminate, wholly or partially, except with the decision of the President of the competent court.

### WHY IS THIS IMPORTANT?

The Dubai Court of Cassation clarified that the legislator regulates interim and precautionary measures and they may be taken before the commencement of the arbitration procedures or during the course of those procedures, in a particular way which is different from that found in the Civil Procedures Law (Federal Law No. 11/1992) in terms of the authority to issue the order, procedures and rules, and on appealing or challenging such orders.

The Dubai Court of Cassation confirmed an interim or precautionary measure involving arbitration proceedings governed by Federal Law No. 6/2018 may not be cancelled except by a decision which has been issued by the authority that made the order, whether that is the arbitral tribunal or the President of the Appeals Court, as regulated by Federal Law No. 6/2018.

The Dubai Court of Cassation has also established that it is not permissible to argue that the legislation lacks regulations on challenges against arbitration interim or precautionary orders, which therefore, requires the provisions of a Federal Law No. 11/1992 (UAE Civil Procedures Law) to be applied to challenge the seizure order, as it is clear from Federal Law No. 6/2018 that this law has regulated grievance procedures against such orders on the authority that issued the interim or precautionary order.