

# Abu Dhabi Court of Cassation's Interpretation of Conflicting Contractual Clauses: A Specific Arbitration Clause Overrides a General Clause that Provides for Court Jurisdiction

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June – July 2017

It is an established principle that a court of substance has the discretionary power to interpret the clauses of an agreement, provided that such interpretation considers the agreement as a whole in understanding the parties intent.

In a judgment handed down in October 2014, the Abu Dhabi Cassation Court confirmed the application of another rule available to Courts or arbitrators in interpreting conflicting provisions in an agreement; namely that specific clauses override general clauses dealing with the same subject matter. In this judgment the Cassation Court confirms the application of the foregoing rule where the conflicting clauses provided for recourse both to State Courts and arbitration for the resolution of their disputes.

The Court further addressed the distinction between the required authority for the validity of an arbitration agreement and the authority required by Article 58 of the Civil Procedures Law to appoint an attorney to represent a company in the arbitration proceedings, which does not have any legal effect on the validity of an arbitration agreement.

## **The facts of the case**

At the Court of Cassation, the Respondent was a manager and a shareholder of a limited liability company ("Company").

The Respondent, in his capacity as the manager of the Company, entered into a sub-contractor agreement with another company ("Contractor") for the performance of certain construction works for the value of AED 2 million ("Agreement").

The Company completed all works as per the Agreement; however, the Contractor failed to settle all the Company's invoices.

The Respondent, in his personal capacity and as a proxy of the other two shareholders in the Company, assigned their shares in the Company to other parties by virtue of a notarised Memorandum of Association ("MOA"). In the Memorandum of Association, it was agreed that any rights derived or stemming from contracts or transactions concluded prior to the assignment of the shares would be kept by the assignors. It was further agreed that the assignors have the full right and capacity to seek redress in connection with such contracts or transactions without the prior consent of the assignees.

The Respondent issued a claim at the Abu Dhabi Court of First Instance ("CFI") seeking the appointment of an arbitrator to look into the dispute between him and the Contractor. The CFI appointed an arbitrator who later issued an award against the Contractor.

The Respondent then filed a claim for the ratification of the Arbitration Award (“the Award”) at the CFI. The Contractor filed a counter claim seeking to have the Award annulled.

The Abu Dhabi CFI ratified the Award. Dissatisfied with this outcome, the Contractor appealed the decision. On appeal, the Abu Dhabi Appeal Court upheld the CFI judgment. The Contractor therefore filed a petition to the Abu Dhabi Court of Cassation (“CC”) challenging the lower Courts’ judgments.

### **On Appeal to the Court of Cassation**

The Contractor’s argument before the CC was twofold:

First, the Contractor argued that the Appeal Court erred in its decision to uphold the ratification of the Award despite the Contractor’s claim for an annulment of the Award on the ground that the Company’s representative (i.e. the Respondent) did not have the requisite capacity to either enter into and bind the Company to the arbitration agreement or to sign the Power of attorney delegating that power to the appointed attorney to represent the Company in the arbitration proceedings. The Contractor argued that it is evidenced from the Company’s Memorandum of Association, appointing the Respondent as the Company’s manager; nevertheless, the MOA did not authorise the Respondent to enter into arbitration on behalf of the Company. The Contractor further asserted that Article 58 of the UAE Civil Procedures Law (“CPL”) requires an express and specific authorisation to enter into arbitration agreements. The Respondent, albeit not authorised as such, signed the Agreement on behalf of the Company and further appointed an attorney to represent him and the other shareholders.

Secondly, that the decision being challenged contradicted certain provisions of the law and the Court had further erred in its application of the law in dismissing the Contractor’s assertion that the dispute stemming from the Agreement did not fall within the scope of the arbitration agreement. In this vein, the Contractor argued that Clause 10 of the Agreement provided for the exclusive jurisdiction for the Abu Dhabi Courts over any dispute that may arise between the parties. Nevertheless, the Appeal Court dismissed the Contractor’s argument on the ground that the arbitration clause contained in the Agreement is construed as a specific clause that supersedes the general clause i.e. Clause 10. The Contractor argued that the Appeal Court’s conclusion in this respect contradicts the general principle which dictates that resorting to Courts is the rule and arbitration is the exception.

### **Judgment of the Court of Cassation**

The CC rejected both the Contractor’s arguments:

The CC stated that in order for an arbitration agreement to be valid, the required legal capacity pursuant to Article 216 (b) of the CPL is the capacity and competence to dispose of the disputed right. It is also established in the Commercial Companies Law and the rulings of the Cassation Court that the director of a limited liability company has the full authority and legal capacity to manage the company including the capacity to agree to arbitration on behalf of the company. The foregoing does not contradict the provision of Article 58 of the CPL because Article 58 concerns the authority granted to an attorney to litigate the dispute before the concerned forum.

The Appeal Court in its application of the above stated that it is evidenced that the Agreement was entered into between the Contractor and the Respondent in his capacity as a director of a limited liability company. It is also evidenced from the Company’s trade license that it is a limited liability company with the Respondent and two others as the shareholders and it is further evidenced from the Company’s trade license that the Respondent is its director. The Appeal Court concluded that the Agreement was made prior to the assignment of the shares and was signed by a person who had the authority and capacity to agree to arbitration.

The CC upheld the Appeal Court's findings and further stated that the Appeal Court's application of the law was correct, especially since there is no clause in the Company's MOA that limits the Director's capacity or precluded him from entering into an arbitration agreement. The CC further stated that the power of attorney granted from the Respondent to his attorney in the arbitration proceedings is irrelevant to the validity of the arbitration agreement and thus the above argument was rejected. In stating this, the CC distinguished between the capacity to dispose of the disputed right required to bind a company to arbitration and the capacity to appoint an attorney to represent the company in arbitration proceedings as required by Article 58 of the CPL.

The CC stated that the interpretation of disputed contracts, terms, and clauses falls within discretionary power of the court of substance to identify the parties intention; provided that such interpretation considers the agreement as a whole and does not read the contractual provisions in a vacuum.

The Appeal Court had found that: "Even if Clause 10 of the Agreement subject of arbitration provided for the exclusive jurisdiction of the Abu Dhabi Courts over any dispute that may arise between the parties which echoed the general rule of the State Courts' jurisdiction to adjudicate disputes. Nevertheless, the Parties followed this general clause with a specific one i.e. Clause 12 whereby they agreed that any dispute arising from the Agreement or its interpretation shall be amicably settled between the parties otherwise for such dispute to be referred to be settled by arbitration in Abu Dhabi. The Court construes from the foregoing that the Parties intended for their disputes to be settled through arbitration."

The CC found that the Appeal Court's interpretation of the Agreement to be sound and falls within the Appeal Court's discretionary power to interpret contracts and their clauses and therefore the CC rejected the Contractor's second challenge.

## **Conclusion**

In confirming arbitration as an exceptional mode of dispute resolution, the above judgment is without doubt another positive leap taken by the UAE Courts towards establishing the UAE as an arbitration friendly jurisdiction. However, it is imperative for parties to be mindful of any inconsistencies or conflicting provisions in their agreements. These inconsistencies may render a clause or certain clauses inoperative or at the very least provide room for dispute. Since the practice before the UAE Courts is for arbitration clauses to be interpreted in a very narrow manner, parties must ensure that their arbitration clause is detailed, clear and signed by a competent individual to avoid any future challenges to its validity and enforceability.