

Authority to agree to arbitration: a recent Dubai Court of Cassation judgment

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Introduction

In a recent ruling, the Dubai Court of Cassation upheld a lower court's decision to dismiss the Claimant's claim because of the existence of an arbitration clause. In doing so, it rejected the argument of the Claimant – a limited liability company concluding that the arbitration clause was void on the basis of an alleged lack of authority. The Court of Cassation confirmed that a manager of a limited liability company, as its legal representative, has the power to agree to arbitration unless the company's memorandum of association restricts his/her authority by excluding the right to agree to arbitration.

Background

The Claimant had entered into a contract with the Defendant to design and install hoardings at a lump sum price of AED 5,390,035 (approximately US\$1.45 million). The Defendant later commissioned additional work by the Claimant at a price of AED 1,664,523.41 (approximately US\$450,000). The Claimant completed both the original and additional works. The Defendant paid AED 5,170,241 (approximately US\$1.4 million) to the Claimant, leaving a balance of AED 2,241,163, (approximately US\$600,000) which the Defendant failed to pay. The Claimant initiated court proceedings against the Defendant to recover payment of the outstanding balance (i.e., AED 2,241,163 plus interest). The Defendant sought the dismissal of these (essentially debt collection) proceedings against it on the basis of the arbitration clause contained in the Contract.

Lower Court judgments

The Court of First Instance declined to entertain the action due to the existence of the arbitration clause on the following grounds:

“According to the general provisions of the contract in question – Clause 21 (Dispute Resolution) of the parties' contract, dated 03.01.16, disputes shall be referred to Dubai International Arbitration Center. Clause 21-8 states: “Any arbitration shall be conducted under the Arbitration Rules of Dubai International Arbitration Center.” The Defendant pleaded that the action was barred due to the arbitration clause. Accordingly, we have no jurisdiction to hear any dispute that arises between the parties to said contract, pursuant to the parties' mutual intention to submit to arbitration rather than the courts, as the matters which the

parties agreed to resolve through arbitration do not relate to public policy and are capable of conciliation, being strictly a commercial dispute concerning a subcontract. The Defendant's plea is correct as a matter of fact and law and will, as such, be granted in the dispositive part of this ruling."

The Claimant appealed the ruling of the Court of First Instance. It asserted that the Contract, which contained the arbitration clause, bore the sole signature of the Claimant's manager. However, the Claimant asserted that the responsibility of the management of the Claimant as a limited liability company did not vest solely in the manager on the basis that Article 2 of its Memorandum of Association provided, under "Board of Directors," that the business and affairs of the Company shall be managed and its full powers exercised by or at the direction of the Board of Directors, unless otherwise provided in the Articles of Association or Memorandum of Association, and that the Board of Directors shall be composed of two directors.

The Court of Appeal rejected the Claimant's challenge and upheld the primary ruling, noting:

"The challenge made to the primary ruling on appeal is baseless and is rejected. This is not changed by the Appellant's argument that the arbitration clause is void because it was signed by a person lacking the relevant authority since the contract carries the signature of only one of the Appellant's directors when the Company's Memorandum of Association provides that the directors who constitute the Board shall have a joint right to agree on arbitration and that neither director has sole signatory rights in this regard. It is clear, looking at the copy of the Articles of Association of the Appellant company, that Article 2-1 (Board of Directors) provides that the business and affairs of the Company shall be managed and its full powers exercised by or at the direction of the Board of Directors, unless otherwise provided in the Articles of Association or Memorandum of Association, and that the Board of Directors shall be composed of two directors. Article 2-6, headed "Quorum, Adjournment, Vote Required on a Motion" provides that the quorum for all meetings of the Board of Directors is at least half of the number of the directors authorized to transact business which means that the Appellant company's Articles of Association do not require the joint signatures of the two directors but allows for half that number of directors (either director) when transacting company business. The Appellant has not disputed the fact that the signatory to the contract containing the arbitration clause is one of the Company's directors. Therefore, the terms and provisions of the contract are binding on the Appellant."

Judgment of the Court of Cassation

The Claimant appealed on cassation arguing that the Court of Appeal contradicted and misapplied the law, erred in the adequacy of its reasoning and findings, prejudiced defence rights, and contradicted what is evidenced in the documents. The Court of Cassation dismissed the appeal.

The Court of Cassation confirmed that "arbitration is an express agreement by the parties to submit to arbitration, instead of the courts, all or certain disputes which have arisen or may arise between them." The Court of Cassation referred (amongst other things) to Article 4.1 of the UAE Federal Arbitration Law No. 6 of 2018 ("Arbitration Law"), which states that:

"An Arbitration Agreement may only be concluded, on pain of nullity, by a natural person having the legal capacity to dispose of his rights or on behalf of a juridical person by a

representative with specific authority to arbitrate”.

It recalled that:

“...arbitration may only be agreed by persons having authority to exercise the disputed right rather than the authority to refer to courts since an arbitration agreement entails a waiver of the right to bring an action in courts and consequently a waiver of all guarantees that courts afford to litigants. Thus, as an exceptional method of dispute resolution, arbitration, by UAE law, can only be agreed upon pursuant to a special power of attorney and express authorization. And so, under Article 4 of the Arbitration Law, an arbitration agreement may only be concluded, on pain of nullity, by a natural person having the legal capacity to exercise his/her rights or on behalf of a legal person by a representative who is authorized to conclude the agreement on arbitration. The court before which a dispute is brought that is subject to an arbitration agreement shall decline to entertain the action if the defendant has so pleaded before submitting any request or plea on the merits.”

Furthermore, the Court noted that:

“It is settled that the manager of a limited liability company, as its legal representative, has the power to agree to arbitration in its name unless the company’s memorandum of association restricts his authority by excluding the right to agree to arbitration. The trial court has the discretion to find and interpret facts, explain contracts and agreements, and interpret and explain disputed terms according to the mutual intention of the parties, having regard to the facts and circumstances of the case, without review by the Court of Cassation, provided that its interpretation does not go beyond the plain meaning of such writings. Such exercise of discretion cannot be challenged before the Court of Cassation.”

The Court of Cassation referred to Article 8 of the Arbitration Law, which confirms that “[t]he court before which a dispute is brought that is subject to an Arbitration Agreement shall decline to entertain the action if the defendant has so pleaded before submitting any request or plea on the merits, unless the court is satisfied that the Arbitration Agreement is void or incapable of being performed.”

Comment

Generally, an arbitration clause cannot be enforced against a UAE company unless the person signing the arbitration clause (or the contract it is included therein) has authority to bind the company to arbitration. Article 4.1 of the Arbitration Law confirms that arbitration agreements must be signed by “a natural person having the legal capacity to dispose of his rights or on behalf of a juridical person by a representative with specific authority to arbitrate”.

This is further enshrined in Article 53.1(c) of the Arbitration Law, which confirms that a party can seek to set aside an arbitral award if the arbitration agreement was signed by a person that does not have the requisite capacity required under Article 4. In the UAE, general managers are presumed to have authority to enter into arbitration agreements on behalf of a limited liability company, unless the memorandum of association expressly states otherwise (Article 237 of the UAE Companies Law No. 8 of 1984). The Court of Cassation has confirmed that managers indeed have the requisite authority to sign the arbitration clause, and any resulting arbitration agreement between the parties is considered valid and enforceable.

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