

Arbitration Clauses in UAE Government Contracts

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Today, parties to commercial agreements, particularly construction-related agreements, will usually include an arbitration clause within the contract pursuant to which the parties agree that any disputes which arise between them in connection with the interpretation or performance of the contract will be resolved by arbitration. In the United Arab Emirates, Article 203(1) of UAE Federal Law No. 11 of 1992 Concerning Civil Procedures, as amended ("the Civil Procedures Code") permits contracting parties to agree to refer any dispute concerning the performance and execution of a contract to one or more arbitrators. The courts have generally enforced such arbitration clauses provided they are legally valid and meet the requirements set out in the legislation.

UAE Administration Appeal No. 302/2015, which was heard by the UAE Federal Supreme Court, is an example of a case in which the UAE courts have enforced a legally-valid arbitration clause in a UAE government contract.

The Claim

In March 2002, a UAE federal government body ("the Claimant") entered into a contract with an engineering consultancy company ("the First Defendant") for the provision of engineering consultancy services for an inter-emirate highway construction project ("the Contract"). The Contract contained an arbitration clause which provided that "Any disputes arising from the performance or interpretation of [the] Contract shall be settled by the Arbitration Committee for Compensation (attached to the [government body's] Standing Committee for Projects)..."

The First Defendant subsequently entered into a sub-contract with an international engineering consultancy firm ("the Second Defendant") for the provision of engineering consultancy services in connection with the foregoing project.

A dispute later arose between the parties and the Claimant filed a claim against the First Defendant in the UAE Federal Court of First Instance (Administrative Circuit) in April 2013 for alleged breach of the Contract, and sought damages from the First Defendant and the Second Defendant (who was joined to the proceedings as a co-defendant). The Claimant did so without having regard to the Contract's arbitration clause.

Court of First Instance

At the first hearing, the First Defendant and the Second Defendant both raised the defence that the Court of First Instance did not have jurisdiction to hear the case and, therefore, the Claimant's claim should be dismissed pursuant to Article 203(5) of the Civil Procedures Code as the dispute should be resolved by arbitration in accordance with the arbitration clause in the Contract. Article 203(5) of the Civil Procedure Code states *"If the parties agree to arbitrate the dispute it shall not be permissible to bring an action in respect thereof before the courts but, nevertheless, if one of the parties does have recourse to litigation without regard to the arbitration clause and the other party does not object at the first hearing the action must be tried and the arbitration clause shall be deemed to be cancelled."*

The Court of First Instance judgment held that the Claimant's legal action was barred by the arbitration clause which was agreed by the Claimant and the First Defendant in the Contract.

Court of Appeal

The Claimant appealed to the UAE Federal Court of Appeal (Administrative Circuit) in Abu Dhabi. However, the Court of Appeal dismissed the appeal and upheld the judgment issued by the Court of First Instance.

Federal Supreme Court

The Claimant appealed again, this time to the UAE Federal Supreme Court- (Administrative Circuit) in Abu Dhabi, arguing that the arbitration clause became unenforceable with the dissolution of the Arbitration Committee pursuant to the UAE Prime Minister Resolution issued on 20 February 2006. The Supreme Court decided that the Claimant's appeal was without merit and, therefore, dismissed the appeal. The Court's reasoning was as follows:

Arbitration is an exceptional means for resolving disputes outside of the normal means of litigation before the courts. Arbitration is limited to the dispute that the parties choose to submit to the arbitral tribunal. An arbitration agreement covering all disputes and consequences that may arise out of the contract would include disputes arising out of the formation or termination of the contract or thereafter. The foregoing resolution of the Prime Minister replaced the Standing Committee for Projects with another committee, namely the Committee for Compensation Claims, whose responsibility is to review compensation and arbitration claims. The Prime Minister's resolution essentially changed the committee's name without altering its designation which has been retained under a different name. This step served to prevent the creation of a gap in this subsidiary legislation until a framework is put in place to support the implementation and enforcement of arbitration clauses. Hence, it cannot be argued that the arbitration clause became void with the dissolution of the Committee responsible for arbitration provided the Committee has continued to exist, albeit under a different name. Therefore, the arbitration clause remains in force and may not be disregarded on the pretext that the relevant arbitration framework has been cancelled.

Significance of the Case

This case is significant for a number of reasons. First, the Supreme Court acknowledged that arbitration is an exceptional means for resolving disputes outside the usual forum (i.e. the local courts), and that if parties have agreed to refer all disputes to arbitration, this will include disputes concerning the formation or termination of the contract.

Second, in order for an arbitration clause to be legally effective, it must meet the requirements set out in Article 203 of the Civil Procedures Code.

Third, the arbitration clause in the Contract made reference to a special arbitration committee established by a government body. The Supreme Court held that a party cannot raise the argument that the arbitration clause became void if the Arbitration Committee continued to function, albeit under a different name. Further, the Court held that the arbitration clause in the Contract was still valid and effective and may not be disregarded on the basis that the relevant arbitration framework had been cancelled. The Appellant should not have approached the Courts directly without first going to the Arbitration Committee.

Finally, where a party to a legally valid arbitration clause commences legal proceedings in the courts in breach of the arbitration clause, the counter-party seeking to raise a jurisdictional objection as a defence must do so at the first hearing, in accordance with Article 203(5) of the Civil Procedures Code. Otherwise, he is taken to have waived his rights under the arbitration clause.