

Helpful Dubai Court of Cassation Judgment on Capacity and Foreign Arbitral Awards

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When it comes to resisting the enforcement of an award in the UAE, a common defence is that the Defendant was not a party to the arbitration agreement because the person who signed on its behalf did not have the required authority to bind the company to arbitration.

This can be a persuasive argument because in the UAE arbitration is seen as an exceptional form of dispute resolution, one that deprives parties of their rights to refer disputes to the national courts. The Courts will therefore need to be satisfied that the company signatory had the required authority when signing to ensure the company consented to arbitration.

Where a UAE company is subject to a foreign award, a question that often emerges is which law needs to be complied with when determining the authority of the signatory. Is it UAE law (being the law under which the party was formed and exists); the governing law of the agreement; or the law where the arbitration takes place?

In a recent decision 693/2015 Commercial Appeal, the Dubai Court of Cassation has clarified that it is sufficient that the signatory has the authority to sign under the laws where the arbitration took place. Al Tamimi represented the successful Plaintiffs.

Background

In October 2014, a major shipping line (the “Owners” or “Plaintiffs”), filed a claim for the recognition and enforcement of a foreign arbitral award in the UAE. The award has been issued pursuant to the LMAA rules in London. The party against whom the arbitral award was issued was a commercial company based in the UAE (the “Defendants” or “Charterers’ Guarantor”).

The facts of the arbitral award are as below:

The Owners chartered their vessel to ‘X’, with the Defendants countersigning the Charterparty as a Charterers’ Guarantor. X went into compulsory liquidation and failed to pay the hire amount punctually to the Owners. In accordance with the terms of the Charterparty, the matter was referred to arbitration in London.

By a Second Final Partial Arbitration Award, the arbitrators ordered the Charterers’ Guarantor, as the counter signatory, to pay the Owners an amount of USD 12,221,875.00 plus costs, 5% annual interest from 2011 until complete payment, and arbitration fees.

Dubai Court of First Instance

The Charterers’ Guarantor submitted a reply to challenge the enforcement proceedings, raising, amongst other arguments, the below defences:

- The Defendants were not a party to the Charterparty, as their counter-signature was only to authenticate the Charterers’ signature on the Charterparty.
- The Second Final Arbitral Award should be refused pursuant to Article V (1)(a) of the New York

Convention, on the basis that the Defendants were under some incapacity. The person who signed the Charterparty, which contains the arbitration clause, was not authorized on behalf of the Defendants to bind them in arbitration proceedings. As per the UAE laws, which ought to be the applicable law on the Defendants (as it is a UAE entity), only a director of the company or its board can bind the company to an arbitration clause.

- The Second Final Arbitral Award should be refused pursuant to Article V (1)(c) of the said convention, as the Defendants were not given proper notice of the appointment of the arbitrator and/or of the arbitration proceedings of the Second Final Arbitral Award, hence, they were unable to present their defense.
- The Second Final Arbitral Award should be considered as null and void, as the Second Arbitral Award dealt with a difference not contemplated by and not falling within the terms of the submission to arbitration, and the arbitral tribunal ended its jurisdiction over this dispute by issuing its First Final Arbitral Award.

The Plaintiffs argued that:

- Pursuant to Article 5(1)(a) of the New York Convention, the issue of whether the Defendants were a party to the charterparty or not was an issue that could only be determined by the applicable law to the contract (which was English Law). The tribunal had found that under English law the Defendants were bound by the charterparty and the arbitration clause it contained, and there was no reason to disturb this finding.
- The issue of whether the person who signed the arbitration agreement was an authorized signatory on behalf of the company or not should not be considered, as the Defendants had previously acknowledged its signature on the arbitration agreement as a countersigning party. In addition, this issue was subject to English law, being the applicable law on the Defendants. Under English Law an arbitration clause can be agreed upon by the representative of the company, its brokers, or by any way of communication.
- As regards the alleged procedural defects, the Plaintiffs submitted that there was no merit to these allegations as the Defendants had been duly served and had an opportunity to present its case and attend hearings, but had refused to do so.
- With regard to the allegation that the Second Arbitral Award dealt with a difference not contemplated by and not falling within the terms of the submission to arbitration, the Plaintiffs argued that this defence was not arguable before the Dubai Courts as the Defendants failed to submit a proof of this argument. Furthermore, a mere denial and objection on the arbitral award before the court where it is sought to be recognised should not have any effect as long as Defendants had not obtain a judgment from the competent authority to invalidate the award (in this case the English courts).

The Court of First Instance decided to dismiss the arguments of the Defendants, and decided to recognise the Second Final Arbitral Award in the UAE. It was satisfied that the award complied with the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards (which the UAE signed in 2006), and was in compliance with local laws and did not contradict or breach UAE public policy.

Dubai Court of Appeal:

The Defendants appealed the Court of First Instance judgment, raising the same arguments. However, the Court of Appeal upheld the arguments made by the Plaintiffs and ordered that the arbitral award be recognised and enforced in the UAE. In a short judgment the Court referred to the New York Convention, acknowledging that it applied directly to the enforcement of foreign arbitral

awards, and rejected the arguments made by Defendants.

Dubai Court of Cassation:

The Defendants chose to lodge a further appeal before the Dubai Court of Cassation, and also submitted an application to stay the execution proceedings until a final judgment had been issued by the Dubai Court of Cassation. The application for a stay of execution proceedings was approved by the Dubai Court of Cassation, as it was held that prior to enforcing the award it was necessary that a final court judgment be issued by the Court of Cassation.

The Defendants appeal was based on two main reasons, namely:

- The Defendants were not served duly with the arbitration proceedings. Although a special federal decree (no 38 of 2007) had been enacted to regulate the judicial cooperation between the UAE and the UK, the proceedings had not been served through diplomatic channels.
- The Defendant is an LLC company, based and incorporated under UAE laws. Only its director had the authority to bind the company to an arbitration clause. The director of the company had never signed or agreed to the arbitration clause.

The Dubai Court of Cassation issued its judgment on 10 April 2016, dismissing the appeal and affirming the Court of First Instance and the Court of Appeal judgments, for the following reasons:

- Article V of the NY Conventions regulates when an foreign award can be refused enforcement, and states that: “ 1. *Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c)etc.*”.
- The advantage of this article is that an arbitral award shall not be dismissed and a party against whom it is invoked shall not challenge the arbitral award, unless he proves to the competent authority where the recognition and enforcement is sought to be recognised that he was under some incapacity pursuant to the law where the arbitral award was issued, or that he was not duly served with the appointment of the arbitrator or the arbitration proceedings which made him unable to present his defense.
- Upon reviewing the Second Arbitral Award, it is apparent that the tribunal did mention in paragraph 6 of its award that the Defendants denied its responsibility in this claim, as it was not a party to the Charterparty. This meant that the Defendants were aware of the arbitration proceedings and did attend before the tribunal to submit its initial defences.
- It is apparent to the court upon reviewing the charterparty that the Defendants had signed the charterparty and its company stamp was placed on the charterparty. This meant that they were charterers of the vessel and a party to this agreement.
- Furthermore, the Defendants did not submit any proof to the UAE courts confirming that they were under some incapacity pursuant to English law, despite being granted this opportunity before the Dubai Court of First Instance the Court of Appeal.

Practice Note:

This case helpfully clarifies at the highest level that a company’s capacity to enter into an arbitration clause shall not be limited to its director, but can also be extended to its employees, agents or brokers as long as this is in compliance with the laws applicable where the arbitration proceedings take place (the seat). This means that even if the signatory may not have been authorised pursuant

to UAE law, provided the signatory would have had the authority under the foreign law, that is sufficient.

This is because the Court interpreted the phrase “the law applicable to them” referred to in article V(1)(a) of the New York Convention, as the laws governing the arbitration proceedings (i.e. the laws of the seat) rather than the laws governing the incorporation of each party.

This is a welcome judgment that demonstrates the Dubai Courts’ supportive attitude towards the enforcement of foreign arbitral awards, and will strengthen the perception of the UAE as a pro-arbitration jurisdiction.