**The General Authority of the Dubai Court of Cassation**

**Decision no. 10/2023**

**Impossibility of performing arbitration/ DIAC Decision to Consider the Case Withdrawn.**

On 24/10/2023 the General Authority of the Dubai Court of Cassation has issued, unanimously, the decision no. 10/2023 which is a significant decision in relation to arbitration whereby it has departed from settled application of the previous principle regarding the effect of theDubai International Arbitration Center’s decisions that arbitration cases to be considered withdrawn in case of failure to pay arbitration cost.

The court of cassation continued consistently to treat such DIAC decisions as leading to the impossibility of performing arbitration.

**The General Authority of the Dubai Court of Cassation**:

According to Dubai Law no. 13/2016 Concerning the Judicial Authority in Dubai, the General Authority/ Assembly is an authority constituted of the court president or the old ranking judge and 8 of the members of the cassation court to be appointed by the court president. This Authority is mandated, inter alia, to consider and determine legal issues of complexity or high importance. In the present decision the matter was referred to the authority by the court of cassation’s technical office, which is competent, among other things, to infer and summarize legal principles and judicial rules adopted by the court of cassation.

**Previous Ruling**:

The verdicts of the court of cassation regarding the effect of the decision Of the Dubai International Arbitration Center (DIAC) to consider the arbitration case withdrawn because the parties failed to pay the cost, remained to be consistent in treating the decision of DIAC as rendering the arbitration incapable of being performed, and hence give the parties the right to resort to the Dubai court which has the inherent jurisdiction.

As to our knowledge, there was one exception where the court of cassation has not applied that principle. It was the ruling of the cassation court in the appeal no. 228/2021 Real Estate, issued on 29/6/2021, the appeal concerning a case filed by a plaintiff who was a respondent/counter claimant in an arbitration proceeding which were conducted under the DIAC Rules, the two parties to the arbitral claim failed to pay the cost of arbitration of both the original and the counter claim and therefore the two cases were considered by DIAC as withdrawn. The Dubai court of first instance dismissed the case because of the existence of an arbitration clause, the appeal court over ruled the verdict of the first court, the court of cassation ruled that the arbitration clause is valid because the DIAC Rules (2007), in Article 5, does not deprive the counter claimant who failed to pay the cost of arbitration, of filing his counter claim in a later date by another request. We do not intend to discuss the conclusion of this ruling;however, it is noted that the ruling applies only to the counter arbitration claim.

**The Decision**

Prior to the enactment of law no. 6/2018, the arbitration proceeding was organized by a few articles which were contained in the Civil Procedures Law. The present arbitration law is expansive and most covers a wider area of arbitration issues, and it is, indeed, arbitration friendly legislation. To the extent relevant to this brief, there are two Articles of the Law which were invoked by the judicial authority in reaching its decision no. 10/2023, which are Article 45 para 1 and Article 54 para 4.

Article 45/1 states: - “” *The arbitration proceedings shall be terminated by the issuance of the award terminating the dispute by the Arbitral Tribunal.*””

Article 54/4 states: - “” Unless *otherwise agreed by the Parties, the Arbitration Agreement shall remain effective according to the provisions of the present Law after the nullification of the arbitral award, unless such nullification is based on that the agreement itself does not exist, or upon the forfeiture of its term, or its nullity, that it is incapable of being performed*.””

Grounded on those articles, the decision no. 10has abandoned the court of cassation’s previous line of ruling and decided that the decision of DIAC to consider the case withdrawn in case of failure to pay the arbitration cost does not lead to the impossibility of performing the arbitration, that any party to that arbitration may pay the feeslater and continue the arbitration proceedings. Moreover, any party to that arbitration can plead the existence of the arbitration clause in any court case filed against that party and the court shall admit such apleading and declare the inadmissibility of the case due to the existence of an arbitration clause.

We believe that the construction of the General Authority of these articles, and the adoption of a different principle regarding the impossibility of performing arbitration in the scenario dealt with by the decision, strongly support the arbitration mechanism and close the door for avoiding arbitration through unjustified cause, given that the parties has chosen to submit to arbitration at their free will.

In conclusion, we believe that the decision impliedly gives the priority to the application of the rules of the arbitral institution chosen by the parties.