

Abu Dhabi Court of Cassation Decision on Arbitration

Hassan Arab - Partner, Regional Head of Dispute Resolution - Litigation / Arbitration
h.arab@tamimi.com - Dubai International Financial Centre

April 2014

Introduction

The Abu Dhabi Court of Cassation, in Appeal no. 924 of 2009, integrated the following important rules in respect of arbitration:

- The power of attorney of the Respondent's representative can only be contested by the Respondent.
- If the parties fail to agree on arbitrators, or if the appointed arbitrator was precluded from acting or disagreed over the appointment of an arbitrator, the Court may appoint one.
- The arbitrator's attendance at the hearings would be sufficient to constitute an implicit acceptance of his nomination and mandate.
- The award is not void if it does not rely on the unsworn testimony of the witness.
- The arbitrator may rely on foreign documents as long as the other side does not object to it during the procedure and that this issue is not one of public policy.

Facts

The Petitioner entered into an agreement with the Respondent for the purchase of a luxury dress. Since the Petitioner failed to make full payment of the price, the Respondent requested the Court to appoint an arbitrator to resolve the parties' dispute, in accordance with the arbitration clause in the agreement. The Court of First Instance appointed an arbitrator who issued an award in favor of the Respondent. The Respondent initiated an action for the ratification of the award before the Court of First Instance, which ratified the award. The Petitioner appealed before the Court of Appeal, which confirmed the decision of the Court of First Instance. Thereafter, the Petitioner filed a petition to the Court of Cassation.

The Court of Cassation

The Petitioner made the following arguments. The Court of Cassation's findings are set out below each point:

1. The power of attorney given by the Respondent's representatives to the attorney who instituted the action was not accompanied by proof of their authority to appoint attorneys to agree on arbitration and execute an arbitration agreement. The Court of Cassation held that the relationship between the parties and their attorneys before the lower courts is a matter that concerns the parties alone and may not be contested by others or by the court of its own motion as long as the party itself does not question the power of attorney that it granted to its representative. An agreement to arbitrate that had been agreed without specific authority provided in the power of attorney is sanctioned by a relative nullity of the agreement to arbitrate that only the grantor of the power of attorney has the right to raise. The Respondent has not denied giving a power of attorney to the attorney who instituted the action. The Petitioner cannot therefore dispute the power of attorney or claim nullity of the arbitral award on the basis that the Respondent's attorney has exceeded his powers and that the power of attorney did not authorize him to agree to arbitrate or execute an arbitration agreement.
2. The Respondent instituted the action in court without regard to the arbitration clause and without any

objection from the Petitioner. In light of this, the arbitration clause is void and the Court of First Instance should have heard the action and not referred it to arbitration. Pursuant to Articles 203(1) and 204 of the UAE Federal Law No. 11 of 1992 Concerning Civil procedures (as amended) ("Civil Procedure Law"), where the parties have agreed to arbitrate any disputes that may arise in relation to the performance of their contract, but have failed to agree on arbitrators or had agreed on an arbitrator who was then precluded from acting or disagreed over the appointment of an arbitrator, the Court originally competent to hear the dispute shall appoint whatever arbitrators are required by normal litigation procedures. The Petitioner and the Respondent had agreed under Clause 12 of their agreement that any dispute or difference arising between the parties to the agreement shall be referred to arbitration before a sole arbitrator who is to be appointed. A dispute arose between the parties concerning the performance of the agreement and the Respondent asked the Petitioner to perform its obligations and, should it refuse to pay the amount owing to the Respondent, to appoint an arbitrator on its behalf within seven days in order to commence arbitration. When the Petitioner refrained from nominating an arbitrator, the Respondent approached the Court of First Instance to appoint an arbitrator. Therefore, this argument is groundless.

3. The award was rendered without terms of reference. Pursuant to Article 203(3) of the Civil Procedure Law, "The subject matter of the dispute must be defined in the arbitration document or during the course of proceedings even if the arbitrators are authorized to conduct conciliation; otherwise the arbitration shall be deemed null and void." This means that an agreement to arbitrate may be set out in a contract or separately in an arbitration document. An arbitration clause in a contract dispenses the need to establish terms of reference or an arbitration document in order to validate the proceedings. Since the parties have provided for an arbitration agreement in their contract, there was no need for separate terms of reference. The arbitrator's acceptance of his appointment must be evidenced in writing or recorded in the minutes of hearing. Neither party had communicated its acceptance to the arbitrator, nor was such acceptance recorded in the minutes of hearing.
4. The arbitrator's attendance at the hearings is sufficient to constitute an implicit acceptance of his nomination and mandate. Further, the minutes of the hearing indicate that all the witnesses heard by the arbitrator had taken the oath except for the Respondent's witness, who was not questioned by the arbitrator but by the Petitioner's attorney. While unsworn testimony is void, the arbitral award did not rely on that witness' testimony. The Court therefore rejected the Petitioner's arguments.
5. The arbitrator did not have the witnesses take the oath. The arbitrator further accepted foreign documents that were not accompanied by certified translations, despite the Petitioner's insistence on production of the originals. While Article 45(4) of the Civil Procedure Code requires that documents drafted in a foreign language be accompanied by certified translations into Arabic, the court may rely on foreign documents after acquainting itself with their content and the other side not objecting to the content or insisting on an Arabic translation. The issue is not one of public policy and as long as the other side accepts the documents and discusses their content, it cannot then claim that the award which has relied upon the documents is void.

Accordingly, the appeal was dismissed by the Court of Cassation.