

Grounds for setting aside arbitration awards

Suzanne Abdullah
s.abdullah@tamimi.com

March 2011

Claim and facts of the case

A Commercial Action was filed before the Dubai Court by a Subcontractor (“Party A”) against (“Parties B and C” together the “Parties”). Party A requested the Court to ratify an arbitral award issued on 18 June 2008 in which the Parties were ordered to jointly and severally pay AED843,912 plus 9% legal interest from 12 July 2003 until full payment. Party A was also awarded its legal costs in the amount of AED30,000.

Party A submitted that it had concluded a Sub Contracting Agreement (“The Agreement”) with the Parties. The Agreement contained an arbitration clause. Party A’s obligations under the Agreement were to execute carpentry work, being the supply and installation of wooden doors and cupboards in a residential complex in Sharjah. Party A pleaded it carried out all the works as stipulated in the Agreement but that the Parties refused to make the final installment payment, amounting to AED843,912. As stated above, Party A received an award to this effect in its favour.

Consequently, a representative of the Parties filed an interlocutory application before the Court, requesting the Court set aside the arbitral award. A number of grounds were put forward in support of the application:

- The award was issued without terms of reference and/or based upon invalid terms of reference. The basis for this argument was the suggestion that the minutes of arbitration hearings neglected to state that parties neither prepared nor signed terms of reference.
- The arbitrator exceeded the time prescribed in the terms of reference (being 18 January 2008) to issue the award, and further, that the invalid terms of reference did not empower the arbitrator to extend the prescribed time. The Parties noted that both participants to the proceedings had refused to extend the time within which the proceedings were to be conducted. The Parties submitted that any such extensions should have been requested by the arbitrator prior to the expiration of the prescribed time (in this case the Parties alleged it was requested following the expiration of the time).
- The legal representative of the Parties during the arbitral hearings had not been properly authorized by the Parties to attend and make submissions at arbitral hearings. The Parties further argued their legal representative had not been duly authorised to sign the terms of reference or to extend the deadline as prescribed in the terms of reference;
- The arbitrator did not ensure the Parties had been adequately served. The arbitrator received his terms of reference from the execution judge and not from the Court which appointed him. The Parties argued that Article 216(b) of the UAE Civil Procedure Law precluded the execution judge from addressing the arbitrator.
- The arbitrator directed the Parties to pay the arbitration fees before commencing arbitration proceedings and then again before identifying the losing party, which the Parties argued was in contravention of Article 218 of the Civil Procedure Law.
- The arbitrator did not deposit his award as prescribed in Article 213 of the Civil Procedure Law but deposited it with the execution judge without providing a copy to both parties within the stipulated time limit.

Court of First Instance

The Court of First Instance dismissed Party A's plea that the award be enforced and ruled in favor of the Parties. Consequently Party A appealed to the Court of Appeal. Although the award was set aside, the Parties also appealed on the basis the Court of First Instance had failed to adequately address the Parties' reasons for arguing that the award be set aside.

Court of Appeal

The Court of Appeal overturned the Court of First Instance's decision and ratified the arbitral award. Furthermore, the Court of Appeal dismissed the Parties' interlocutory claim. Subsequently, the Parties appealed to the Court of Cassation.

Court of Cassation

The Parties argued that the Court of Appeal had erred in reversing the decision of the Court of First Instance. The Parties put forward a number of propositions in support of this plea:

- The Parties relied on to Article 212 (5) of the Civil Procedure Law in arguing that one of the essential requirements of an arbitration award is the signature of the arbitrator who has issued the award. The Parties noted that the arbitrator only signed the last page of the arbitral award (which contained the decision) whereas all the other pages containing the grounds for the ultimate decision were not signed;
- The proceedings were not governed by valid terms of reference (or indeed no terms of reference). The Parties argued that the terms of reference had only been signed by Party A and not the Parties' representatives.
- The Parties again put forward the arguments that the proceedings had expired, and the proposition that their legal representative had not been properly authorised to represent them.

With respect to the Parties' first argument, the Court of Cassation repeated a long established principle that the most essential element of an arbitration award is the signature, on the award, of the arbitrators who have issued the award. The Court further explained that from a legal point of view; the signature is the only evidence of the existence of the award, and must refer to both the ultimate decision and the grounds reached in support of that ultimate decision. Essentially, a failure by the arbitrator to sign each page of the award would render that award invalid.

The Court of Cassation found one exception to this crucial and important rule. Where the grounds or reasoning for the ultimate decision are continued on the same page as the relief ultimately ordered, and the page containing the ultimate relief is signed, that signature shall be deemed to cover the reasoning for the granting of the relief.

If the reasoning and grounds for the ultimate decision and the ultimate decision itself appear on separate pages, then all pages of the award should be signed by all arbitrators. Failing this, such award shall be invalid.

In this case, the final page of the award, which contained the ultimate decision, also contained part of the reasoning for the ultimate decision. The final page was signed; therefore the signature was deemed to cover both the grounds for the ultimate decision and the ultimate decision itself. Importantly, the Court of Cassation ruled the format of the award complied with Article 212.

The Parties' second argument was dismissed. The Court of Cassation determined that an arbitration agreement is capable of either being incorporated as a clause ("arbitration clause") in the contract between parties or as a separate independent agreement in the course of a dispute between both parties (this is not to be confused, however, with the doctrine of separability which prescribes that an arbitration clause in a contract is to be treated as separate from that main contract). Importantly, the Court of Cassation held that when the arbitration agreement is incorporated as a clause in the contract it exempts the participants from drafting a separate independent agreement or terms of reference in order to validate the procedure.

In this case, the Court of Cassation found that because the Court of First Instance had appointed the arbitrator on the basis that the Agreement contained an arbitration clause, there was no need to enter into

separate terms of reference.

From a further procedural standpoint, the Court of Cassation held that there was no provision in the law requiring the arbitrator to document, in the minutes of the arbitration hearings, that he had submitted terms of reference to the parties for their signature.

The Parties' third and final argument was also dismissed. The Court of Cassation, with reference to Article 210 of the Civil Procedure Code, held as follows:

- An agreement on a specific timeframe for the arbitrator to render his award would not prevent a later agreement explicitly or implicitly, extending that timeframe for one or more additional periods, or to authorise the arbitrator to determine the extension. The court may, at the request of the arbitrator or any of the parties, extend that date for the duration of time it deems appropriate for the settlement of the dispute.
- As such an extension of the time for arbitration, whether pursuant to the agreement of the parties or authorisation of the arbitrators or order of the court, begins to run after completion of the previous period and not separately.
- The arbitration proceedings shall be deemed to continue (i.e. without expiration) if the parties continue to appear, and neither party expressly pleads that the arbitration proceedings have lapsed, or if the arbitrator requests an extension from the Court before the expiry of the time limit for arbitration (the proceedings will not be held to have expired even if the Court agrees to the extension only after the arbitration time limit has expired - the crucial date is the date the request is made).

The Court found that the arbitrator had requested an extension from the Court within the 6 month period of the proceedings. In this regard, the Parties' time bar argument was dismissed.