

Tailoring the scope of arbitration agreements: A recent judgment of the Abu Dhabi Court of Cassation

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Introduction

In a recent judgment, the Abu Dhabi Court of Cassation considered the scope of the parties' arbitration agreement, and in particular the extent to which the parties intended to submit all disputes thereunder to arbitration. In this case, while the parties' agreement (a Sale and Purchase Agreement 'SPA') contained an arbitration clause, a specific exception to arbitration was made in a separate declaration which was appended to the SPA. The clause in the declaration excluded disputes arising in relation to service charges and community fees, which thus fell within the jurisdiction of the courts. The Court upheld the parties' agreement to exclude such disputes from the arbitration agreement, based on the general principle that special rules apply to the exclusion of general rules.

Background

The Claimant, a real estate development company incorporated in Abu Dhabi, filed a case against the Defendant, an Abu Dhabi registered investment holding company, for unpaid service charges and community fees owed to it by the Defendant.

Pursuant to the SPA, the Defendant had an obligation to pay service charges and community fees to the Claimant upon the receipt of the unit of property that was sold to the Defendant. In the event of a delay in payment of such fees, the Claimant had the right to impose delay penalties. Both parties agreed that the courts had jurisdiction to decide any dispute related to the recovery of the service charges and community fees. The Defendant failed to pay these charges and fees and so the Claimant initiated court proceedings for recovery of the outstanding amounts.

The Court of First Instance

The Defendant argued that the claim should be dismissed on the basis of the arbitration clause contained in the SPA. The Court of First Instance dismissed the case.

The Court of Appeal

The Claimant appealed the Court of First Instance judgment. The Court of Appeal upheld the Court of First Instance judgment and rejected the appeal.

In its judgment, the Court of Appeal highlighted that the SPA contained an arbitration clause. The clause indicated that the arbitration tribunal had jurisdiction to settle all disputes arising out of the SPA after exhausting all means of amicable settlement. The clause specified the arbitration procedure along with the method of appointing the arbitrators.

The Court of Appeal did not engage with the Claimant's argument that the Defendant was required to pay the service charges and community fees in accordance with the Declaration appended to the SPA, which the Claimant argued formed an integral part of the SPA, failing which it was entitled to commence court proceedings as an exception to the arbitration clause in the SPA.

Court of Cassation judgment

The Claimant appealed the decision of the Court of Appeal to the Court of Cassation and requested the case be remanded to the Court of First Instance

The Court of Cassation overturned the Court of Appeal's judgment and rejected the first instance ruling.

In its judgment, the Court of Cassation held that the Court of First Instance ignored established facts. It was clear from the record that the Claimant had asserted, before the Court of First Instance, that the plea of an arbitration clause should not be entertained. The Court of First Instance stated, in response that: *"Clause 25 of the SPA is an arbitration clause that specifically and expressly provides for the jurisdiction of the Arbitral Tribunal to resolve any disputes which may arise out of the SPA, after an attempt at amicable settlement, and defines a mechanism for arbitration and the appointment of arbitrators."*

The Court of Cassation held the Court of Appeal's reasons were an insufficient response to the Claimant's plea. This was because, while the SPA undisputedly contained a dispute resolution clause providing for the referral of disputes to arbitration, the declaration appended to the SPA contained a specific rule, in which the parties agreed to submit certain matters under the SPA to the courts.

Clause 11-5(b) of the Declaration read: *"The Purchaser acknowledges and understands that whilst the Service Charges and/or Community Fees and other monies due under the Declaration may be due and payable by the Purchaser, the Seller or the Seller's Affiliate shall be entitled pursuant to the Declaration to charge a reasonable penalty on late payment and/or place a charge on the Purchaser's property title (if any) and/or commence court proceedings for recovery of the amount due."*

In the Court's view, since the particular derogates from the general, the foregoing was binding on the parties. This express agreement evinced an intention to submit to the jurisdiction of the courts in any dispute which may arise between the parties regarding service charges and community fees.

The Court of Cassation also held that the judge must interpret the contract according to its plain language, without departing from the meaning borne out by the contract or going beyond what the parties had intended or contemplated at the time the contract was made.

The Court of Appeal thus erred in its interpretation of the SPA, which it had construed contrary to the parties' agreement. Its ruling was accordingly flawed. Furthermore, the Court of First Instance had not considered the merits of the dispute and has not, therefore, determined the dispute over which it had jurisdiction.

Commentary

Although the Court of Cassation respected the agreement to arbitrate, it also protected the jurisdiction of the courts to the extent the parties had agreed to limit the scope of the arbitration agreement. Applying the rule, *lex specialis derogate legi generali*, the court decided that as long as an agreement between parties contained a special rule that excluded certain matters from the scope of the arbitration agreement such a rule should apply irrespective of an arbitration clause, provided that the agreement is both clear and explicit. Hence, the Court held that the parties to the agreement to circumscribe the scope of their arbitration clause, and in doing so, was influenced by the view that as an exception to the jurisdiction of the courts such arbitration agreements were to be narrowly construed. Finally, the Court was prepared to enforce the terms of a separate document appended to the main agreement, which it appears to have regarded as an integral part of that agreement.

The Court's decision is to be welcomed. While obviously confined to the specific facts of the case, it suggests that under UAE law parties are generally free to tailor their arbitration agreements to include and exclude certain disputes.

The Court of Cassation confirmed that arbitration is an exception to the competence of the ordinary courts with respect to civil and commercial disputes. The arbitration clause however must be clear, explicit and exhaustive in its terms if it is to exclude the jurisdiction of the courts.

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