

When can an Arbitration Clause be Incorporated by Reference in the UAE?

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July - August 2014

In many jurisdictions arbitration clauses can be incorporated by reference. For example, although the main commercial terms will be set out in one agreement, certain standard terms will be incorporated by reference to a second document, and these standard terms may include an arbitral agreement.

Under UAE law however arbitration is viewed as a special form of dispute resolution which requires parties to clearly evidence that they both consent to the process in writing. This is because by agreeing to arbitration parties are waiving their right to refer the dispute to court. UAE law will not allow a party to lose this right unless there is clear evidence that the party consciously chose to waive it by signing an arbitration clause.

Incorporating an arbitration clause by reference to the terms of another document is therefore problematic because will give rise to the possibility that party will sign the main document without being fully aware of the arbitration clause that exists in the standard terms being incorporated by reference.

In Dubai Court of Cassation case in 2012 (Real Estate appeal 153 of 2011, issued on 19 February 2012) the Court explained on what conditions arbitration clause might be incorporated by reference.

Background

The parties had entered into an agreement for the sale of land. The Purchaser brought a claim before the Court of First Instance seeking the recovery of its paid instalments due to an alleged breach of the agreement by the seller.

At the Court of First Instance the Seller applied to the case dismissed on the basis that there was a valid arbitration clause. The main sale agreement that was signed by the parties contained a clause that stated that the Seller's general terms and conditions were incorporated into the main agreement. These general terms and conditions were attached to the main agreement and contained an arbitration clause. When the main agreement was signed the Purchaser signed the main agreement in full, and initialled the appended terms and conditions.

The First Instance Court dismissed the Seller's argument and directed the Seller to refund the Purchaser with the paid instalments along with interest.

The Seller appealed to the Dubai Court of Appeal and requested that the appeal court quash the lower court ruling and dismiss the claim due to the parties' agreement to refer their disputes to arbitration. Alternatively, the Seller requested that the court refer the case for investigation to prove that the signatory on behalf of the Purchaser signed and agreed to refer disputes that may arise out of the execution of the land's sale agreement to arbitration

The Appeal Court referred the case for investigation to question the purchaser's manager who had signed on the Agreement on behalf of the purchase and whose initials were on the general terms and conditions attached to it.

After questioning the manager the court allowed the Seller to evidence through witnesses that the manager of the Purchaser acknowledged the arbitration clause incorporated in the general terms and conditions of the sale agreement by reference.

Following submission of the witnesses' statements, the Appeal Court rendered its decision to dismiss the appeal and uphold the ruling of the Court of First Instance. The Court found that the general terms and conditions and the schedules appended to the sale agreement were not signed by the Purchaser, but were only initialled.

The Cassation Court:

Before the Cassation Court the Seller argued that the Court of Appeal had erred in its application of the law and it disregarded the witness statements in respect of the Purchaser's agreement to refer any disputes to arbitration.

The Court of Cassation dismissed the appeal and held that:

1. It is established in the rulings of this court that an arbitration clause is valid when the parties to an agreement explicitly agree to the jurisdiction of arbitration rather than the courts and that an arbitration agreement may only be evidenced by writing.
2. As such, reference made in the main agreement to an arbitration clause can be construed as an arbitration agreement only if such reference is incorporated explicitly in the main agreement. However, in the event the reference is generally made to incorporate general terms and conditions without including an explicit reference to arbitration to indicate that both parties have agreed to the arbitration, the reference then does not extend to include the arbitration clause.
3. A reference in the main agreement to its appendixes and schedules would suffice without requiring the parties to sign each page of such appendixes in the event that such appendixes and schedules were merely a detailed elaboration of the fundamental clauses included in the main contract. However, when such appendixes and schedules include an exceptional clause such as an arbitration agreement, such clause may not be valid unless both parties sign all pages of the appendixes to the main agreement.
4. Article 11 of the UAE Evidence Law provides that an informal document is deemed to emanate from the person who signed it, unless he formally contests the writing, the signature, the seal or the finger print alleged to be his. In the case at hand, since the document which included the arbitration clause was not signed by the Purchaser's authorized signatory and was contested by the Purchaser, the arbitration clause is deemed to be invalid.

The Court of Cassation therefore found that the lower courts did not err in the application of the law and as such dismissed the Seller's challenge.

Practice Note

In light of the above ruling, it is important that parties explicitly state their agreement to arbitrate. If the arbitration clause is to be incorporated by reference to another document, this other document must be fully signed on each page so that there can be no doubt that both parties consented to it.