

UAE: Ratification of a Domestic Arbitral award and the issue of Arbitration clauses incorporated by reference

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April 2013

This amount represented an outstanding due to the client in addition to damages for breach of contract.

The below article is based on the judgment rendered by the Dubai Court of Cassation in relation to the ratification of the arbitral award.

Facts of the Case:

The Claimant, a general contractor for engineering construction, entered into an agreement with the Respondent in which they agreed to settle their disputes in accordance with the International Federation of Consulting engineering Contracts (FIDIC) and in accordance with the procedures of arbitration in the UAE.

As the Respondent failed to perform his contractual obligations the Claimant initiated arbitration proceedings before the Dubai International Arbitration Centre which awarded the Claimant the amount of AED 52 Million.

In order to enforce the award, the Claimant initiated proceedings before the Dubai Court of First Instance requesting the ratification of the award rendered by DIAC arbitrator. The Respondent filed a counter claim requesting the court to annul the award on the basis of lack of consent, alleging that he did not sign the agreement with the Claimant and that he never agreed to the arbitration clause. Further, he alleged that the agreement was signed by the consulting engineer of the project who was not granted a specific power of attorney from the Respondent to agree to arbitrate.

Procedural History:

The First Instance Court annulled the arbitral award relying on article 58(2) of Civil Procedures Law. According to the Court of First Instance an agreement to arbitrate shall not be valid unless made by persons having the legal capacity to make a disposition over the subject matter of the dispute or by special authorization from the latter. Therefore, the court concluded that the Respondent did not sign the agreement, or agree personally to arbitrate nor did he authorize his consultant to agree to arbitrate, therefore the arbitration clause as well as the arbitration award shall be considered null and void. The Claimant appealed the above judgment on the grounds accepted by Court of Appeal which overturned the lower court's decision and ratified the arbitration award. Consequently, the Respondent challenged the Appeal Court's decision before the Court of Cassation on the following grounds:

1- The main contract, the subject of the award was signed by the project's consultant who was appointed by the Respondent (the employer) and was not signed by the Respondent himself.

2- The documents did not include a specific Power of Attorney from the Respondent to the consultant to agree to arbitrate on his behalf. The applicable law as set out in previous judicial precedents, requires an arbitration clause or deed to be signed either by the contracting party or an agent who holds a specific power of attorney to agree to arbitrate on behalf of the contracting party.

3- The award did not include a copy of the arbitration agreement nor was the subject matter of the dispute defined in an arbitration agreement or specified during the course of the arbitration proceedings.

The Court of Cassation

Responding to the Respondent's above arguments, the Cassation Court rejected all his arguments on the following grounds:

1- Pursuant to Article 203 of the UAE Civil procedures Law (CPL) an arbitration may be agreed between contracting parties and included in an arbitration clause where they would agree to refer any future disputes arising from their contract to arbitration or they may later agree to refer their current dispute to arbitration and conclude it in an arbitration deed. Once the contracting parties include an arbitration clause in their agreement, there is no requirement to enter into a separate arbitration deed. In this case, the tender documents included the tender terms and conditions which referred to FIDIC general terms and conditions specifically clause 67(1) that deals with arbitration in accordance with Dubai Chamber of Commerce rules and FIDIC.

2- In addition, a letter was signed by the Respondent and submitted to the arbitration tribunal acknowledging that he signed the contract which is derived from the tender general terms and conditions. This letter established that the Respondent was aware of the arbitration clause when he entered into the agreement as well as his knowledge of the tender's general terms and conditions that referred to the FIDIC terms and conditions (which contain an arbitration clause).

The fact that the consultant signed the agreement on behalf of the Respondent does not change the fact that the latter was aware of the arbitration clause as indicated in the tender's general terms and conditions to which he agreed and accepted when he submitted his tender. As evidenced in correspondence with the Claimant. The fact that the Respondent terminated the agreement pursuant to Article 63 of the Tender's general terms and conditions proves that he was aware of the arbitration clause explicitly mentioned therein.

Therefore the Cassation Court upheld the Appealed judgment which ratified the arbitration award.

Practice Note:

The court established a new precedent by deciding to ratify the arbitral award concerning an arbitration agreement which was not specifically signed by one of the contracting parties nor was it signed by a holder of a specific power of attorney to agree to arbitrate on behalf of one of the contracting parties. . The Court held that because the tender documents (which contained an arbitration clause) were accepted by the defendant and the defendant had performed the contract and then engaged fully in the arbitration, it was bound by the arbitration clause and could not now seek to annul the award due to lack of consent.