

# Kluwer Arbitration Blog

## Is Non-Payment of Advance on Costs a Waiver of an Agreement to Arbitrate in the UAE?

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A topic that has been hugely debated in the arbitration world is whether non-payment of the advance on arbitration costs constitutes waiver of the arbitration clause. The answer to this debate does not only differ from one jurisdiction to another but [may differ in the same jurisdiction](#). This blog post examines how the courts in the United Arab Emirates (“UAE”) treat non-payment of the advance on arbitration costs.

### The Problem

Non-payment by respondents of the advance costs and expenses in arbitrations is not an infrequent occurrence and often leaves claimants in arbitration proceedings in a difficult situation. One way to deal with such an occurrence would be for the claimant to pay the respondent’s share of the advance on costs so that the arbitration can proceed. When the claimant chooses this path, it is likely to find itself in a situation that is financially cumbersome. The claimant may, on the contrary, decide not to pay the advance on costs and instead bring the claim before the courts. Doing so raises other issues for the claimant, such as finding itself litigating before courts although it had intended to avoid their jurisdiction by agreeing to arbitration. Equally problematic for the claimant would be the case where the courts have already decided that they have no jurisdiction on the basis of the arbitration clause in which case, the claimant is left with no forum to hear its claim.

### What is the Position in the UAE?

There are very few decisions issued by UAE courts, which shed light on this question. One such decision is by the [Dubai Court of Cassation \(“Court of Cassation”\) No. 215/2019 \(Commercial\)](#). In this case, the Court of Cassation dealt with a claim that was initially filed before the Dubai International Arbitration Center (“DIAC”). The respondent had also filed a counterclaim in this case. Neither party paid the advance on costs for their respective claim and counterclaim. As a result, the DIAC closed the casefile and considered both parties’ claims as withdrawn. When the case was filed before the courts, the Court of Cassation decided that the arbitration clause was considered as non-existent and therefore, the claimant could only have recourse to the courts as they have the “*original jurisdiction*” to hear disputes.

The term “*original jurisdiction*”, that is often used by the courts in the UAE, reflects the courts’ view that they are the default forum for hearing disputes and that arbitration is a deviation from the norm. Other routes of resolving disputes, such as arbitration, are considered to be exceptional and therefore when arbitrating a dispute is no longer possible, the jurisdiction of the courts to hear the dispute is automatically restored.

In its reasoning, the Court of Cassation took into consideration that after the closure of the casefile by the DIAC, the respondent had not objected to the decision that the case was considered as withdrawn and there was also no action taken by the claimant to resubmit the case to arbitration in line with the applicable rules (i.e., the DIAC 2007 Rules [Appendix Cost of Arbitration](#)). The Court of Cassation concluded that, as a result, it was not possible to hear the claim that was previously the subject of the arbitration proceeding.

Although the Court of Cassation did not provide an analysis of whether there had been a waiver of the arbitration clause by the parties, it is possible to conclude that there had indeed been such a waiver on the basis that each party declined to pay the advance on costs with respect to its own claims and none of the parties had objected to the decision of the DIAC to close the casefile and consider the claims and counterclaims withdrawn.

In a recent case which ended up before the Dubai courts, a sub-contractor had filed arbitration proceedings against the contractor but had not paid its share of the advance on costs due to lack of funding. The respondent (contractor) was invited to pay the share of both parties but declined to do so. As a result, the tribunal issued a decision declaring the proceedings as terminated. The sub-contractor then filed proceedings before the Dubai Court of First Instance (“CFI”) (See [Case No 678/2020 \(Commercial\)](#)). The contractor challenged the jurisdiction of the courts on the basis of the arbitration clause but its challenge was rejected. The CFI explained that when the arbitration clause is not capable of being performed for whatsoever reasons and grounds, the jurisdiction goes back to the court as the judiciary has “*general jurisdiction*” to decide disputes. It further explained that when the arbitral award is invalidated<sup>1)</sup> or the arbitration clause is no longer applicable, the purpose behind arbitration is extinguished. As a result, either party may approach the courts and is under no obligation to refer the case to arbitration unless there is a new arbitration agreement. According to the CFI, the arbitral tribunal had decided to end the arbitral proceedings for non-payment of the arbitration fees and as a result, the arbitration clause became inoperable. . The case was then heard by the Court of Appeal, which upheld the decision of the CFI. Subsequently, the case was appealed to the Court of Cassation which upheld the decision of the lower courts and adopted the same analysis. In this case as well, the claimant had failed to pay the advance on costs. Although the court did not mention that the claimant had waived the arbitration, one could conclude that waiver has taken place on the basis that the claimant did not pay the advance on costs, which it is responsible to.

Contrary to the above two decisions, in [Dubai Court of Cassation 379/2013 \(Real Estate\)](#), it was not the claimant who had not paid the advance on costs, but the respondent, which prompted the DIAC to declare the casefile as closed. The claimant then brought its claims to the courts. The Court of Cassation, again, relied on the basis that when the arbitration agreement is not possible of being executed, the jurisdiction goes back to the courts as they have the “*general jurisdiction*”. It further explained that the DIAC’s decision to close the casefile renders the arbitration clause non-existent as the purpose behind arbitration is extinguished given that it has not been possible to proceed with the arbitration. This then gives the claimant the right to file its claim before the courts. The court added that the claimant is not under an obligation to pay the respondent’s fees as

Article 2(4) of the Appendix-Cost of Arbitration of DIAC's 2007 Rules states that the advance is to be paid equally. The reference in the decision to Article 2(4) raises the question of whether the Court of Cassation would have reached a different conclusion if there was no such provision under the DIAC 2007 Rules. On the one hand, it may not be wise to reach any conclusion on this point in the absence of sufficient court decisions which would provide insight on this point. On the other hand, given the well-established concept that the UAE courts have general jurisdiction and that arbitration is an exceptional route, it is likely that the Court of Cassation's conclusion would not have been any different in the absence of Article 2(4).

## **Final Observations**

One may conclude from the above decisions that when the parties' conduct can be interpreted as waiver of the arbitration clause, the UAE courts would exercise jurisdiction if and when the claim is filed before them. Doing so does not raise any concerns because it is only legitimate for the dispute to be resolved through the courts when the parties no longer wish to resolve it through arbitration. Parties are at liberty to opt for arbitration and are equally at liberty to opt out of arbitration.

When there is no indication that the parties have waived the arbitration clause and the claimant seizes the court's jurisdiction as a result of the respondent's non-payment of the costs, it appears that the courts would consider the arbitration agreement as having become inoperable and would exercise jurisdiction. Such approach ensures, on the one hand, that the claimant is not deprived of a forum and not forced to shoulder the full advance on costs. On the other hand, this approach encourages frustration of the arbitration agreement by respondents intending to hinder the arbitration process.

There are not yet enough decisions dealing with this question and given how rapidly the arbitration landscape is evolving in recent years, it would be very interesting to see how UAE courts will deal with this thorny issue in the coming years.

*(The author of this Blog post has been involved in one of the cases reviewed as counsel for a defendant before the courts.)*

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## References

?1 The CFI erred in its decision with respect to this specific point as under Article 54(4) of the [UAE Federal Arbitration Law No. 6 of 2018](#), when an arbitral award is invalidated by the courts, the arbitration agreement remains in force unless the parties agree otherwise and unless the invalidity is due to the non-existence of the arbitration agreement, its lapse, its invalidity or it being incapable of execution. However, this error does not affect the CFI's findings with respect to the subject under examination.

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