

UAE: Capacity of companies' representatives to agree on arbitration

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Article 154 of the new law states that:

“The Board of Directors shall have all the powers specified in the Articles of Association of the company, other than as reserved by this Law or the Articles of Association of the company to the General Assembly. However, the Board of Directors may not enter into loans for a period in excess of three years, sell the property of the company or the store, or mortgage movable and immovable property of the company, discharge the debtors of the company from their obligations, make compromise or agree on arbitration, unless such acts are authorized under the Articles of Association of the company or are within the object of the company by nature. In cases other than these two ones, such acts require to issue a special resolution by the General Assembly.”

The text of Article 154 is almost identical to Article 103 of the existing Commercial Companies Law. The latter referred to the requirement for “an approval from the General Assembly” whereas Article 154 requires “a special resolution by the General Assembly”. While the latter appears to have the same meaning and goal, it could also be viewed as specifically requiring a “special resolution” rather than just an “approval”, where agreement to arbitration is not “authorized under the Articles of Association of the company or are within the object of the company by nature”.

What is clear is that the new law is maintaining a restrictive approach when it comes to the critical issue of authority to agree to arbitration (to the exclusion of court proceedings in the UAE). While arbitration has increasingly been adopted by many companies in the Middle East, it is viewed by the local UAE courts as an exceptional mode of dispute resolution. This restrictive view is also reflected in Article 154 of the new law.

The power of the Board of a PJSC to agree to arbitration as a means of resolving disputes has to be explicitly stated in the Articles of Association of the Company. The alternative requirement is to deem the agreement to arbitration as a matter falling within the objectives of the company, which is unlikely to ever be the case. Failing these two options the General Assembly will be required to issue a special resolution. It should also be noted that Article 58(2) of the Civil Procedures Law provides a general restriction that the power to agree on arbitration cannot be delegated to others without a special resolution to that effect.

While the foregoing may seem formalistic, failure to satisfy the same may have adverse and unwanted implications. In a recent case the Abu Dhabi Courts annulled an arbitration award since it was based on an arbitration agreement whose signatory was someone who lacked an explicit resolution authorizing him to agree on arbitration (the power had not been properly delegated as is necessary under article 58(2)). Al Tamimi & Company represented the successful applicant.

We note that, in practice, the above requirements may not always be absolute as cases contesting arbitration agreements are assessed on a case by case basis. The Courts may interpret other

circumstances such as implied approval of an arbitration agreement, and thus deem the agreement valid in all the circumstances.

To minimize unwanted outcomes, however, a PJSC would be well advised to explicitly state in its Articles of Association that its Board can agree on arbitration. Any delegation of this power to third parties should be explicitly stated in a special resolution as well.