

UAE Law on the Enforceability of Unilateral Arbitration Agreements

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In a recent decision dated 29 October 2024, the Dubai Court of Cassation (Court of Cassation) in Case No. 735 of 2024 (Commercial) confirmed that a unilateral (or asymmetric) arbitration agreement—an agreement which provides one party with the unilateral option to choose between arbitration and court proceedings—is not a valid arbitration agreement under United Arab Emirates (UAE) law and does not preclude the onshore UAE courts from hearing the dispute.

Background

A subcontractor filed a claim against the main contractor before the Dubai Court of First Instance (Court of First Instance) seeking payment for work performed under two subcontracts. The subcontracts contained an identical dispute resolution clause. The clause provided that in the event of a dispute arising out of the subcontract, such dispute, if not resolved by amicable settlement, shall be referred to either (a) arbitration at the Dubai Chamber of Commerce or (b) the local courts in the UAE, and specified that the forum to be used shall be decided by the main contractor. The main contractor invoked the arbitration agreement and argued that the Court of First Instance lacked jurisdiction over the dispute. The Court of First Instance dismissed the main contractor's jurisdictional argument. The main contractor appealed to the Court of Appeal on the basis of lack of jurisdiction due to the arbitration agreement, which gave the main contractor the sole power to determine which forum would resolve any dispute between the parties. The Court of Appeal dismissed the appeal. The main contractor appealed to the Court of Cassation.

Ruling of the Court of Cassation

The Court of Cassation noted that the approach to unilateral arbitration agreements differs between jurisdictions. Some judicial systems enforce the parties' agreement under the principle of party autonomy of will. Others find that there is no valid arbitration agreement, either because such a clause violates the principle of equality between the parties or because a valid arbitration agreement must reflect a conclusive meeting of the minds to adopt arbitration as the sole forum for resolving disputes.

The Court of Cassation confirmed that, under UAE law, an arbitration agreement must be a clear and explicit agreement between the parties to resolve any disputes arising between them by arbitration to the exclusion of the courts. The Court of Cassation held that the unilateral arbitration agreement at issue was not a valid arbitration agreement because it did not provide a clear agreement to resolve disputes solely by arbitration. The Court of Cassation stated that the clause in issue was invalid, as it prevented the subcontractor from referring a dispute to any authority for resolution until the contractor had elected which forum to adopt.

Conclusion

This judgment confirms that a unilateral arbitration agreement is not a valid arbitration agreement under UAE law. However, the significance of this judgment is not limited to contracts governed by UAE law. Pursuant to Article 21 of the UAE Civil Code, Federal Law No. 5 of 1985 (as amended), the rules of jurisdiction and all procedural matters shall be governed by the law of the state in which the case is filed. Accordingly, if the onshore UAE courts would in principle have jurisdiction over a dispute arising between contracting parties and those parties wish for any dispute between them to be resolved by arbitration, care should be taken to ensure that the parties' dispute resolution clause clearly and explicitly provides for arbitration as the sole forum for resolving disputes. These considerations apply irrespective of the governing law of the contract, or the seat (or legal place) specified in the arbitration agreement. This is because if proceedings are filed before the onshore UAE courts, the court will consider the validity of the unilateral arbitration agreement and therefore the court's jurisdiction over the dispute under UAE law.

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