

# A matter of interpretation ... decisions on arbitration clauses in the UAE

Antonios Dimitracopoulos, Partner and Head of Arbitration and Dispute Resolution, *Bin Shabib & Associates LLP*, Dubai, explains how local jurisprudence is likely to deal with ambiguous and contradictory dispute resolution clauses.

**B**ack in the days of frenetic financial growth, the last things on people's minds were all the nuances of dispute resolution clauses. However, in the UAE a high level of importance on procedure is placed, so relying on a reused arbitration clause that has been amended by different people for different reasons only resulted in making resolution of disputes that much more cumbersome.

When matters turn contentious, the first task legal practitioners are faced with, is to disentangle the knot of clauses that attempt to point to one dispute resolution forum or another. At times, this process can take almost as long as resolving the merits of the dispute itself, resulting in a substantial wastage of time and money.

Keeping abreast of what the latest trend is on UAE Court interpretation of a dispute resolution clause is more relevant than ever.

## The problem

The main concern practitioners have when embarking on pursuing a claim in the UAE is whether it is safe to start arbitration. The concern revolves around the dangers of eventually experiencing nullification of an arbitral award, usually for a variety of technical and procedural reasons. If attention was not paid, at the time of entering the contract, on spelling out the agreed dispute resolution choice in no uncertain terms, then this would become the main bone of contention between the parties' legal representatives for a longer time in the UAE than most people would think.

The philosophy behind the courts scrutinising a dispute resolution clause is that disputes under a given contract are generally intended to be resolved by way of local litigation. Deviating from this position in the UAE, would require greater precision in wording, conclusiveness in incorporation and power in agreeing, than one would encounter in other jurisdictions.

The power to agree to an arbitration clause is generally deemed to be the most significant aspect of a deviation from litigation. The person indicated in the company's trade licence as 'manager' would be deemed to have such authority regardless of his overall ranking within that entity. By contrast, any other senior official

may not be deemed to have such power unless expressly granted by a valid, authorising instrument, usually a court notarised Power of Attorney.

In terms of what is being agreed to, arbitration clauses included by reference to another document run the risk of not being held as binding by the UAE Courts. It very much depends on whether the nature of the document, wherein the arbitration clause lies, is changeable or not. An example of a consistent and unchangeable text would be the standard forms of FIDIC contracts.

At this point it must be stressed that the UAE Courts are the ultimate authority on whether an arbitration clause is valid and on whether the conduct of the arbitral proceedings and the form of the arbitral award were UAE Law compliant. Whilst many arbitral rules may grant such powers to the tribunal, the fact remains that their ruling on their own jurisdiction, is neither final nor binding on the parties.

The dangers of proceeding with an arbitration clause that may be fraught with shortcomings are obvious: lengthy and expensive arbitration proceedings that result in a document that the UAE Courts decide that it is not worth the paper it is written on. Depending on the reason for the nullification of the award, this could mean recommencement of the arbitral process or resorting to litigation.

## A possible solution

One damage-controlling approach is to resort to litigation regardless: under UAE Law if the defendant does not raise the arbitration clause defence at the very first hearing it enters an appearance in, then the dispute becomes fully absorbed by the litigation process. For the Plaintiff, there are two benefits with this approach:

One is the – rather unlikely – instance of the defendant failing to raise the arbitration clause at the first hearing. The second and perhaps more substantial one, is that if the arbitration clause defence is raised, then the plaintiff can simply refrain from strenuously opposing this and allow the court to pass its ruling thereon: if the court decides to uphold the arbitration clause, then the plain-



tiff can allow this judgment to become final by not appealing it and then proceed to arbitration, having obtained a final and unappealable authority proving that it would be the right thing to do. If the Court rejects the arbitration clause, then the Plaintiff can proceed to litigation.

The problem with the latter scenario is that judgments of the Court of First Instance courts are almost always appealed. Therefore, the road to litigation in the presence of an unclear arbitration clause, can be quite bumpy, as the different court tiers reject or uphold its validity. It is unfortunately not uncommon for a plaintiff to proceed with the merits of his case through three court tiers, only to be told at the last level (that is, at Cassation) that the arbitration clause was perfectly valid after all, and that he should go back to arbitration, having wasted irrecoverable time and money until then.

### **DIFC Courts**

One other forum that could have been the source of a more stable environment with regard to arbitration agreements is the DIFC (Dubai International Financial Centre) Courts. They are essentially Courts of limited jurisdiction (that is, within the confines of the DIFC or by express choice of the parties) and invariably apply English Law when dealing with any matter brought before them.

However, in 2012, the DIFC Courts issued two entirely conflicting and incongruous judgments on the issue of whether they can rule on the validity of non DIFC based arbitration agreements. To some, this development added confusion and disappointment on what many thought to be a refuge for an approach that could be both practical and pragmatic in the context of parties' contractual agreements.

In summary, one judgment upheld that the DIFC Courts cannot determine the validity of a non DIFC arbitration clause, and the next judgment, within the very same year, reached the diametrically opposite decision, namely that the DIFC Courts can rule on how effective and binding any arbitration clause is.

As a result, proceedings could be stayed for any type of arbitration clause, be it DIFC based or not, as long as the DIFC Courts thought it to be binding and effective. The second judgment did not distinguish the facts of the case from the first, nor were there any new arguments raised that were not considered by the first judgment.

The first judgment was subject to much criticism from the expat legal community, although no one could identify any defects in it from a judicial perspective. The second judgment was hailed as a correction of the position held in the first, although a diametrically opposite stance within the same year could be described more as confusion, rather than correction.

### **Cases in point: Evolution of UAE Court judgments on authority to arbitrate**

The UAE Courts have customarily adopted a strict approach by requesting that an agent's authority to arbitrate be evidenced in writing. The courts require specific written authority from a principal to allow its agent to bind it to arbitration as is evident from a 2005 Dubai Court of Cassation Judgment relating to a sole proprietorship, or "Establishment". The Court in that judgment ruled that only the "owner" of a corporate entity could bind it to arbitration. The owner is however entitled to entrust such power to another person, on condition that such delegation is written and express. Under UAE Law and practice at that time, this implied that the owner was to give his agent a Power of Attorney certified before the Court Notary that specifically authorised him/her to bind the entity to arbitration. If this was not done, then the arbitration agreement would be void.

This position was further confirmed by a 2008 Dubai Court of Cassation judgment, which provided that an agreement to arbitrate will not be valid unless made by a person having the competence to make a disposition over the subject matter of the dispute. That judgment went further into explaining that the director of a limited liability company would be the person having full authority in the management thereof, including entering into an agreement to



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arbitrate. The only exception, that judgment highlighted, would be if the articles of association of the company restricted a director's authority by prohibiting the making of certain dispositions or by expressly prohibiting agreements to arbitration.

In a 2009 judgment, the Abu Dhabi Court of Cassation found that the authority to arbitrate given to an agent may be express or implied or ostensible. The authority will be implied if it is to be deduced from the facts of the case, and everything that has been said or written, and the ordinary mode of dealing, all of which may be regarded as part of the surrounding facts. That judgment softened the approach adopted previously by allowing “implied” authority to evidence a delegation instead of the formalistic insistence of a notarised Power of Attorney.

### Modern trends

UAE Courts have received a lot of criticism on being arbitration unfriendly by issuing confusing and contradicting judgments. The formal position has always been that this is not so and that the drive behind the rejection of an arbitration clause is the fact that such a clause may, for one reason or another, not clearly confirm the departure from the default method of dispute resolution that the man in the street has at his disposal, that is, litigation.

But the number of judgments rejecting arbitration clauses was simply too large to ignore or to attribute to a technicality. As a result, the UAE Courts have recently issued landmark decisions that depart from their past approach to arbitration agreements.

Recent judgments point to a more tolerant view on whether an arbitration clause forms part of a given contract. In short, if it can be shown that the party pleading invalidity was actually aware of the contested clause, then he is bound by it even if he or the authorised signatory did not sign it and even if its incorporation to the contract was only made by reference – as long as that reference was to an unalterable document.

The same modernised approach is also observed in the process of ratifying and enforcing foreign arbitral awards. A recent decision of the Dubai Courts, allowing the local ratification and enforcement of an award issued in London, rejected all arguments that would have normally received greater attention had they related to a UAE based arbitration. However, the award in question applied (and was by agreement subject to) English law, hence the hands off approach of the UAE Courts when it came to its local ratification. It is doubtful that the ratification process would have been as straightforward if the underlying dispute was subject to UAE Law, albeit resolved outside the UAE.

In a 2013 judgment, the Dubai Court of Cassation allowed surrounding factors to evidence an implied authority even in an instance where the entire contract was not signed by the authorised signatory. The court eventually confirmed the validity of an arbitration agreement.

### What lies ahead

Some recent judgments are encouraging in that the UAE Courts have applied a more liberal approach in the recognition of agreements to arbitrate. A larger number of such judgments and greater consistency would be required before parties can confidently proceed to arbitration if it can be reasonably assumed that this is what they agreed upon. One potential development that could provide more confidence to practitioners is the eagerly awaited promulgation of the New UAE Arbitration Law that has been circulated for public comment, it being anticipated to be a giant leap towards aligning dispute resolution jurisprudence in the UAE with international standards.

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