So you think you can Arbitrate?

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We shed some light on some of said issues, particularly, (i) the event of not signing part of the agreement; (ii) not calling upon the arbitration clause before the national courts and (iii) the absence of a special delegation to the signatory of an arbitration agreement, as follows:

I. Not signing part of the Agreement where the arbitral clause is embedded:

In a recent case handled by Al Tamimi & Company in Abu Dhabi, the Claimant filed a case against the Defendant before the Abu Dhabi Courts disputing some issues in the agreement they previously concluded and requesting the appointment of an expert to evidence the Defendant's alleged defaults.

The disputed agreement was a set of documents divided into two parts attached to each other, namely, part 1 and part 2.

a) Part 1 was four pages signed by both parties containing the very basic details of the contracting parties and a summary of their obligations.

This part had an explicit clause referring to Part 2, deeming it as an integral part forming the whole agreement and further states that the Claimant has received, read and agreed to comply with its terms.

b) Part 2 was the full extensive part of the agreement, detailing the obligations of each party, the triggers for default, and an arbitration clause clearly stating that any dispute shall be resolved by arbitration.

Since Part 1 (signed by both parties) referred to Part 2 and the parties knew that the agreement could not be executed without Part 2, the parties saw no need to sign Part 2.

At the first hearing before the Abu Dhabi Court of First Instance, the Defendant brought the arbitration clause to the court's attention. Nevertheless, the Court of First Instance rejected such plea and instead issued a preliminary judgment to appoint an expert as requested by the Claimant.

The Court's rationale was that the Court deemed the above Parts (1 and 2), as two separate agreements. The Court further explained that only Part 1 was signed by the parties showing their consent to its content, on the contrary to Part 2 which was not signed. The Court neglected Part 2 (or the "second agreement" as per its interpretation) and thus the arbitration clause was not binding.

The Defendant appealed the preliminary judgment for misapplication of the law and misinterpreting the facts of the dispute.

The Appellant relied on the fact that an agreement to arbitration was made through the reference made in Part 1 to the content of Part 2 i.e. the arbitration clause.

The Court of Appeal upheld the judgment issued by the Court of First Instance for the same reason.

Originally and as a general rule, we note that the national courts retains jurisdiction for disputes arising from contractual agreements. However, paragraph 1 of article 203 of the Civil Procedure Code No. 11 of 1992 as amended (the "CPC") provides an exception to the above rule. Said paragraph states that:

1. *" It shall be permissible for contracting parties generally to stipulate in the original contract or in a subsequent agreement to refer any dispute between them concerning the implementation of a specified*

contract to one or more arbitrators and it shall likewise be permissible to agree by special conditions to arbitration in a particular dispute."

Although such exception is regulated by law, certain conditions must be satisfied for it to be deemed as a valid agreement. We note that paragraph 2 of the above article states that:

2. *"An arbitration agreement may be proved only by writing."*

It is thus essential to have the agreement to arbitrate made in writing, which is the case for most standard commercial agreements. It is the act of "signing the said agreement" that remains a question to be addressed. Is signature mandatory or would the evidence showing that it was agreeable by the parties – even if it was not initialed and signed – suffice? In the above example, the implied doctrine is that it should be signed, otherwise it will not be deemed binding and will be overlooked.

In conclusion and to avoid any unforeseen alteration to a planned method of resolving potential disputes, it is recommended that the contracting parties sign and initial every page of the agreement.

II. Call upon Arbitration at the first hearing before the National Court:

We often encounter situations where our clients instruct us on a very short notice to represent them in a dispute before the national court whose hearing is scheduled the next day. The first question we ask the client is whether there is an arbitration agreement between the two parties.

Unless you wish to give the courts jurisdiction to hear a case, raising the issue of arbitration before the national court is very important. If not raised at the first hearing, the court will assume that the parties have waived their rights to refer the matter to arbitration and submit to the jurisdiction of the court.

Paragraph 5 of Article 203 of the CPC provides that:

"If the parties agree to arbitrate the dispute it shall not be permissible to bring an action in respect thereof before the courts but nevertheless if one of the parties does have recourse to litigation without regard to the arbitration clause and the other party does not object at the first hearing the action must be tried and the arbitration clause shall be deemed to be cancelled."

The timing you should call upon the arbitration clause is a key factor to have the claim rejected by the national court. The principle established in the Abu Dhabi judiciary is that any objection to jurisdiction on the basis of having an agreement to resolve the dispute through arbitration should be raised at the first hearing. The first hearing in such context means the very first one where your lawyer attends before the court, even if the purpose of such attendance is to submit the power of attorney and requests an extension to review the case file and submit the statement of defence.

As a result,, remaining silent and not contesting jurisdiction for having an arbitration clause is deemed a waiver of the previous agreement to arbitration. The arbitral clause will become ineffective and the national court retains jurisdiction to review the dispute.

In this regard the Cassation Court ruled in the Cassation No. 141 of 2007 – Session of 22/11/2007 (Commercial) that the party adhering to the arbitration clause must take a positive action to object in the first hearing on the filing of the claim made before the national court by his opponent.

Consequently, it is essential that the above objection occur at the first hearing or else the case will be reviewed by the national court and the arbitration agreement will be cancelled.

III. Absence of a special delegation to the signatory of the Arbitration Agreement:

We always bring to the attention of our clients that the signatories to an arbitration agreement should have explicit authority allowing them to arbitrate. Article 203(4) of the CPC states that: "It shall not be

permissible to arbitrate in matters which conciliation is not permissible. An agreement to arbitrate shall not be valid unless made by persons having the legal capacity to make a disposition over the right the subject matter of the dispute."

In application of the above article, the Dubai Cassation Court ruled "In accordance with article 203 (4) of the Civil Procedures Law – that it is not permissible to agree on resorting to arbitration without having the capacity to make a disposition over the right of the subject matter, and not the legal capacity to resort to court. Agreeing to arbitration means waiving the right to file the claim before the national courts, which requires a special power of attorney. A delegation from the principals to the agent to conclude some actions and dealings will not do." Cassation No. 577/2003 – Hearing of 12/6/2004

Furthermore, article 58(2) of the CPC stipulates that: "No admission or waiver of a right alleged or settlement or submission to arbitration or acceptance of or requisition for the oath or refusal thereof or abandonment of the proceedings or waiver of the judgment in whole or in part….. without special authority".

The above articles of the CPC denote that no rights shall be submitted to arbitration without a special authority (power of attorney) to authorize such submission.

In many events we find that the signatories of an agreement having an arbitration clause do not have a special authority evidenced in their delegation/power of attorney authorizing them to sign arbitration agreements in compliance with articles 203(4) and 58(2) of the CPC noted above.

In light of the above, the arbitration clause could be declared null and void and resorting to arbitration may not be possible, making the national courts competent to review the dispute, or even allowing for a situation where any arbitral award rendered based on said clause could be annulled by the national courts while ratifying it as per article 216 (b) of the CPC. Article 216 allows the parties to request nullification from the Court (that looks into the ratification of the arbitration award) of the arbitration award in the following circumstances, one of which is having an agreement to arbitrate made by a person lacking the capacity to arbitrate as outlined above.