

Important Judgment on Contractual Preconditions to Arbitration in the UAE

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The Court held that if an agreement provides that the parties are to attempt amicable settlement before referring the dispute to arbitration, but does not set out the specific steps that must be taken, the court will be unable to determine whether or not a settlement was pursued.

Furthermore, if one of the parties proceeds to arbitration and the opposing party fails to raise an objection before the tribunal on the basis that attempts to reach an amicable settlement were not taken, this implies that the parties have failed to amicably resolve their dispute. The argument cannot then be raised later before the courts to have the award set aside.

Summary of the Facts and Procedural History

The Claimant purchased from the Respondent eleven units in a property development and ten parking spaces. A dispute arose from the sale and purchase agreement and the Claimant successfully brought a claim against the Respondent in an arbitration administered by DIAC. The Claimant then filed a claim before the Dubai Court of First Instance seeking to ratify the DIAC arbitral award.

On 28 May 2014 the Court of First Instance ratified the award.

The Respondent appealed to the Court of Appeal arguing that the arbitral award was void as the Claimant failed to seek an amicable settlement of the dispute prior to resorting to arbitration, as mandated in the sale and purchase agreement. On 24 December 2014, the Court of Appeal quashed the lower court's judgment and declined to ratify the arbitral award on this basis.

The Claimant therefore appealed to the Cassation Court seeking to confirm the First Instance Court's judgment upholding the award. The Court of Cassation overturned the Court of Appeal's decision, and upheld the First Instance Court's judgment ratifying the arbitral award.

The Court of Cassation held that:

".. the sale and purchase agreement provides no guidance as to what such amicable settlement entails and contains no material facts to enable the Court of First Instance to determine whether or not the settlement was pursued. Moreover, the parties proceeded with the arbitration without the Respondent ever pointing out before the arbitral tribunal that the Appellant had proceeded to arbitration directly without first attempting to reach an amicable settlement and use best endeavors to settle any dispute between the parties, as required by the sale and purchase agreement. This would indicate that the parties failed to amicably resolve their dispute. The Court of Appeal failed to take this approach and its decision is thus flawed and will be quashed."

Conclusion

In this case, the Dubai Cassation Court established that if an agreement contains a general clause that mandates that the parties must attempt to resolve a dispute amicably before initiating arbitration, and do

not offer any guidance on the process to be followed by the parties to amicably settle the dispute, then there is no specific test to determine with certainty whether or not such efforts to reach amicable settlement has taken place between parties.

Therefore in such cases, if either party proceeds to arbitration directly this implies that settlement attempts have failed. A party that disputes this must raise such an objection before the arbitral tribunal. It cannot raise it before the court for the first time after the arbitral award has been issued.

However the position followed by the Dubai Court of Cassation would appear to be different regarding dispute resolution clauses contained in construction contracts. For example, in Dubai Court of Cassation Commercial Appeal 53 of 2011 (dated 7 December 2011), it was held that if the parties have agreed that the dispute should be referred to a consulting engineer for assistance with amicably resolving the dispute before the commencement of arbitration, then neither party may commence arbitration before bringing the dispute before the consulting engineer. The burden of proving the fulfillment of such pre-conditions lies with the party requesting arbitration.

To conclude, any precondition with clearly-defined steps that must be taken before the commencement of arbitration must be followed otherwise the arbitration will be considered premature. Where there is a general clause (which only requires that an attempt be made at reaching an amicable settlement without specifying a particular method or procedure to be followed), the fact that a party has filed for arbitration itself indicates that settlement attempts have failed. It is up to the Respondent to then raise the issue to the Tribunal, failing which he cannot raise the issue on enforcement.