

The importance of a signed Arbitral Agreement in the UAE

Omar Khodeir - Senior Counsel - Litigation

o.khodeir@tamimi.com - Dubai International Financial Centre

November 2014

To the casual observer, such formalities may seem minor and insignificant, but they may have a serious impact on the enforceability of the contract.

This article discusses a recent judgment highlighting the importance of the parties' signature to an arbitral agreement and the problems that may occur where the contract seeks to incorporate terms by reference to a separate document which has not been signed.

CASE FACTS

The Claimant entered into a Sale and Purchase Agreement ("SPA") with the Defendant to purchase a residential unit that was to be handed over in December 2012.

The SPA was composed of two parts: the first part was referred to as the "Signed Particulars" and the second part was referred to as "Standard Terms and Conditions". The first part was signed by the parties, whereas the second part – which included the arbitration clause – was not signed.

In early 2012, the Claimant initiated proceedings against the Defendant before the Abu Dhabi Court of First Instance. The Claimant sought a refund on the basis that the Defendant had not commenced construction and would inevitably fail to deliver the unit by the end of the year.

COURT OF FIRST INSTANCE

The Defendant objected to the Court's jurisdiction and requested that the dispute be referred to arbitration. The Defendant argued that:

1. In the first part of the SPA – that was signed by the parties – there is a clause stating that the Claimant has read and received the full Standard Terms and Conditions, which formed an integral part of the entire agreement. The arbitration clause had therefore been incorporated by reference.
2. No objection was made by the Claimant nor did it deny the Defendant's argument that there was an existing arbitration clause. In fact, the Claimant submitted a closing statement requesting the appointment of a sole arbitrator in line with the provisions of the SPA (although this was submitted after the Court had closed the hearing).

The Court however did not accept this. The Court found that the second part of the SPA had no binding effect because it had not been signed, and consequently there was no proof that the parties had agreed to refer any disputes to arbitration.

The Defendant appealed the preliminary judgment to the Court of Appeal. However the Court of Appeal also rejected the Defendant's arguments and upheld the judgment issued by the Court of First Instance. The Court of Appeal elaborated more in its reasoning as to why the arbitration clause was not valid. It further explained the effect of not having a document signed by the parties:

1. Invalidity of the arbitration clause for lack of signatures, in line with article 203 of the CPL

The Court of Appeal found that:

- Article 203 of the UAE Civil Procedure Law requires the arbitration agreement to be in writing, which includes a requirement that it be signed.
- There was no proof that the parties agreed to arbitration. Any acknowledgment made by the Claimant to the second part of the SPA was made with regards to a document that has no binding effect and so the acknowledgment has no effect as well. The rationale behind this view was the lack of signatures in the second part of the SPA.

It is worth mentioning that a similar judgment was issued by the Dubai Cassation Court in February 2014, with the slight difference being that the second part of the SPA had been initialled by the parties. In that case the Court did not deem this as sufficient proof, stating that full signatures of the parties are needed, and not only initials (please refer to Al Tamimi's Law Update issue of July/August 2014 – Article by Mohammad Al Muhtaseb and Marwa Al Mahdy).

2. The second part of the SPA is not binding for lack of signature, in line with article 11 of the Federal Evidence Law

The Court of Appeal stated in its judgment that:

“...as it is a mutual agreement between the parties, it should have been signed... signature is its only condition to serve as full proof to evidence the agreement and make it binding... In this regard, article 11 of the Evidence Law states that a customary document shall be considered to originate from the person signing it provided he does not explicitly deny any handwriting, signature, seal or fingerprint pertaining to him.”

Although the judgment is not clear, the above quote suggests the Court found support for its decision from Article 11 of the Evidence Law. The second part had not been signed, and so cannot be said to originate from the Claimant, as per Article 11 of the Evidence Law.

We believe that the underlying issue is not the signature per se, but rather a question of evidence. The key issue is whether the parties agreed to the content of the second part or not, irrespective of having the document signed. There are other means to prove that a party consented to an agreement. For example, an electronic signature would serve as a sufficient proof as per the UAE Electronic Transactions and Commerce Law. Another example is where the other party simply decides to acknowledge the truth before the court that he has previously agreed to the content of that agreement.

There are rulings in other cases that have upheld arbitration clauses incorporated by reference (please see Al Tamimi's Law Update issue of June 2013 – Article by Ahmad Ghoneim and Omar Khodeir). For example, in Abu Dhabi Court of Cassation case 462/2002, the Court held that:

“It is sufficient in a construction contract to make a referral, so that in case a dispute arises between the client and the contractor in respect of the construction contract, it becomes resolved through the general conditions of construction (FIDIC). This means that the parties agreed to arbitration in respect of all the disputes arising out of the obligations stated in said contract without the need to refer to the details of such condition, where the referral to it is sufficient...”

Curiously, when the merits of the case were decided by the Court of Cassation it was held that the Defendant had a right to extend the handover date for a period of 18 months as stated in the second part of the SPA – the section which the Court had earlier found had no binding effect for lack of signatures.

CONCLUSION

Whilst the courts have previously held that in certain circumstances arbitration agreements can be incorporated by reference, in light of this recent case parties would be well advised to nonetheless sign the page containing the arbitration agreement in full to avoid any doubt that it has been agreed.