

Arbitration from a UAE Legal Perspective (June 2005)

Dubai's property and construction market is booming as world-class projects are being launched by innovative property developers with the help or association of international companies and operators. The number of such construction projects has dramatically increased in the UAE, and Dubai in particular, which has inevitably given rise to significant numbers of claims and disputes, mainly between contractors and employers. Such disputes, arising out of construction contracts predominantly set out in FIDIC or similar forms, are generally settled by way of arbitration held in the English language, with specialist arbitrators appointed due to the technical nature and background of the aspects involved and particulars of the disputes.

I- Advantages that Arbitration Offers

1- The negotiation of any international contract should include a thorough discussion of dispute resolution procedures. Arbitration has gradually become a popular dispute resolution mode in many jurisdictions, including the UAE. In fact, in view of the many advantages that arbitration offers over litigation in the international arena, such clauses should be *de rigueur* in most international contracts.

2- For businessmen, litigation in any court is rarely a comforting prospect. In the international context, the usual burdens and risks of litigation are compounded by the unfamiliarity of foreign laws, procedures, and judges, the fear of partiality and the necessity of entrusting the dispute to foreign counsel.

3- Contrast that with the perspective of the client whose international dispute will be arbitrated. The client can be represented by his own counsel and need not obtain foreign counsel, arbitral proceedings will likely be in the language of the agreement and the client will have substantial involvement in the selection of the arbitrators. The process is clearly more accessible and expeditious when compared with the alternative of foreign judicial proceedings.

4- Arbitration further ensures a neutral forum and impartial administration. Problems of personal jurisdiction and service of process, often obstacles in international litigation, are avoided.

5- In contrast to the formal procedures of national legal systems, international arbitration procedures are less rigid, permitting the parties to adjust procedures to the particular demands of their dispute.

6- International rules combine civil and common law approaches to evidence-gathering and other issues. This blended approach usually entails reasonable limitations on document exchanges and the use of witness statements instead of depositions, resulting in more cost-effective procedures for pre-hearing disclosure and discovery.

7- Arbitration rules grant arbitrators broad powers with respect to the conduct of the proceedings.

8- The grounds upon which arbitration awards may be challenged are usually limited, and awards may not be challenged on the merits.

II- Arbitration Laws in the UAE (Brief Outline)

Under UAE laws in effect, arbitration is governed and regulated by the UAE Civil Procedures Code of 1992. For the interest of clarity, I will attempt to give a brief outline of the relevant provisions of the code in this regard.

1- The arbitration award must be rendered in the UAE for it to be deemed to be a local award otherwise it will be treated as a foreign award and will be subject to the rules pertaining to the enforcement of foreign arbitral awards. Such rules lay upon the party applying for the enforcement of an arbitral award the duty of proving the existence of an agreement to refer the case to arbitration, that the parties have been properly summoned, that the award is enforceable and that it does not violate the public policy of the UAE. All claims must go through a channel of legalization and be notarised by the UAE Embassy in the country concerned and the Ministry of Foreign Affairs in the UAE.

2- It is to be noted that the UAE (at the time of publishing this Paper), was not yet a party to the New York convention on the Enforcement of Foreign Arbitral Awards. Hence, it was important for a party potentially interested in enforcing an arbitration award against UAE based entity or assets, to avoid agreeing a foreign arbitration clause. However, there were some bilateral agreements with certain countries making enforcement of arbitration awards issued in those countries possible.

3- The arbitration clause or agreement should specify the rules under which the arbitration proceedings should be conducted. For a more effective supervision and conduct of arbitration proceedings held in the UAE it is advisable to agree to local rules. This will facilitate the certification of the award by the supervising body and subsequently its authentication through the UAE Courts.

4- An award rendered by an arbitrator is final and may not be appealed against. However, for the award to be enforceable the award must be ratified by a UAE court which examines only the formalities involved and does not review the merits of the award. The judgment ordering the enforcement of the award may, however, be appealed in the normal course of appealing a judgment unless the parties explicitly agree otherwise.

5- Special note (As for the substantive legal framework relevant to construction disputes in the UAE:

a) Articles 870 to 896 of the UAE Civil Law No. 2 of 1987 (the “Civil Transactions Law”) relating to construction works, as well as general principles form the basis of the legal framework relating to construction.

b) In addition, the provisions of the UAE Commercial Transactions Law No. 18 of 1993, (the “Commercial Transactions Law”) would also apply to the extent that the parties to a construction claim can be defined as traders carrying out commercial business in accordance with Articles 6 and 11 of the Commercial Transactions Law.

c) Specialised laws and Decrees - such as Law No. (6) of 1997 relating to contracts with Government Departments in the Emirate of Dubai).

III- Legal Issues

A- Interim Relief and Partial Awards:

1- **Interim Relief:** There is frequently a compelling need to seek interim relief in connection with arbitration. When the arbitral tribunal is fully constituted, most of the arbitration rules and modern arbitration laws empower the arbitrators to grant interim relief such as conservatory or provisional measures.

Although the UAE Civil Procedures Code remains silent on this issue, however, in line with Egyptian and Kuwaiti jurisprudence, the Dubai Court of Cassation upheld that in the absence of the parties' mutual understanding in the Arbitration Agreement to empower the arbitrators to issue interim injunctions and orders, such powers shall not be recognized for the arbitrators.

Moreover, a case study shows that the Dubai Court of Cassation upheld on various occasions that arbitration is an exceptional way of dispute resolution, restricted to what the parties specifically agreed with regard to referring the dispute to the arbitrators.

In fact, as we noted earlier, an interim or partial award is an award rendered in the course of the arbitration procedure addressing matters which for various reasons need to be settled at a rather early or preliminary stage, and may be considered as 'final' in respect of matters which it determines.

2- **Partial Awards:** In principle, UAE laws do not preclude the recognition and enforcement of a partial award, i.e. an award in which part of the dispute is finally resolved. However, the UAE is a young jurisdiction, and this matter has not been examined by or tested in UAE courts.

In all cases, the issue of the enforceability of a partial award should be dealt with in light of the parties' recorded understanding as to the Arbitration terms and conditions.

In fact, although an award rendered by an arbitrator is final and may not be appealed against, however, for the award to be enforceable the award must be ratified by a UAE court which examines such an award on specific procedural grounds. These are set out in Article 216 of the UAE Civil Procedures Law. Article 216 states *inter alia* that if arbitrators exceed the limits of the powers given to them in the arbitration clause/agreement, such award will be invalid, at least to the extent that it includes decisions that have been made beyond the powers of the arbitrators.

Ultimately, the award will take the form of a judgment and as such it is imperative to ensure that it is as legally sound as possible so that its nullification by the UAE Courts is avoided and that throughout the Arbitration procedure attention is focused on the ultimate validity of the arbitration award.

B- The Law Governing the Arbitration Agreement

One of the problems which arise from applying the choice of law approach to the arbitration agreement is whether that agreement should be characterized as substantive or procedural. In the former case, the arbitration agreement will be characterized as a contract, whereas in the latter the law governing the arbitral procedure will also govern the arbitration agreement.

In a judgment delivered in 1991 (prior to the enactment of the UAE Civil Procedures Law), the Dubai Court of Cassation held that “... *it is a generally admitted principle that the validity and effects of the arbitration agreement be governed by the law of the seat of arbitration ...*”. The parties had agreed in the main contract to refer their disputes to arbitration under the rules of conciliation and arbitration of the International Chamber of Commerce in Paris. Subsequently French laws were applied. (Dubai Court of Cassation - Cassation Appeal No. 293 year 1991 - 10/11/1991 and Cassation Appeal No. 131 year 18 - 15/02/1998).

The above judgment simply considered the applicability of the law of the seat of arbitration to the validity and effects of the arbitration agreement as an admitted general principle without any further elaborations.

A careful review of Egyptian jurisprudence and publicists' opinion shows that the Dubai Court of Cassation ruling falls in line with Egyptian jurisprudence on the matter. In fact the Egyptian Court of Cassation had held in several judgments that “*the validity and effects of the arbitration agreement should be governed by the law of the seat of arbitration, provided that the provisions of such law are not contrary to Egyptian public policy ...*”. (Egyptian Court of Cassation - Cassation Appeal No. 245 year 50 - 21/01/1985) also (Egyptian Court of Cassation - Cassation Appeal February 9, 1981 and Cassation Appeal June 1983 referred to in Munir Abdul Majid Treatise on “General Principles of Local and International Arbitration”)

The above judgments clearly considered that the arbitration agreement is of a procedural nature and therefore subject to Article (22) of the Egyptian Civil Code similar to Article (21) of the UAE Civil Transactions Law. Similarly the Dubai Court of Cassation adopted a resolution that the validity and effects of the arbitration agreement would be governed by the law of the seat of arbitration. The Dubai Court of Cassation thus implicitly characterized the arbitration agreement as procedural and applied an admitted principle that the arbitral procedure was necessarily governed by the law of the country where the arbitration was held.

However, the UAE being a civil code jurisdiction, there exists no formal and binding system of judicial precedents, which means that the decisions of a court in one case do not have binding authority in another case.

C- Autonomy of the Arbitration Agreement

The Autonomy of the arbitration agreement from the main contract gives rise to at least two direct consequences: first, the arbitration agreement is unaffected by the status of the main contract. As a result, the validity of the arbitration agreement does not depend on that of the main contract;

And secondly, the arbitration agreement may be governed by a law different from that governing the main contract. This is true if the arbitration agreement is subject to a particular national law, following the application of traditional choice of law rules. The arbitration agreement would be considered a “severable part” which the parties or even the courts may subject to a law other than that governing the rest of the contract.

It should be emphasized at the outset that the term “autonomy” has a dual meaning. It is sometimes used in its traditional sense, which is to refer to the autonomy or severability of the arbitration agreement from the main contract to which it relates. Sometimes though, the autonomy of the arbitration agreement is referred to as autonomy from “all national laws” which is an entirely different concept, related to the issue of selection of the rules on basis of which the existence and validity of an arbitration agreement must be assessed.

What really concerns us in this paper is the autonomy in its traditional sense, meaning the autonomy of the arbitration agreement from the main contract in which it is incorporated or to which it relates.

The Civil Procedures Law remains totally silent on the issue of autonomy of the arbitration agreement, and on other issues from which such principle may be derived.

As for case laws, we have made a thorough search to locate precedents issued by UAE courts which may have addressed the issue of autonomy, but due to the fact that the UAE is a young jurisdiction and that its Federal laws, including the Civil Procedures Law, were newly enacted, it was difficult to find an established jurisprudence or literature on this issue, save for the judgments which are referenced hereunder. We have

also extended our search into precedents of the Egyptian Court of Cassation because judgments issued by the Egyptian Court of Cassation are relied upon heavily by UAE Courts in interpreting its laws since UAE laws in general are almost textual copies of Egyptian laws and since most of the judges in Dubai and UAE courts are Egyptian judges. We have also researched laws in neighbouring jurisdictions and writings of the most qualified publicists on international arbitration in Egypt and the Middle East.

A couple of judgments issued by UAE courts, which we have been able to site, basically state that the nullity of the main contract in which the arbitration clause is incorporated, entails the nullity of the arbitration clause itself.

In this regard, the Abu Dhabi Federal Supreme Court upheld in a case wherein the court considered a contract of monetary speculation as null and void for being contrary to the public policy, that the nullity of the main contract entails the nullity of the arbitration clause. (Federal Supreme Court - Cassation Appeal No. 209 year 15 - 22/01/1995).

The same principle was confirmed in a judgment delivered by the Abu Dhabi Court of Appeal, in a similar case concerning a contract of investment in speculation of currency, and upheld by the Abu Dhabi Federal Supreme Court in its Judgment No. 144 of 1999.

Furthermore, in another judgment, the Abu Dhabi Federal Supreme Court held that the nullity of the main contract in which the arbitration clause is incorporated is a preliminary matter which falls outside the jurisdiction of the arbitrators and must be settled by the court before referring the dispute to arbitration (Federal Supreme Court - Cassation Appeal No. 35 year 16 - 27/11/1994 and Cassation Appeal No. 131 year 18 - 15/02/1998).

In conclusion, although the above judgments do not clearly discuss the principle of autonomy, however their ruling does not fall in line with the case laws of other jurisdictions where the autonomy of the arbitration agreement is recognized.

A careful review of Egyptian jurisprudence shows that prior to the enactment of the new Egyptian Arbitration Law No. 27 of 1994 which clearly adopted the principle of autonomy; Egyptian judgments were not aligned with such principle. The most qualified Egyptian publicists on international arbitration were in disagreement. Dr. Ahmed Abul Wafa, the leading Egyptian publicist, in his treatise on "Consensual and Mandatory Arbitration" rejected the principle of autonomy on grounds that the

arbitration clause may not be severed from the main contract and that the arbitrator may not have the authority to decide on the validity of the arbitration agreement (*Contra*. Dr. Samia Rashed – treatise on “Arbitration in Private International Relations”). This explains the decisions of UAE courts. In fact as we noted earlier, judgments issued by the Egyptian Court of Cassation are relied upon heavily by UAE Courts in interpreting its laws.

However, after the enactment of the new Egyptian Arbitration Law No. 27 of 1994, the autonomy of the arbitration agreement was naturally recognized by Egyptian courts, which has seemingly influenced subsequent decisions of UAE courts, particularly that there exists no legal or textual impediment which may preclude the recognition of such principle.

In fact, the Dubai Court of Cassation upheld in a recent landmark judgment delivered in 2002 that the nullity of the main contract in which the arbitration clause is incorporated does not necessarily entail the nullity of the arbitration clause itself (Dubai Court of Cassation - Cassation Appeal No. 157 year 2002 - 2/6/2002) The above judgment simply considered the severability of the arbitration clause as an admitted general principle without any further elaborations.

D- Assignment of the Agreement containing the Arbitration Clause

The fundamental question raised by the assignment of a contract is whether it should be treated as the simultaneous assignment of rights and obligations, where the respective conditions for each of the transactions must be satisfied, or as the assignment of an indivisible set of reciprocal obligations subject to an autonomous legal regime. The assignment of the main contract containing the arbitration agreement can thus be seen either as the simultaneous assignment of rights and obligations, or as the assignment of the agreement as a whole.

1- Rules Regulating Assignment under UAE laws:

There exists no separate legal regime for the assignment of contracts under UAE laws. An assignment of contract is considered as an assignment of rights and obligations of the assignor under such contract to the assignee.

The assignment of obligations is regulated and governed by the UAE Civil Transactions Law.

In this regard Article [1109] of the Civil Transactions Law provides as follows:

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“In order for an assignment to be valid, there must be the consent of the transferor, the transferee, and the creditor...”

Accordingly, the Article basically states that in order for a valid assignment of debt to take place, all parties involved in the assignment, namely the debtor, the creditor and the assignee must consent to the same.

As for the assignment of rights, the Court of Cassation has ruled that although the assignment of rights is not regulated under UAE laws, its rules and regulations may be constructed based on prevailing commercial common practices and comparative law, and hence its validity and enforceability against the obligor is only contingent upon notification of the assignment to the latter.

Bearing in mind that the assignment of an obligation requires the consent of all parties, and that the assignment of a contract implies an underlying assignment of obligations arising therefrom, we conclude that such an assignment of contract similarly requires the consent of all parties involved in the assignment.

The assigned obligations and rights are transferred to the assignee in the same shape and form as they existed before such assignment and the debtor/creditor whose debts/rights have been assigned shall be entitled to raise against the assignee the same pleas and defences he has against the assignor.

2- Assignment of Rights Under an Arbitration Agreement:

The dominant trend in publicists' writings holds that an arbitration agreement is not only valid between the parties, but can also be relied upon against their heirs, their legatees, their assignees and all those acquiring obligations.

The only exceptions are cases where the arbitration agreement is drafted in such a way as to exclude successors and assignees. In fact, UAE Supreme Courts consistently held that arbitration is an exceptional way of dispute resolution, restricted to what the parties specifically agreed with regard to referring the dispute to the arbitrators. Hence an

arbitration agreement reflecting the parties' intentions must be interpreted literally and not extensively.

The Dubai Court of Cassation delivered a landmark decision in 2000 (Contract of Supply and Installation of Mechanical, Electrical and Sanitary works, between the Main Contractor and a Subcontractor) whereby it held that if the arbitration agreement is incorporated in the main contract, and one of the parties to the main contract assigns its rights and obligations under such contract to a third party who consents to the assignment, whether in an express or implicit manner, the assignee will replace the assignor in his commitment to the arbitration clause. (Dubai Court of Cassation – Cassation Appeal No. 537 year 1999 – 23/04/2000)

Seemingly the Dubai Court of Cassation has adopted the rule that the *“Acceptance of the Assignment of the Main Contract Raises a Presumption of Acceptance of the Arbitration Agreement.”*

In fact, the signature of a contract containing an arbitration clause constitutes acceptance of both the main contract and the arbitration agreement. Likewise, acceptance of the assignment of a contract which contains an arbitration clause must lead to the conclusion, in the absence of a clear indication to the contrary, that the assignee has accepted the contract as a whole, including the dispute resolution provisions.

Furthermore, in our opinion the above judgment clearly sets a rule that for all purposes intended, an arbitration clause incorporated in the main contract is an ancillary part of such contract and is therefore assignable with the contract itself.

However, the above judgment examines the enforceability of the assignment of the arbitration agreement from the point of view of enforceability against the assignee. We believe that the conditions governing the enforceability of the assignment must also be examined from the point of view of enforceability of the assignment against the initial co-contractor.

In fact, the assignment of an arbitration agreement seeks to change the status quo in two ways. First, it places a new party—the assignee or, more generally, the beneficiary of the transfer—under an obligation to refer disputes to arbitration, and prohibits it from applying to the courts. Secondly, the initial co-contractor of the party assigning the arbitration agreement faces, whether as claimant or defendant, an adversary other than the party with which it initially contracted.

As a result of the assignment of the arbitration agreement, the co-contractor of the party whose obligation is assigned will be dealing with a new contractual partner. The main question this raises is whether it can occur without the consent of the initial co-contractor who, having entered into an arbitration agreement with a particular person or entity, now finds itself in a different situation. If it accepts the new situation, either expressly or tacitly, there is no difficulty and the only issue will be that of the arbitration agreement's enforceability against the assignee. If, on the other hand, the initial co-contractor refuses to be bound by the arbitration agreement vis-à-vis a party other than that with which it originally dealt, is its consent necessary to give effect to the assignment?

Theoretically, the answer should be in the affirmative, that the consent of the initial co-contractor is necessary to give effect to the assignment of the underlying main contract containing the arbitration clause. In fact as we earlier noted, there exists no separate legal regime for the assignment of contracts under UAE laws. Hence, an assignment of the underlying main contract containing the arbitration clause may be considered as an assignment of rights and obligations of the assignor under such contract to the assignee, and therefore requires the consent of all parties involved in the assignment, including the co-contractor, particularly where express acceptance by the initial co-contractor is required for the assignment of the arbitration agreement.

To conclude, we believe that arbitration may be the most adequate dispute resolution mode available on the local market, for disputes related to international construction contracts. However, uncertainties or silence under the UAE Civil Procedures Code regarding certain fundamental issues, and procedural complexities lead us to believe that the solution for such dilemmas lies in the amendment of national legislation.

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