INVALIDITY OF ARBITRATION AGREEMENT IMPACT ON REFERRAL TO ARBITRATION AND ARBITRAL AWARDS

أثر الخلل في اتفاقية التحكيم على الإحالة إلى التحكيم وعلى قرارات التحكيم

by

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Abstract

Arbitration has become a common route for dispute resolution, particularly in large projects carried out in the Middle East, in which the parties involved may be part of international entities. Most of the standard forms of contracts recommend arbitration in lieu of litigation due to numerous reasons that are mainly attributable to time and expertise.

Nonetheless, in recent years the phenomenon of parties making attempts to file cases before the courts became frequently observed in spite of the existence of an Arbitration Agreement in the contract. In this regard, it is strongly advised for contracting parties to have genuine intention to bind by arbitration, by referring their disputes to arbitration rather than recourse to courts or any other dispute resolution mechanism, and by abiding by arbitral awards.

The UAE Arbitration Law, the Model Law and the New York Convention were all drafted with a formidable initiative to secure the parties' intention to arbitrate, by giving effect to an Arbitration Agreement.

To elaborate further, giving effect to an Arbitration Agreement can be demonstrated through the referral to arbitration by either dismissing a claim filed before a court or a stay of court proceedings for lack of jurisdiction. In the same context, giving effect to an Arbitration Agreement, in regard to the arbitral awards, can be understood as the recognition and enforcement of arbitral awards by the courts, whether they were domestic or foreign arbitral awards, without any exemptions, except for those referred to in the national law and conventions as compelling reasons to revoke the arbitral award.

However, there are limited cases in which a claimant may refer the dispute to courts or contest enforcing an arbitral award and challenge its validity, albeit having agreed on arbitration as a dispute resolution route, for reasons related to the validity of the Arbitration Agreement beside other reasons included in the aforementioned legislations which mainly revolve around adequacy, integrity and jurisdiction.

The subject of this study is to highlight the validity of the Arbitration Agreement and how does this impact the referral to arbitration and the recognition & enforcement of arbitral awards.

الملخص

أصبح التحكيم طريقة شائعة لتسوية المنازعات، لا سيما في المشاريع الكبيرة المنفذة في الشرق الأوسط والتي قد تكون الأطراف المعنية فيها جزءًا من كيانات دولية. توصي معظم نماذج العقود بالتحكيم بدلاً من التقاضي لأسباب عديدة تُعزى أساسًا إلى الوقت والخبرة.

ومع ذلك، في السنوات الأخيرة، تكررت ظاهرة قيام الأطراف بمحاولات رفع دعاوى أمام المحاكم على الرغم من وجود اتفاق تحكيم في العقد. في هذا الصدد، يُنصح بشدة أن يكون لدى الأطراف المتعاقدة نية حقيقية للالتزام بالتحكيم، عن طريق إحالة نزاعاتهم إلى التحكيم بدلاً من اللجوء إلى المحاكم أو أي آلية أخرى لتسوية المنازعات، والالتزام بقرارات التحكيم.

تمت صياغة قانون التحكيم الإماراتي والقانون النموذجي واتفاقية نيويورك لتأمين نية الأطراف للتحكيم، من خلال تفعيل اتفاقية التحكيم.

لمزيد من التفصيل، يمكن إثبات تفعيل اتفاقية التحكيم من خلال الإحالة إلى التحكيم إما عن طريق رفض الدعوى المرفوعة أمام المحكمة أو بوقف إجراءات المحكمة لعدم الاختصاص. إن تفعيل اتفاقية التحكيم أيضًا، فيما يتعلق بقرارات التحكيم، يمكن أن يُفهم على أنه الاعتراف بقرارات التحكيم وتنفيذها من قبل المحاكم، سواء كانت قرارات تحكيم محلية أو أجنبية، دون أي استثناءات باستثناء تلك المشار إليها في الاتفاقيات والقوانين الوطنية كأسباب قاهرة لإلغاء قرار التحكيم.

ومع ذلك، هناك حالات محدودة يمكن فيها للمدعي إحالة النزاع إلى المحاكم أو الطعن في إنفاذ قرار التحكيم والطعن في صلاحيته، وإن كان قد اتفق على التحكيم كطريق لتسوية النزاع، لأسباب تتعلق بـصلاحية اتفاقية التحكيم إلى جانب الأسباب الأخرى الواردة في التشريعات المذكورة أعلاه والتي تدور أساسًا حول الكفاية والنزاهة والولاية القضائية.

موضوع هذه الدراسة هو تسليط الضوء على صلاحية اتفاقية التحكيم وكيف يؤثر ذلك على الإحالة إلى التحكيم والاعتراف بقرارات التحكيم وإنفاذها.

Dedication

I dedicate this dissertation to my Family; my Father Tayseer, my Mother Najwa, My sisters Ayah & Dana, my Brothers Janti & Shadi, my adorable nephew Raed and my lovely niece Yasmine for their love, continuous support and encouragement.

Acknowledgment

I would like to thank Professor Dr. Abba Kolo, my dissertation supervisor, for his support, direction and feedback during my dissertation and during my journey in fulfilling the requirements for the master's degree in Construction Law and Disputes resolution. During the last two years, Dr. Abba has been teaching us all the modules and made a huge effort in transferring the knowledge he has in a simple and understandable approach.

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1 Introduction

1.1 Background

The growth of investments and trade had led to relationships that are more complex between investors and traders. Disputes are inevitable, hence the importance of resolving these disputes was reflected on the agreements between the transactions' parties, by agreeing on the dispute resolution mechanism which in many cases will be arbitration.

Arbitration can be defined as an alternative dispute resolution method. "In arbitration, private parties contractually exit the system of state-controlled dispute resolution in favor of a purely private system wherein they authorize a private decision maker to resolve their rights and obligations. Proceedings typically are confidential, and the parties agree in advance to be bound by the result reached by the decision maker."[1]

Arbitration has many advantages that contribute in the popularity of arbitration as a dispute resolution mechanism, it is well-known for advantages related to "neutrality, expertise procedural, flexibility, finality, superior cross-border enforcement, and confidentiality"[2].

The increased globalization of investing and trading has resulted to a huge increase in disputes involving individuals and companies from all over the world, hence the need for international arbitration has emerged.

Also, international conventions played a major role in linking all national arbitration laws in a way to enforce Arbitration Agreements. One of the most common international conventions is the New York Convention which was established in 1958, and it is considered as "the single most important pillar on which the edifice of international arbitration rests"[3].

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[1] Peter B. Rutledge, Arbitration and the Constitution (2012) 1

[2] Neil Andrews, Arbitration and Contract Law (2016) 3

[3] J Gillis Wetter, 'The Present Status of the International Court of Arbitration of the ICC: An Appraisal' (1990) 1 American Review of International Arbitration 91, 93

The importance of the New York Convention has emerged from the number of countries that have become parties to it. As of the date of writing this dissertation, one hundred forty-five states have become parties to the New York Convention. Moreover, the convention "could lay claim to be the most effective instance of international legislation in the entire history of commercial law"[4].

Another significant legal instrument, which had played a vital role in international arbitration, is the Model Law on Arbitration that was developed by the United Nations Commission on International Trade Law (UNCITRAL) in 1985. The Model Law aims to regulate and govern the international commercial arbitration. In 2000, the UNCITRAL appointed working group to revise the Model Law in a way to suit the development in international arbitration, and in December 2006, the proposals by the working group were approved by the United Nations and adopted to the Model Law as revisions.

The Model Law is featured by flexibility, as the name itself indicates, it is a "Model" that "each jurisdiction can decide whether to take it in its entirety, substantially, or simply to pick and choose among its terms"[5]. This helps explain why, at the time of writing this dissertation, more than 60 states have relied upon the Model Law in their national arbitration laws, only with some modifications to suit the overall national judicial system.

The main advantage of national arbitration laws and the Model Law is "to maximize the effectiveness of the arbitral process, whilst minimizing judicial intervention, other than when it is needed to support Arbitration Agreements and awards"[6].

Agreeing on arbitration shall be genuine and any dispute arising must be referred to arbitration, also an arbitral award must be final and binding because contract parties have agreed on this at their own discretion, however there are some circumstances in which a competent court may nullify or refuse recognition of an arbitral award, or decide to look into a dispute rather than referring it to arbitration, circumstances that are related to Arbitration Agreement will be thoroughly discussed in the following chapters.

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[4] Michael Mustill, 'Arbitration: History and Background' (1989) 6 Journal of International Arbitration 34, 47

[5] David Cairns, 'The Spanish Application of the UNCITRAL Model Law on International Commercial Arbitration' (2006) 22 Arbitration International 573

[6] Alan Redfern and Martin Hunter, International Arbitration (2015) 1

1.2 Scope of the study

There are many grounds which may affect the enforcement of arbitral awards and the referral to arbitration, however the scope of this study is mainly to examine the grounds related to Arbitration Agreement. The study focuses on the validity of Arbitration Agreement in terms of writing and signature, in addition to how an Arbitration Agreement may be considered null and void, inoperative or incapable of being performed and what will be the consequences in such cases. Principles such as separability, arbitrability and the law governing the Arbitration Agreement will be discussed as well.

1.3 Objectives of the study

This dissertation aims to highlight the situations in which an Arbitration Agreement may be considered as invalid agreement, and how parties intending to arbitrate may be prevented from doing so or how an arbitral award may be unenforceable due to invalidity of Arbitration Agreement.

1.4 Significance of the Study

Understanding the impact of the Arbitration Agreement validity on the enforceability of arbitral awards and referral to arbitration will contribute in raising awareness among the parties for the need to put the required effort while drafting an Arbitration Agreement, and to avoid any deficiency that may risk the validity of the Arbitration Agreement.

1.5 Methodology

The topic of this dissertation is radically linked to practical aspects, hence different law provisions and various court cases were found to best demonstrate the significance of the topic. The doctrinal research methodology was adopted in this dissertation, information was gathered from primary and secondary legal resources, namely court judgements, law provisions, articles, books and websites to support the subject of the dissertation.

2 Arbitration Agreement

2.1 Brief and Definition

The anchor point of arbitration is an agreement by parties to refer any dispute arising between them to arbitration. The golden rule is: A valid arbitration will always require a valid Arbitration Agreement. All national arbitration laws and international treaties have recognized this rule as will be illustrated in details in the coming sections of this chapter.

Parties' consent to refer their dispute to arbitration is recorded in the Arbitration Agreement, their consent is substantially crucial to be recorded because they are giving up their constitutional right to recourse to courts and choose to refer their disputes to arbitration instead.

The UAE Arbitration Law defines the Arbitration Agreement in Article (1) as:

> "The agreement of the parties to submit to Arbitration, whether such agreement is made before or after the dispute."[7]

The Model Law 2006 defines the Arbitration Agreement in two options as follows:

- Article 7 option 1 of the Model Law 2006 reads:

"(1) Arbitration Agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An Arbitration Agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The Arbitration Agreement shall be in writing.

(3) An Arbitration Agreement is in writing if its content is recorded in any form, whether or not the Arbitration Agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an Arbitration Agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for

[7] The UAE Arbitration Law, Article (1)

subsequent reference; electronic communication means any communication that the parties make by means of data messages; data message means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an Arbitration Agreement is in writing if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an Arbitration Agreement in writing, provided that the reference is such as to make that clause part of the contract."[8]

- However, Article 7 option 2 of the Model Law 2006 reads:

"Arbitration Agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."[9]

It can be seen from the two options that option 2 is simpler than option 1, and option 2 can be construed widely, whereas option 1 is more detailed and gives a narrow, but certain, definition of the Arbitration Agreement.

So far, the definition of Arbitration Agreement was examined, in the coming section the forms of Arbitration Agreement will be discussed.

2.2 Forms of Arbitration Agreement

In general, Arbitration Agreement can be found in two forms:

1) Arbitration clause, or
2) Submission agreement

[8] The Model Law 2006, Article 7 Option 1

[9] The Model Law 2006, Article 7 Option 2

Arbitration clause is, as the name suggests, a clause indicated in the original contract or agreement, by which parties agree to refer any future dispute to arbitration. Arbitration clauses are usually short, because they deal with future disputes that are unknown and parties are not aware how they could be best handled. Parties usually use model clauses that are recommended by arbitration institutions to avoid discrepancies and to make sure that the interpretation of the clause will serve the intention behind it. It is noteworthy that an arbitration clause which indicates Ad-hoc arbitration will usually be longer and lots of details will be specified due to the nature of Ad-hoc arbitration.

On the other hand, Submission Agreement is an agreement to refer an already arisen dispute to arbitration. Parties will be in a position to detail the submission agreement because they are already aware of their dispute's characteristics. A submission agreement would usually include the substantive law, the place of arbitration, the arbitrators, description of the dispute and any additional details that parties may think are required.

What distinguish arbitration clause from submission agreement is that an arbitration clause is a forward-looking agreement whereas submission agreement is a backward-looking agreement.

An arbitration clause is the most common type of Arbitration Agreement in a commercial contract, however in some countries an arbitration clause is considered as inoperative, "for instance, a submission agreement for domestic disputes is still required (whether or not a valid Arbitration Agreement already exists) in Argentina and Uruguay"[10].

Arbitration clauses are usually called "midnight clauses" because parties consider these clauses at the last stages before finalizing a contract, hence inadequate care is taken when deciding how disputes shall be resolved. Parties usually rule out the probability of having disputes and they will be very optimistic during the contract finalization process or at the beginning of the transaction, however when a dispute arises, those "midnight clause" become a nightmare for the parties if they were not prepared in a professional manner.

[10] Alan Redfern and Martin Hunter, International Arbitration (2015) 16

Unprofessionally drafted Arbitration Agreements may lead to the waste of time and money, hence the most important aspects in drafting an Arbitration Agreement will be examined in the next section.

2.3 Drafting Arbitration Agreement

An Arbitration Agreement, whether it is in the form of a clause or a submission agreement, must be carefully drafted. The below checklist outlines the main points that should be taken into consideration while drafting an Arbitration Agreement:

(i) "Have the parties been properly identified?
(ii) Is there a clear reference to arbitration?
(iii) What disputes are referred to arbitration?
(iv) Where is the seat of the arbitration?
(v) What is the law governing the substance of the dispute?
(vi) What is the law of the Arbitration Agreement?
(vii) Is there a choice of the procedural law to be applied by the arbitral tribunal?
(viii) How will the tribunal be appointed?
(ix) Is there an appointing authority?
(x) Is the tribunal to have any particular attributes or qualifications?
(xi) How many members of the tribunal will there be?
(xii) Are procedural and/or evidential rules or the rules of an institution to be adopted?
(xiii) What will be the language of the arbitration?
(xiv) Should the tribunal be given power to make provisional awards?
(xv) Confidentiality: scope for specific provision;
(xvi) Should determinations of preliminary points of law or appeals on points of law be excluded?
(xvii) Is a waiver of sovereign immunity required?

(xviii) Should there be provision of multi-party arbitration, consolidation, or concurrent hearings?"[11]

The above checklist constitutes a guideline on the most important points that should be considered while drafting an Arbitration Agreement, however there are certainly many other points that shall be considered based on the nature of the contract and the characteristics of the transaction.

Undoubtedly, it is recommended to consult contractual and legal specialists while drafting an Arbitration Agreement specially when the agreement is in the form of a clause, because the dispute is unknown to all parties at the time of drafting the clause. An arbitration clause may be drafted badly and consequently obstruct the commencing of arbitration proceedings, such clauses are referred to as "pathological clauses" which "contain a defect or defects liable to disrupt the smooth progress of the arbitration"[12].

For instance, a blank clause "which contains no indication, whether directly or by reference to arbitration rules or to an arbitral institution, as to how the arbitrators are to be appointed"[13] constitutes a pathological clause.

Another example of a pathological clause is a clause wherein the choice between arbitration and litigation is uncertain and unclear, as if to say that "any dispute shall be solved by arbitration, but if the parties do not agree on the award, the Tribunal of Tunis shall be competent"[14].

An equally significant aspect that must be considered while drafting Arbitration Agreement is to specify the number of arbitrators, because it impacts the cost, duration and quality of arbitration. "If the parties do not specify the number of arbitrators (and cannot agree on this once a dispute has arisen), the arbitral institution, if there is one, will make the decision for them, generally on the basis of the amount in dispute and the perceived complexity of the case. In ad hoc arbitration, the selected arbitration rules, if any, will ordinarily specify whether one or three arbitrators are to be

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[11] David St John Sutton, Judith Gill and Matthew Gearing, Russell on Arbitration (24th edn, London, 2015) 2.066

[12] Milo Molfa, 'Pathological Arbitration Clauses and the Conflict of Laws' (2007) 37 Hong Kong Law Journal 161

[13] Bernardo M. Cremades and Ignacio Madalena, 'Parallel Proceedings in International Arbitration' (2008) 24 Kluwer Law International 507, 540

[14] Bernardo M. Cremades and Ignacio Madalena, 'Parallel Proceedings in International Arbitration' (2008) 24 Kluwer Law International 507, 540

appointed absent contrary agreement. Where the parties have not selected such a set of arbitration rules, it is especially important to specify the number of arbitrators in the clause itself."[15]

Obviously, drafting an Arbitration Agreement requires lots of care and experience to avoid any ambiguity or discrepancy that may risk the validity of the Arbitration Agreement.

2.4 Separability Principle

There are some legal principles that are applied to Arbitration Agreement, one of the most important principles is the separability principle. It can be defined as a legal principle which allows Arbitration Agreement to be considered as independent and separate from the original contract which contains the Arbitration Agreement.

The independency between the Arbitration Agreement and the contract, which contains the Arbitration Agreement, can be demonstrated through the fact that if the contract is invalid, for any reason, the Arbitration Agreement will remain valid, unless the Arbitration Agreement is invalid due to other reasons, for example lack of capacity for the signatory. On the other side, if an Arbitration Agreement is found to be invalid, the contract containing the Arbitration Agreement will remain valid, unless the contract is invalid due to any other reason.

In other words, the separability doctrine simply allows "creating a contract within a contract", hence Arbitration Agreement will survive any defect in the contract containing the Arbitration Agreement.

The UAE Arbitration Law recognizes the separability principle through Article 6 which reads as follows:

> "1. The Arbitration Agreement shall be treated as independent from the other conditions provided for in the contract. The nullity, rescission or termination of the contract shall not have any effect on the Arbitration Agreement contemplated in that contract, provided that the said agreement is valid per se, unless the same is pertaining to the loss of the legal capacity of one of the parties.

[15] IBA Guidelines for Drafting International Arbitration Clauses Adopted by a resolution of the IBA Council, International Bar Association (2010)

2. Claiming that the contract containing the Arbitration Agreement is invalid, rescinded or terminated shall not entail the suspension of the arbitral proceedings and the Arbitral Tribunal may decide on the validity of such contract."[16]

Similarly, English Arbitration Act 1996 Section 7 recognizes the separability principle as follows:

> "Unless otherwise agreed by the parties, an Arbitration Agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."[17]

The separability principle provides basis for arbitral tribunal to decide upon the validity of the contract containing the Arbitration Agreement, for instance in the case of JSC BTA Bank v. Ablyazov, Christopher Clarke J decided that:

> "The separability principle justified referring to the arbitral tribunal the question whether the main transaction and the Arbitration Agreement might be voidable and, if so, obtaining its avoidance."[18]

Likewise, in an arbitration case, the arbitral tribunal was given the power to determine any dispute arising under the charter between Fiona Trust and Holding Corporation v. Privalov. A dispute arose and the shipowners filed a case before London Court on the basis that bribes were given prior concluding the contract, on the other side, the charterers initiated an arbitration case and the arbitral tribunal was asked to look into the issue of the bribery along with the dispute. The House of Lords held that:

> "The arbitral tribunal retained power, in accordance with the separability principle, to determine whether the main contract had been procured by bribery."[19]

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[16] The UAE Arbitration Law, Article 6

[17] English Arbitration Act 1996, Section 7

[18] JSC BTA Bank v. Ablyazov [2011] EWHC 587

[19] Fiona Trust and Holding Corporation v. Privalov [2007] EWCA Civ 20

To sum up, if the separability principle was not there, we would not be able to rely on the invalidity of Arbitration Agreement, as we will see in the coming chapters, to bring a claim to the court or to nullify an arbitral award albeit having an Arbitration Agreement, because an invalid Arbitration Agreement will not impact the validity of the contract containing the Arbitration Agreement, and it will only impact the enforceability of the Arbitration Agreement itself.

2.5 Arbitrability Principle

Another important legal principle that applies to Arbitration Agreement is the arbitrability principle, which can be defined as a legal principle that concerns whether a dispute can be resolved through arbitration or the competent court shall exclusively resolve the dispute.

The laws of each country determine the arbitrability, some countries may permit settling a certain type of dispute by arbitration, whereas settling the same dispute may be limited to the courts in another country.

Article 4 (2) of the UAE Arbitration Law states that:

> "The agreement on arbitration may not be concluded with respect to the matters where conciliation is not allowed."[20]

In UAE, "disputes related to public policy, criminal acts, or certain issues of family law may not be settled by arbitration.[21].

The New York Convention deals with the arbitrability principle through Article II (1) which provides that:

> "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."[22]

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[20] The UAE Arbitration Law, Article 4 (2)

[21] Ahmad Ghoneim, 'Some Commercial and Civil Disputes That May Not Be Settled by Arbitration In the UAE' <https://www.tamimi.com/law-update-articles/commercial-civil-disputes-may-not-settled-arbitration-uae/>

[22] The New York Convention, Article II (1)

Moreover, it is dealt with through Article V (2)(a) which states that:

> "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a)The subject matter of the difference is not capable of settlement by arbitration under the law of that country;"[23]

It is clear that an Arbitration Agreement involving settling non-arbitrable disputes will be invalid, hence the dispute shall not be referred to arbitration and the competent court shall have the jurisdiction to look into the dispute.

The question that may arise is: Who should decide the arbitrability of a dispute? the answer is that arbitrability can be decided by the arbitral tribunal based on the competence-competence principle or it can be decided by the competent court, it all depends on the situation and the approach that the parties have followed in resolving the dispute. Article 19 of the UAE Arbitration Law deals with this matter as follows:

> "1. The Arbitral Tribunal shall decide on any plea to the jurisdiction, including the plea claiming the non-existence or the invalidity of the Arbitration Agreement, or that it does not cover the subject matter of the dispute. The Arbitral Tribunal may decide on the same either in a preliminary decision or in the final arbitral award issued on the subject matter of the dispute.
>
> 2. If the Arbitral Tribunal decides in a preliminary decision that it is competent, any of the parties may, within fifteen (15) days from the date of being aware of that decision, request the Court to rule on that matter. The Court shall decide on the request within (30) thirty days from the date of its submission at the Court, and its decision shall not be subject to appeal by any means. The arbitral proceedings shall be suspended until the Court decides on the request unless the Arbitral Tribunal decides to continue with the proceedings at the request of one of the parties."[24]

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[23] The New York Convention, Article V (2) (a)

[24] The UAE Arbitration Law, Article 19

It is obvious that the arbitrability principle may change the route for resolving a dispute, hence parties to an Arbitration Agreement shall pay attention to the kind of dispute before referring it to arbitration, and to consider determining the arbitrability, by either the arbitral tribunal or the competent court, at the early stages of resolving the dispute.

2.6 Arbitration Agreement Governing Law

An Arbitration Agreement enclosed in a contract, and the contract itself may be governed by two different laws. Deciding the governing law of the Arbitration Agreement is substantially crucial, because any question that may arise on the validity of the Arbitration Agreement must be dealt with in accordance with the provisions of the governing law of the Arbitration Agreement.

The governing law of the Arbitration Agreement is not always explicitly stated in the contract, and this may impact rendering an Arbitration Agreement valid or invalid since the grounds for evaluating the validity of the Arbitration Agreement may differ from one law to another.

For example, in Uruguay and Argentina an arbitration clause in the contract is considered inoperative unless a submission agreement has been executed, whereas in Brazil an arbitration clause is considered inoperative unless it includes the mechanism to constitute the arbitral tribunal[25]. On the other hand, in UAE an arbitration clause in the contract is considered as a valid Arbitration Agreement, unless it was found to be invalid for other reasons, such as lack of capacity.

An interesting case demonstrating how the governing law of Arbitration Agreement has an impact on the validity of Arbitration Agreement is the case of Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb wherein the English Supreme Court held that:

> "If the contract does not specify the law governing the Arbitration Agreement but specifies the law governing the contract, the law governing the Arbitration Agreement will be the same as the law of the contract, even if that law is different to the chosen seat of arbitration.
>
> In the absence of both the governing law of the contract and the governing law of the Arbitration Agreement, the Arbitration Agreement will be governed by the law with which

[25] Alan Redfern and Martin Hunter, International Arbitration (2015) 72

> it is most closely connected. In the case of Enka v Chubb, the seat of the arbitration was London. As such, the Supreme Court held that English law was the law applicable to the Arbitration Agreement because it was the law most closely connected to the Arbitration Agreement"[26]

Jason Hambury, a partner in Pinsent Masons Law Firm, commented on this case:

> "In circumstances where no express choice of law has been made to govern the substance of the contract, it is still reasonable to conclude that all the terms of the contract – including an arbitration clause – are governed by the same system of law. Where, however, the parties have selected a place for the arbitration of disputes, as a general rule, the law with which the Arbitration Agreement is most closely connected is the law of the seat of arbitration. This is because the seat of arbitration is the place where the Arbitration Agreement is to be legally performed – a rule which accords with international law as embodied in the 1958 New York Convention, and the national law which gives it effect in England and Wales."[27]

Similarly, in Sonatrach Petroleum Corp v Ferrell International Ltd [2002] 1 All E.R. (Comm) 627 it was held that:

> "Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract."[28]

Given the above, contract parties are encouraged to specify the governing law of the Arbitration Agreement to avoid any discrepancy.

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[26] Florian Quintard, 'A global view of the law applicable to an Arbitration Agreement' (2021) <https://www.pinsentmasons.com/out-law/analysis/a-global-view-law-applicable-arbitration-agreement>

[27] Jason Hambury, 'UK Supreme Court confirms proper approach to arbitration governing law' (2020) <https://www.pinsentmasons.com/out-law/analysis/uk-supreme-court-confirms-proper-approach-to-arbitration-governing-law>

[28] Sonatrach Petroleum Corp v Ferrell International Ltd [2002] 1 All E.R. (Comm) 627

3 Validity of Arbitration Agreement - Need for Writing & Signature

Validity of an Arbitration Agreement is radically linked to the need for writing and signature, this is a variable requirement under different law systems and conventions, in the below sections we will discuss the validity of Arbitration Agreement in terms of writing and signature requirements under different law systems and the New York Convention.

3.1 Under the UAE Arbitration Law

The UAE Arbitration Law requires the Arbitration Agreement to be in writing, Article 7 reads as follows:

1. "The Arbitration Agreement shall be in writing; otherwise it shall be void.
2. The Arbitration Agreement shall be deemed to have met the writing requirements in the following cases:
    a. If it is included in an instrument signed by the parties or in the letters or other means of written correspondence between the parties, or made by an electronic mail in accordance with the regulations in force in the State governing the electronic transactions.
    b. If a reference is made in a written contract to a model contract, an international agreement, or any other document that includes arbitration clauses and the said reference is clear in treating such clause as an integral part of the contract.
    c. If an agreement to resort to arbitration is reached while the dispute is being considered by a competent court, the court shall render its ruling to confirm the Arbitration Agreement and the litigants shall initiate the arbitration proceedings in the set place and time and under the clauses governing thereof, and the court shall also rule that the action is null and void.
    d. If it is included in the written submissions exchanged between the parties during the arbitral proceedings or it is recognized before the courts, where one of the parties

> requests to refer the dispute to arbitration and the other party does not object to the same in its reply."[29]

In view of the above, it is clear that writing is of essence in considering an Arbitration Agreement valid. Also, the signature is required, as will be illustrated in the next case, however in some conditions the signature requirement is relaxed, for example when a signature cannot be performed, such as the agreement made by an electronic mail.

In one case, two parties entered into sale and purchase agreement (herein referred to as SPA) for the sale of a residential unit. The agreement included two parts; the first one was signed and it was named as "Signed Particulars" and the second one was not signed and it was named as "Standard Terms and Conditions".

A dispute arose between the two parties, and the buyer initiated a case before Dubai Court of First Instance seeking a refund of the paid amount since the residential unit was not handed over as per the planned date in the agreement.

The seller objected on the jurisdiction of the Court on the basis that an arbitration clause existed in the agreement, however the Court of First Instance rejected the seller's defense on the following basis:

> "The second part of the SPA had no binding effect because it had not been signed, and consequently there was no proof that the parties had agreed to refer any disputes to arbitration."[30]

An appeal was filed by the defendant; however, the Court of Appeal upheld the previous decision and specified the reasons as follows:

> "As it is a mutual agreement between the parties, it should have been signed, signature is its only condition to serve as full proof to evidence the agreement and make it binding. In this regard, article 11 of the Evidence Law states that a customary document shall be

[29] The UAE Arbitration Law, Article 7

[30] Omar Khodeir, 'The Importance of a signed Arbitral Agreement in the UAE' (2014) <https://www.tamimi.com/law-update-articles/the-importance-of-a-signed-arbitral-agreement-in-the-uae/>

considered to originate from the person signing it provided he does not explicitly deny any handwriting, signature, seal or fingerprint pertaining to him."[31]

In this context, it is worth mentioning that an electronic signature is recognized as a sufficient proof as per the UAE Electronic Transactions and Commerce Law.

It can be seen that writing and signature requirements are sensitive in UAE, the need for writing and signature has emerged because arbitration replaces litigation, which is a constitutional right, hence it is a matter of existence, "as evidence of the parties' consent to arbitration, the agreement is a fundamental expression of justice and proof of legitimacy"[32].

3.2 Under the English Arbitration Act

In accordance with the English Arbitration Act 1996, the Arbitration Agreement shall be in writing, section 5 of the Arbitration Act reads as follows:

"(1) The provisions of this Part apply only where the Arbitration Agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing. The expressions 'agreement', 'agree' and 'agreed' shall be construed accordingly.

(2) There is an agreement in writing:

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

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[31] Omar Khodeir, 'The Importance of a signed Arbitral Agreement in the UAE' (2014) <https://www.tamimi.com/law-update-articles/the-importance-of-a-signed-arbitral-agreement-in-the-uae/>

[32] Mohamed Wahab, 'The Global Information Society and Online Dispute Resolution: A New Dawn for Dispute Resolution' (2004) 21 Journal of International Arbitration 143,168

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means"[33]

It should be noted that "an Arbitration Agreement not in writing might be valid at Common Law, that is, outside the scope of the 1996 Act. An unwritten Arbitration Agreement is not lacking in legal effect; but it will not be governed by the Act."[34]

Unlike the UAE Arbitration Law, the English Arbitration Act is silent regarding the requirement of a signed Arbitration Agreement.

3.3 Under the Model Law

The Model Law had set two options in defining the Arbitration Agreement, wherein Option I require the Arbitration Agreement to be in writing strictly, and specified how an Arbitration Agreement is considered to be "in writing", and Option II defined the Arbitration Agreement without addressing the matter of writing. To avoid repetition, Article 7 of the Model Law was mentioned in the previous chapter.

The Model Law Article 7 Option II is much wider 7 is much wider than the Model Law Article 7 Option I in regards to the writing requirements. One of the major differences between the two options is that an oral agreement is acceptable under Option II, but not under Option I. Similar to the English Arbitration Act, the need for signature is not explicitly mentioned in the Model Law.

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[33] English Arbitration Act 1996, Section 5

[34] The Departmental Advisory Committee Report (1996), at [32]; section 81(2)(b), Arbitration Act 1996; Mustill & Boyd, Commercial Arbitration: Companion Volume (London, 2001) 21, 371

3.4 Under the New York Convention

As stated before, the New York Convention plays a vital role in the enforcement and recognition of foreign arbitral awards, and the Arbitration Agreement validity is a key factor that has an impact on enforcing and recognizing foreign arbitral awards, hence it is very important to examine the need for writing under the New York Convention.

Article II of the convention deals with this matter as follows:

> "1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term agreement in writing shall include an arbitral clause in a contract or an Arbitration Agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

In interpreting the above article, we can see that a written and signed Arbitration Agreement is required under the New York Convention, however the need for parties' signatures is not applicable on the Arbitration Agreement that is included in "an exchange of letters or telegrams".

Regarding the validity of oral Arbitration Agreement, Alan Redfern and Martin Hunter commented that "there is a risk that an arbitral award made pursuant to an oral agreement may be refused recognition and enforcement under the New York Convention, in which event the time, money, and effort expended in obtaining the award will have been wasted"[35].

To summarize, the importance and significance of discussing the need for writing & signature is to set out the basic requirements in recognizing an Arbitration Agreement, however in the next

[35] Alan Redfern and Martin Hunter, International Arbitration (2015) 15

chapter, it will be illustrated that merely satisfying the writing and signature requirements does not always protect the Arbitration Agreement from being invalid, null and void, inoperative or incapable of being performed and consequently impact the referral to arbitration and the enforceability of arbitral awards.

4 Invalidity of Arbitration Agreement Impact on Referral to Arbitration and on Arbitral Awards

Although Arbitration is governed by national laws and international conventions, and it is recognized by the judicial systems as a dispute resolution mechanism that has its own consideration and must be respected, however the judicial systems may sometimes interfere in referring a dispute to arbitration and decide that a dispute shall not be resolved through arbitration, albeit having an Arbitration Agreement.

A defect in the Arbitration Agreement may impact the referral to arbitration, article 8 of the UAE Arbitration Law stipulated how a court should deal with a dispute that is related to a contract in which arbitration is agreed to be the dispute resolution mechanism:

> "1. The court, before which an action was instituted regarding a dispute in respect of which an Arbitration Agreement exists, shall dismiss the action, if the Respondent moves to dismiss on this ground before making any other motions or plea on the subject matter of the action, unless the Court finds that the Arbitration Agreement is void, or unenforceable.
>
> 2. Initiation of the proceedings referred to in the foregoing clause does not preclude the commencement or continuation of the arbitral proceedings or rendering of the arbitral award."[36]

Likewise, the Model Law Article 8 (1) reads as follows:

> "A court before which an action is brought in a matter which is the subject of an Arbitration Agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."[37]

The New York Convention is in line with the Model Law and the UAE Arbitration Law, Article II (3) of the New York Convention reads as follows:

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[36] The UAE Arbitration Law, Article 8

[37] The Model Law, Article 8 (1)

"The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[38]

The question that may arise is: "How the said agreement is considered as null and void, inoperative or incapable of being performed"?

The answer to this question can be divided into three parts, wherein each part illustrates the different situations and circumstances under which an agreement shall be deemed:

- Null and void "if an arbitration clause is illegal (because, for example, it purports to subject a non-arbitrable claim to arbitration, or offends a mandatory domestic law norm). Similarly, depending on the applicable law, an Arbitration Agreement may be denied enforcement due to lack of consent, or consent marred by incapacity, misrepresentation, fraud, duress, undue influence, unconscionability, as well as non-arbitrability and violation of public policy"[39]
- Inoperative "if an Arbitration Agreement was at one time valid but that has ceased to have effect. The inoperative exception typically includes cases of waiver, revocation, repudiation or termination of the Arbitration Agreement. Similarly, the Arbitration Agreement should be deemed inoperative if the same dispute between the same parties has already been decided before a court or an arbitral tribunal (res judicata or ne bis in idem)"[40]
- Incapable of being performed "under circumstances that would justify non-enforcement of a contract due to impossibility. For examples, the arbitrator or institution named may no longer exist or be available, or the clause may be internally contradictory (the so-called pathological clause). Agreements may be inoperative from the very start (as in the case of an internally contradictory Arbitration Agreement) or subsequently (as in the case of designation of an arbitral institution that no longer exists). In principle, Arbitration

[38] The New York Convention, Article II (3)

[39] George A. Bermann, Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts (2017) 23

[40] ICCA's Guide to the Interpretation of the 1958 the New York Convention:A Handbook for Judges, ICCA(2011) 52

Agreements become incapable of being performed only for reasons arising after the agreement has been formed"[41]

Likewise, in the case of Feanmer Developments Ltd v. L&M Keating Ltd & Ors the defendant Counsel had requested the Court to stay the proceedings and refer the dispute to Arbitration, and he relied upon Article 8 of the Model Law and amazingly interpreted the "null and void, inoperative or incapable of being performed" statement, in his statement of defense, as follows:

- "A null and void agreement: This will usually involve a defective or invalid formation, typically as a result of fraud, duress, illegality, certain types of mistakes or lack of capacity.
- An inoperative agreement: This tends to arise where the agreement may once have been valid but has ceased to have effect by reason of revocation, res judicata, or where a time limit has expired.
- An agreement incapable of being performed: This is where the arbitration process cannot be realized or where the terms of the Arbitration Agreement itself are so vague or contradictory that the tribunal cannot ascertain the parties' intention."[42]

As illustrated above, a defect in the Arbitration Agreement has an impact on the referral to arbitration, and the court may interfere and refer the dispute to litigation rather than arbitration albeit having Arbitration Agreement. In the same context, such defect in Arbitration Agreement will also have an impact on the enforceability of arbitral awards, if arbitration had taken place and an award was issued. In the coming paragraphs, it will be explained how an arbitral award may not be enforceable due to reasons attributable to defects in the Arbitration Agreement.

Firstly, it is noteworthy that the mere issuance of an arbitral award by the arbitral tribunal does not render the award enforceable. The arbitral award can be enforced through two scenarios; the first one is when the losing party voluntarily abide by the arbitral award, and unfortunately this does not usually happen, the second scenario is to get the arbitral award ratified by the court after which an award becomes final and biding and has the same power as an execution order.

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[41] George A. Bermann, Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts (2017) 24

[42] Feanmer Developments Ltd v. L&M Keating Ltd & Ors, [2014] IEHC 295

In UAE, "the parties must apply to the court independently for an order to ratify the arbitration award or to file a case to annul the arbitration award, as the case might be, depending on the parties who are filing the case. This will be by way of a normal Statement of Claim with supporting documents to be filed with the court in the normal course (after the payment of the fee). The court will then consider both party's arguments and submissions. The matter may involve several hearings where both parties will submit facts, evidence and arguments before the case is reserved for judgment. The court will decide whether to ratify or nullify the arbitration award."[43]

In another words, an arbitral award may be challenged by filing annulment request to the competent court or by challenging the award during the process of ratification. "Challenging an award affords the losing party a means of attempting to have the award modified or even set aside"[44].

Article 53 of the UAE Arbitration Law stipulated the reasons in which an arbitral award can be annulled or challenged during ratification process; reasons that are attributable to the Arbitration Agreement are specifically covered in Article 53 (1) a & b which reads as follows:

> "1. Arbitral awards shall not be challenged except by instituting an action for annulment or during the consideration of the confirmation decision. The party requesting the annulment of the arbitral award shall prove the existence of any of the following reasons:
>
> a. Absence of an Arbitration Agreement, or the Agreement is void, or terminated due to expiry of its term in accordance with the law to which the Agreement is subject by the parties or in accordance with this Law if there is no reference to a specific law;
> b. One of the parties, at the time of enforcement thereof, lacks capacity or of diminished capacity in accordance with the law which governs its capacity;"[45]

[43] Essam Al-Tamimi, Practical Guide to Litigation and Arbitration in the United Arab Emirates (2003) 156

[44] Jane Jenkins, International Construction Arbitration Law (2013) 278

[45] The UAE Arbitration Law, Article 53 (1) a&b

Similarly, "international bodies have a clear principle which does not allow the arbitration decisions to be appealable more so on the basis of their substance but give alternatives grounds under which they can be appealed"[46].

for example, the Model Law stipulated the situations in which an arbitral award may be set aside due to reasons related to the Arbitration Agreement, Article 34 (2) (a) (i) reads as follows:

> "(2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> (i) a party to the Arbitration Agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State"[47]

Similarly, Article 36 (1) (a) (i) of the Model Law stipulates the grounds for refusing recognition or enforcement of an arbitral award which are related to the Arbitration Agreement as follows:

> "(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
>
> (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
>
> (i) a party to the Arbitration Agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"[48]

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[46] Saad Badah, 'Incapacity of parties and invlaidity if Arbitration Agreement as grounds for refusing recognition and enforcement in Kuwait' (2015) 53 Global Journal of Politics and Law Research 1 <http://publicacoes.cardiol.br/portal/ijcs/portugues/2018/v3103/pdf/3103009.pdf%0Ahttp://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0121-75772018000200067&lng=en&tlng=en&SID=5BQIj3a2MLaWUV4OizE%0Ahttp://scielo.iec.pa.gov.br/scielo.php?script=sci_>.

[47] The Model Law, Article 34 (2) (a) (i)

[48] The Model Law, Article 36 (1) (a) (i)

The New York Convention is in line with the challenging grounds stipulated in the UAE Arbitration Law and the Model Law. Article V (1) (a) of the New York Convention reads as follows:

> "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 the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"[49]

It is important to consider the provisions of challenging an arbitral award in the New York Convention because "when hearing a claim to recognize and enforce a foreign arbitral award [in UAE], judicial supervision over such award shall be limited to verifying that it is not in violation of the Federal Decree that stipulated the accession of the UAE to the New York Convention by making sure that such award meets the formal and substantive requirements of an award stipulated in Article (4) and (5) pursuant to the concerned Decree."[50] This will be illustrated through cases wherein foreign arbitral awards were challenged in UAE on the grounds stipulated in the New York Convention.

In the coming sections, situations related to the impact of invalid Arbitration Agreement on the referral of a dispute to arbitration and on the arbitral award enforcement will be furnished.

4.1 Arbitration Clause Incorporated by Reference to a Standard Contract

There are many forms of contracts which are prepared by technical and legal experts and developed by certain organizations and institutes. Examples of most commonly used forms of contracts are:

[49] The New York Convention, Article V (1) (a)

[50] Saloni Kantaria, 'The Enforcement of Domestic and Foreign Arbitral Awards in the UAE' [2012] International Arbitration Law Review 61

- International standard forms of contract for use on national and international construction projects developed by Federation Internationale Des Ingenieurs Conseils (FIDIC)
- New Engineering Contract (NEC)
- Civil Engineering Works standard contract developed by Institute of Civil Engineers (ICE)
- Main contracts and sub-contracts which reflect the range of collaborative procurement methods used by construction industry developed by The Joint Contract Tribunal (JCT)

Parties can accept any standard form of contract entirely or they can use it as a starting point to draft a contract that suits their transaction's characteristics. There are some cases where the parties may refer to a standard form of contract, and such reference has an impact on the validity of arbitration clause that is contained in the standard form of contract.

As illustrated in chapter 2 of this dissertation, Article 7 (2) b of the UAE Arbitration Law states that an Arbitration Agreement is considered to have met the writing requirement "if a reference is made in a written contract to a model contract, an international agreement, or any other document that includes arbitration clauses and the said reference is clear in treating such clause as an integral part of the contract"[51].

To provide a useful understanding to the application of Article 7(2)(b) of the UAE Arbitration Law and its position from the incorporation of an arbitration clause by reference, two different cases will be summarized in the coming paragraphs, wherein incorporating arbitration clause by reference resulted in considering the Arbitration Agreement valid in one case, whilst in the second case, the Arbitration Agreement was considered as invalid.

The first case is related to a dispute in relation to a subcontract to design, supply and install fiberglass reinforced concrete cladding to cover the roofs of buildings in the Dubai District Development Project between Alumco LLC (herein referred to as Contractor) and Gulf Ready Mix Concrete Company LLC (herein referred to as the Subcontractor).

[51] The UAE Arbitration Law (2018), Article 7 (2) b

Article 17 of the subcontract indicated that the settlement of disputes between the parties is in accordance with the General Conditions of FIDIC Red Book.

The arbitration clause enclosed in the General Conditions of FIDIC Red Book states the following:

> "Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:
>
> (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
>
> (b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
>
> (c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language]."[52]

The Contractor terminated the Subcontractor upon the termination of the main contract between the Contractor and the Employer, and the Contractor tried to liquidate the performance bond guarantee and the advance payment guarantee which were provided by the Subcontractor in accordance with the provisions of the subcontract.

The Subcontractor filed a case before Dubai Court of First Instance requesting to stop the liquidation of the two bonds and to oblige the Contractor to pay a due amount of AED 6 million to the Subcontractor.

Upon looking into the case, the Court of First Instance held that:

> Clause 17 of the subcontract indicated that the settlement of disputes between the parties is in accordance with the General Conditions of FIDIC Red Book, and this provision, expressly stated in the subcontract regulating the relationship between the parties, is sufficient to indicate that the parties agreed on arbitration as a means of resolving disputes between the parties. The defendant had expressed the argument that the case would not be accepted because of the arbitration clause in the initial hearing to appear in Court, with

[52] FIDIC Red Book 1999, Clause 20.6

> which the payment had been fulfilled, hence the Court ruled that it has no jurisdiction over the dispute.[53]

The Subcontractor filed an appeal request before the Court of Appeal, which had adopted the Court of First Instance decision, and stated the following:

> The subcontract dated 29 July 2018 contained the arbitration clause in Clause 17/B under the paragraph of dispute settlement and arbitration, and it was stamped with the signature and seal of the parties and their representatives. The Clause states that: "21 days after receiving this notification and if the two parties fail to reach a mutual settlement, the two parties shall settle the dispute through the United Arab Emirates Court and in accordance with the General Conditions of FIDIC Red Book", which indicates the intention of the contracting parties to settle any dispute that may arise regarding the Subcontract to the General Conditions of FIDIC Red Book, all lead to the result which the appealed judgment had reached.[54]

The Court of Appeal decision did not satisfy the Subcontractor; hence an appeal was filed before the Court of Cassation which upheld the previous judgements and ruled that:

> It is sufficient in the contract to indicate that in the event of any dispute arising between the Contractor and the Employer regarding the implementation of the contract, it shall be settled in accordance with the General Conditions of FIDIC Red Book, without the need to stipulate the details of the condition in the contract.[55]

To summarize, in the previous case, the Courts demonstrated that referring the disputes clause in a contract to a model contract that has an arbitration clause shall give effect to the Arbitration Agreement.

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[53] Dubai Court of First Instance, 2528/2020 (Commercial, partial jurisdiction)

[54] Dubai Court of Appeal, 2579/2020 (Commercial, appeal)

[55] Dubai Court of Cassation, 141/2021 (Objection, commercial)

In another case, a subcontract was entered between Marbella Star International Contracting LLC (herein referred to as the Subcontractor) and J.K. Bayonne Construction LLC (herein referred to as the Contractor) to complete the construction of a villa having a total value of AED 32.5 million.

The subcontract parties agreed that the General Conditions of FIDIC Red Book 1987 edition would govern their contract. Clause 67 of FIDIC Red Book contains a settlement of disputes clause which reads the following:

> "Any dispute in respect of which:
>
> a) The decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and
> b) Amicable settlement has not been reached within the period stated in Sub-Clause 67.2,
>
> Shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules."[56]

The subcontract was terminated by the Contractor who asked the Subcontractor to leave the site immediately, hence a dispute arose between the Contractor and the Subcontractor, wherein the Subcontractor was claiming to have a due amount of AED 20 million in relation to works completed, variations and other damages, so the Subcontractor filed a case before the Court of First Instance against the Contractor requesting for the payment of the due amounts and the release of the performance security cheque which was retained by the Contractor..

The Court of First Instance decided that it has jurisdiction over the dispute, albeit the Contractor's argument that the Court has no jurisdiction over the dispute because of the arbitration clause contained in the General Conditions of FIDIC Red Book. The Court issued its decision in favor of the Subcontractor and held that:

> Because there was no specific reference to the arbitration clause enclosed in the General Conditions of FIDIC Red Book in the signed subcontract between the parties, the subcontract between the parties did not contain a valid arbitration clause. It took the

[5656] FIDIC Red Book 1987, Sub-Clause 67.3

> position that an arbitration clause contained in another document can be incorporated by reference only through a specific reference to that clause. It was necessary that the consent to arbitrate seem obvious from a review of the subcontract. Unlike a clause concerning arbitration, which is an (exceptional clause), general terms contained in schedules and annexures could be incorporated by general reference.[57]

However, the Contractor filed an appeal before the Court of Appeal, objecting on the Court of First Instance decision and argued that the case must be dismissed due to lack of jurisdiction. The Contractor had succeeded in his argument before the Court of Appeal, and the Court overturned the decision of the Court of First Instance, finding that:

> Dubai Courts had no jurisdiction over the dispute due to the arbitration clause incorporated in the contract by reference to the FIDIC Red Book General Conditions, and that general reference to the same was sufficient to bind the parties by that arbitration clause.[58]

The Subcontractor was not satisfied with this decision and challenged the Court of Appeal decision before the Court of Cassation, which overturned the Court of Appeal decision and adopted the Court of First Instance decision, and provided a detailed analysis of the matter as follows:

> "An agreement to arbitration is considered when it is a referral contained in the original contract to the document that includes the arbitration clause if the referral is clear and explicit in adopting this condition, and the effect of the referral is only achieved if it includes an indication to the arbitration clause included in the document referring to it, yet if the referral to the aforementioned document is merely a referral in general for the texts of this document without specifying the aforementioned arbitration clause in particular that establishes the parties' knowledge of its existence in the document, the referral does not extend to such arbitration clause, and the arbitration is not deemed agreed upon between the parties to the contract, and it is also decided that if there are appendices or schedules to the contract, it is not required that the parties sign them if the parties stipulate in the contract that these appendices or schedules are considered an integral part of the contract,

[57] Dubai Court of First Instance 415/2019 (Commercial, full jurisdiction)

[58] Dubai Court of Appeal 2371/2020 (Commercial, appeal)

considering that these appendices or schedules are nothing more than a detailed statement of what the parties have agreed in substantive issues, except that if these appendices or schedules include an exceptional condition such as the arbitration clause, which does not apply to the parties, unless signed by the parties. The contract concluded between the plaintiff and the defendant which governs the relationship that is the subject of the lawsuit does not evidence the will of the parties to bring into effect the arbitration clause to settle the disputes arising from the implementation of the contract."[59]

The difference between the first case and the second case is that in the first case the parties explicitly referred the dispute to a standard form of contract, however in the second case the parties have adopted a standard form of contract entirely and referred the dispute to arbitration impliedly which had affected the validity of Arbitration Agreement. In the first case the Arbitration Agreement was valid and the Court respected the will of the parties and referred the dispute to arbitration, however in the second case the Arbitration Agreement was invalid and the Court decided that there was no intention to go for arbitration which gives the Court the jurisdiction to look into the dispute.

It is wise to remember that, under the UAE Arbitration Law, "if parties want a dispute under their contract to be referred to arbitration, they must: (i) at the very least, explicitly state that they intend for the arbitration clause in the Red Book Conditions (or other document they are incorporating by reference) to apply, preferably under a dispute resolution or arbitration heading in the main contract; and / or (ii) preferably, provide a separate arbitration clause in their signed contract to avoid all ambiguity."[60]

4.2 Non-Existent Arbitration Agreement

The pillar of arbitration is the Arbitration Agreement, if it does not exist by means of proof and evidence, the arbitration loses its source of power and jurisdiction. The court may in some cases

[59] Dubai Court of Cassation 1308/2020 (Objection, commercial)

[60] Joshua Coleman-Pecha and Slava Kiryushin, 'Dubai Court of Cassation Judgment Regarding Including Arbitration Clauses to a Contract by Reference' (2021) <Dubai Court of Cassation overrides an Arbitration Agreement in the interest of justice - Lexology>

reach a conclusion that an Arbitration Agreement does not exist, although one of the parties may think or argue that it exists. In the next paragraphs, a case will be discussed, in which one of the parties falsely thought that an Arbitration Agreement exists in the contract whilst the Court decided the opposite.

Fibero Foundation limited Dubai and Mohamed Abdulrahman AlBahar Company LLC entered into a service business contract on 12th December 2006 for the purchase of electric generators for a price of AED 2,992,800.

A dispute arose between them, hence Fibero Foundation limited Dubai filed an arbitration case against Mohamed Abdulrahman AlBahar Company before the International Chamber of Commerce in Paris, France, and an award was issued in favor of Fibero Foundation limited Dubai in relation to arbitration case No. 15569 / IC.

As a result, Mohamed Abdulrahman AlBahar Company LLC filed a case before the Court of First Instance to nullify the arbitral award on the following basis:

1- Non-existence of Arbitration Agreement,
2- Lack of capacity of the parties who signed the Arbitration Agreement,
3- International Chamber of Commerce in Paris, France, has no competence,
4- Missing the deadline for issuing the arbitral award,
5- Prescribed oath was not performed by the witnesses,
6- One of the witnesses was working as a manager in the claimant company,

Fibero Foundation limited Dubai submitted its defense and sought to dismiss the case on the basis that the arbitral award is valid and it had filed a counter claim before the Court of First Instance to ratify the arbitral award.

The Court found that the service business contract consists of two pages, the first of them was headed with the company's special logo and sent by telefax, it included the data of the electric generators, and was signed by Mohamad Makmoush who is working as sales manager at Mohamed Abdulrahman AlBahar Company LLC. Whilst the second page, included the arbitration clause, and it was not headed with the company's logo and it did not include the telefax numbers of the company, also it was not signed or stamped.

The Court decided that the second page has no validity because it lacks the proof of existence, and since one of parties has not acknowledged the statements contained in the second page, explicitly or impliedly, then the most important pillar of the arbitration clause, which the legislator require for it to prove by writing not by diligence or interpretation, falls and the arbitration clause collapses from its foundation and rendered as non-existent.

Moreover, the Court found that, hypothetically if the Arbitration Agreement exists, the one who signed the first page lacks the capacity to sign Arbitration Agreement.

In addition, Fibero Foundation limited Dubai raised a defense that the other company attended the arbitration proceedings and this implies its acknowledgment of the Arbitration Agreement, however the Court found in the documents that there was objection submitted to the arbitral tribunal who falsely decided that it has jurisdiction over the dispute. Hence, the arbitral award was nullified.[61]

Appeal requests were filed before the Court of Appeal[62] & the Court of Cassation[63], and both Courts upheld the Court of First Instance Decision.

The above case is an example related to enforcing a foreign arbitral award, and it is worth highlighting that in accordance with the UAE Arbitration Law & the New York Convention, a party who seeks to enforce a foreign arbitral award, shall submit an application to ratify the foreign arbitral award, nevertheless such application may be rejected and the award may be nullified on a number of grounds, and the non-existent of Arbitration Agreement is one of these grounds, as illustrated in the previous case, bearing in mind that the same rule applies on the domestic arbitral awards.

[61] Dubai Court of First Instance, 46/2011 (Civil, full jurisdiction)

[62] Dubai Court of Appeal, 354/2011 (Civil appeal)

[63] Dubai Court of Cassation, 333/2011 (Objection, civil)

Two more similar cases on this topic are Shagang Shipping Company Ltd. against Emirates Trading Agency LLC[64], and Euro Climatrol Middle East against Jamamco Trading (LLC)[65], wherein both cases were dismissed by the Court due to non-existent of Arbitration Agreement.

4.3 Lack of Capacity

Generally, contractual obligations are binding when they are executed by a person/representative who has capacity and authority to enter into contracts and to bind the party which he is representing. Similarly, agreeing on arbitration must be performed by a person/representative who is authorized to do so, through either a power of attorney or legal capacity endorsed from the legal status of the person/representative.

"a power of attorney (POA) is a legal document that gives one person – the agent – authority to act on behalf of another – the principal. A general POA empowers the agent with authority to perform certain tasks on behalf of the principal"[66].

A special power of attorney allowing a person to enter into Arbitration Agreement, in unequivocal and clear terms, is required to render an Arbitration Agreement valid. Article 4(1) of the UAE Arbitration Law provides that:

> "Only the natural person, who has the capacity to exercise its rights, or the representative of the legal person, who is authorized to conclude the agreement on arbitration, may enter into an agreement on arbitration, otherwise the agreement shall be null and void."[67]

It should be noted that for a limited liability company, the general manager has the authority to enter into Arbitration Agreement by default, unless such authority was withdrawn explicitly.

In absence of a valid power of attorney or legal authority (as the case of the manager of LLC company) an Arbitration Agreement is considered as null and void.

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[64] Dubai Court of First Instance, 782/2011 (Civil, full jurisdiction)

[65] Dubai Court of First Instance, 688/2014 (Civil, full jurisdiction)

[66] Jason A Miller, 'The Durable Power of Attorney under the New N . C . Law' (2018) <https://millermonroelaw.com/2018/05/the-durable-power-of-attorney-under-the-new-n-c-law/>

[67] The UAE Arbitration Law, Article 4 (1)

To give an illustration, a subcontract was entered in February 2014 between contractor and subcontractor. The subcontractor's representative had a valid power of attorney to represent the subcontractor ("First POA"), however the mentioned POA was without prejudice to Article 58 (2) of the UAE Civil Procedures Law, which reads as follows:

> "It is not valid, without a special authorization, the declaration of the right prosecuted, disclaiming it, reconciliation or arbitration therein, approving the oath, or directing or repulsing it, releasing the litigation, giving up the judgment entirely or partially, relinquishing one of the channels of appeal therein, releasing the attachment (seizure), relinquishing the insurances with the continuation of the debt, claiming the falsification, recusing the judge or the expert or the real petition, or accepting it, or any other disposition that the law requires therein a special authorization."[68]

The interpretation of this article, in view of the aforementioned subcontract, is that the subcontractor's representative, having the "First POA", had no authority to waive any rights, settle disputes and agree to bind by arbitration on behalf of the subcontractor.

Works have been completed in July 2017, and a dispute arose between the contractor and the subcontractor, because the subcontractor was claiming a total amount of AED 75 million as due payments, and the contractor refused to pay and denied the subcontractor's entitlement for this amount.

Subcontractor's representative got another power of attorney ("second POA") in May 2018, however the new power of attorney granted the subcontractor's representative a clear authority to bind the subcontractor by an agreement to arbitrate.

Both parties failed to solve the dispute amicably, hence the subcontractor referred his claim to Abu Dhabi Court of First Instance in 2019. The Court appointed an expert who issued a technical engineering report in favor of the subcontractor stating that a total amount of AED 75 million is due to the subcontractor, however on 16 February 2020, the Court of First Instance ignored the

[68] UAE Civil Procedures Law, Article 58 (2)

expert report, and ruled that "the dispute should be solved by arbitration due to the Arbitration Agreement that was contained in the subcontract"[69].

The subcontractor appealed the judgement, and on 10 June 2020 Abu Dhabi Court of Appeal upheld the judgement of the Court of First Instance, "on the basis that i) the Second POA gave the representative a right to enter into an Arbitration Agreement; and ii) the Second POA ratified the entry into the Arbitration Agreement retroactively, as the Second POA had the same effect as a prior agency"[70].

The subcontractor filed a final appeal to the Court of Cassation, which clarified that:

> "The authority of the attorney may be explicit, implicit, or apparent. Authorization is explicit if stated orally or in writing and implicit if inferable from the state of affairs, from what has been said or written, or from the ordinary course of dealing. Acts of an attorney which fall outside the scope of the power are null and such nullity is relative in favor of the principal whose approval is necessary for such acts to be valid. Determinations on such matters are within the discretion of the trial Court whose reasoning must be sound and demonstrative of the operative part of its decision."[71]

The Court of Cassation found that the Second Power of Attorney did not ratify the subcontractor's representative previous acts and it is applicable on new contracts and not on any subcontract which was made before the date of the second POA.

Finally, the previous decisions were overturned by the Court of Cassation, and the Court decided that agreeing on arbitration in the subcontract was outside the subcontractor's representative authority, hence the case should be referred back to the Court of First Instance to look into the dispute merits and issue a decision.

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[69] Abu Dhabi Court of First Instance 892/2019 (Commercial)

[70] Abu Dhabi Court of Appeal 674/2020 (Commercial)

[71] Abu Dhabi Court of Cassation 922/2020 (Commercial)

In another case, a contract was entered between Architech Engineering Company and Dunia Advertising Company LLC, and a dispute arose between the parties, hence Architech Engineering Company filed a case before Dubai International Arbitration Center to look into the dispute.

The arbitral tribunal issued an award in relation to arbitration case reference: 117/2019 in favor of Architech Engineering Company, and it decided the following:

1- The arbitral tribunal has jurisdiction to consider the dispute
2- The respondent "Dunia Advertising Company" plea to nullify the arbitration clause due to lack of jurisdiction is rejected
3- The respondent "Dunia Advertising Company" is obliged to pay USD 2,260,500 to the claimant "Architech Engineering Company" in addition to paying USD 100,000 as damages
4- All the expenses of the case shall be borne by Dunia Advertising Company

Dunia Advertising Company was not satisfied with the arbitral award, hence and pursuant to Article 53 (1) of the UAE Arbitration Law, Dunia Advertising (herein referred to as the plaintiff) filed a case before Dubai Court of Appeal against Architech Engineering Company (herein referred to as the defendant), seeking the annulment of the arbitral award on the basis that the Arbitration Agreement is invalid because it was signed by a person who lacks the capacity to agree on arbitration on behalf of the company.

The plaintiff stated that the one who signed the contract that contains the arbitration clause is Mr. Alaa Al Deen Al Mudares and he does not have the power of attorney to agree on arbitration, bearing in mind that the company is a limited liability company, and as per the license the general manager is Mr. Saad Bin Laden and he is the only one authorized to sign such contracts in absence of a valid power of attorney.

On the other hand, the defendant argued that Mr Alaa Al Deen Al Mudares, who signed the contract, is the executive manager for the plaintiff, and no objection on the Arbitration Agreement was raised by the plaintiff during the contract period, also the plaintiff was performing the obligations as per the contract, and paid the installments and fulfilled around 71% of the total value of the agreed amount, which implies the plaintiff's agreement to be presented by Mr Alaa Al Deen Al Mudares.

Upon hearing the parties' defenses, the Court found that the agreement of arbitration was invalid because it was signed by a person who lacks the capacity, hence the arbitral award that was issued in relation to arbitration case reference: 117/2019 is null.[72]

It is obvious from the above two cases that agreeing on arbitration without having the legal capacity to do so will definitely result in either referring a dispute to litigation rather than arbitration, or nullifying an arbitral award in case any of the parties had initiated arbitration, such Arbitration Agreement are considered as "null and void" agreement.

An important aspect in this context is the burden of proof, "it is noteworthy that in Case No. 293/2015, the Dubai Court of Cassation held, with regards to the burden of proof, that it is to the person contesting the authority of the signatory to demonstrate that the considered person was not authorized to sign the Arbitration Agreement."[73] Also, one party cannot object on the authority of the other party's signatory, it can only object on the authority of its own signatory.

4.4 Optional Arbitration Clause

Sometimes arbitration clauses are drafted in a way to give the parties the option to choose arbitration on their discretion, for example an arbitration clause involving the word "can" or "may" is considered as uncertain and optional. The uncertainty and optional nature of such arbitration clause will usually lead to confusion in interpreting the clause, one party may believe that it has the right to arbitrate, whilst the other can argue that the litigation is still an open option for resolving the dispute.

Providing an illustration on this matter, in the case of Anzen Ltd & ors v Hermes One Ltd, one of the parties filed a case before the Court to solve a dispute and the other party objected on the Court's jurisdiction on the basis that an Arbitration Agreement exists, however the Court found that the Arbitration Agreement was optional and the judge held that:

[72] Dubai Court of Appeal, 6/2021 (Nullifying Arbitral Award)

[73] Taylor Wessing, 'Arbitration Agreements: do not sign without the requisite authority' (2016) <https://www.lexology.com/library/detail.aspx?g=81bdfaec-a9e4-417f-914d-a13929fc55a6>

> "Clauses depriving a party of the right to litigate should be expected to be clearly worded. There is an obvious linguistic difference between a promise that disputes shall be submitted to arbitration and a provision that 'any party may submit the dispute to binding arbitration'. Accordingly, the clause in this case was not a binding agreement to arbitrate disputes (and not to litigate them). Instead, it allowed either party to commence Court proceedings, save that the other party had an option to submit the dispute to arbitration which, once exercised, created a binding Arbitration Agreement."[74]

In view of the above, a clear and decisive language such as "must" and "shall" should be used in an arbitration clause, because the permissive language, like using the words "may" or "can", indicates only an option to go for arbitration, and parties may not be bound by such option.

4.5 Res Judicata / A Matter Decided

Res Judicata can be defined as "a matter finally decided on its merits by a court having competent jurisdiction and not subject to litigation again between the same parties"[75].

If a final decision is made by a competent court in relation to any dispute, it cannot be referred to the court or arbitration anymore, regardless what the court decision was, because "the matter is decided".

For example; if an arbitral tribunal issued an award and it was either ratified or nullified by a competent court, the "matter is decided" and none of the parties are allowed to initiate any litigation or arbitration proceedings. Similarly, if a competent court decided that it has jurisdiction over a case, rather than arbitration, and issued its decision, then the "matter is decided" and it cannot be referred to arbitration.

The concept of Res Judicata is recognized in the UAE Arbitration Law through article 52 which reads as follows:

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[74] Anzen Ltd & ors v Hermes One Ltd [2016] UKPC

[75] "Res judicata." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriamwebster.com/dictionary/res%20judicata. Accessed 10 Nov. 2021.

> "Arbitral Awards rendered in accordance with the provisions of the present Law shall be binding to all the parties and shall have the authority of the res judicata. Further, it shall have the same self-executing force as if it were a judgment. However, to enforce such awards, a decision to confirm it shall be obtained from the Court."[76]

In one case, Fakher Al Deen Properties (herein referred to as the Buyer) & Al Nakhla Jumierah Company LLC (herein referred to as the Seller) entered into Sale and Purchase Agreement on 24th February 2009. A dispute arose between the parties and the Buyer referred the dispute to Dubai International Arbitration Center, which has issued an arbitral award, in relation to arbitration case reference: 153/2015, in favor of the Buyer.

The Buyer filed a case before the Court of First Instance, seeking ratification of the arbitral award, however during the Court proceedings, the two parties reached a settlement, hence, and pursuant to Article 74 & 79 of the UAE Procedures Code, the Court decided to append the settlement agreement to the minutes of the session and to prove its content therein and to consider it as an execution order.[77]

The decision of the Court of First Instance was final and binding in absence of any appeal from the parties.

Later on, the Seller filed an arbitration case before Dubai International Arbitration Center, seeking a decision to terminate the Sale and Purchase Agreement due to failure by the Buyer to comply with his contractual obligations.

The Buyer had objected on the jurisdiction of the arbitral tribunal in addition to other defenses, however the arbitration center decided that it has jurisdiction over the dispute.[78]

The Buyer felt that the arbitral tribunal decision is not correct, and filed a request to annul its decision before the Court of Appeal, and stated that the annulment request is based on the fact that the arbitration clause is exhausted since the same subject matter was decided through the arbitral award issued in arbitration case reference: DIAC 153/2015 and was submitted to the Court of First

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[76] The UAE Arbitration Law, Article 52

[77] Dubai Court of First Instance, 893/2018 (Commercial, full jurisdiction)

[78] DIAC case reference: 42/2019

Instance to ratify it, and a settlement was concluded between the parties, so the dispute which is currently filed before arbitration is a repetition of the dispute that has been already resolved.

The Seller defended its position and requested the Court to dismiss the case, and stated that the settlement agreement which was concluded before did not include an Arbitration Agreement, but it was clearly stated that all the conditions in the original agreement are still valid and applicable to the transaction after the settlement is signed, hence the arbitration clause contained in the original agreement must be applied on the settlement agreement.

The Court of Appeal decided to annul the decision of the arbitral tribunal in relation to the case reference: DIAC 42/2019 on the basis that issuance of an arbitral award (the first award) leads to exhaustion of the arbitrator's authority to look into the dispute and results in the termination of the purpose of the arbitration clause, whether the Court decided to ratify the award or ruling that it shall be rescinded for any reason. Hence, any dispute between the parties, related to the original agreement, shall not be resolved through arbitration, unless they have entered into a new agreement and clearly agreed to arbitrate. Since the new settlement agreement did not include a new Arbitration Agreement, both parties have the right to recourse to the Court in case of any dispute in relation to the original agreement or the settlement agreement.[79]

The above case is an example of an inoperative Arbitration Agreement; because the Arbitration Agreement was once valid but has ceased to have effect due to res judicata.

4.6 Dispute Resolution Clause Involving Preconditions Prior Referring to Arbitration

In many contracts the dispute resolution clauses may require the parties to follow preconditions, trying to settle the dispute, before referring the dispute to arbitration. Compliance with these preconditions is mandatory to give effect to the Arbitration Agreement in case the dispute was not settled by following the preconditions.

[79] Dubai Court of Appeal, 12/2020 (Nullifying Arbitral Award)

The UAE Law considers the contract between the parties as "the law of the parties", Article 243 (2) of the Civil Code, provides that:

> "With regard to the rights and obligations arising out of the contract, each of the contracting parties must perform that which the contract obliges him to do."[80]

Hence, any preconditions set out in the contract must be respected and performed, the same has been recognized by the Court of Cassation which stated the following:

> "Arbitration – being a contract between the two parties – may include any condition that the two parties thereto deem appropriate in a manner not contrary to pubic order or morals, which entitles them to provide for preconditions prior to resorting to arbitration, so that if none of these conditions are materialized, the request for arbitration shall not be accepted in application of the rule of pacta sunt servanda."[81]

The rule of "pacta sunt servanda" means that "agreements must be kept" and it is arguably the oldest principle of international law.

To give an illustration, in one case, IAH Projects Development (herein referred to as the Developer) and Kele Contracting LLC (herein referred to as the Contractor) entered into a contracting agreement, and the Developer Real Estate LLC (herein referred to as the Project Manager) was appointed by the Developer to manage the works in the project, without being a party in the contracting agreement between the Developer and the Contractor.

The contracting agreement included a settlement of disputes clause that was taken from FIDIC Red Book 1987, Clause 67 and it reads as follows:

> "Any dispute arises between the Employer and the Contractor shall be referred in writing to the Engineer, with a copy to the other party. No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor.

[80] UAE Civil Code, Article 243 (2)

[81] Dubai Court of Cassation, 140/2007

If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the Eighty-fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration,

If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor."

A dispute arose, and the Contractor filed a case before Dubai International Arbitration Center against the Developer and the Project Manager, and an arbitral award was issued in relation to arbitration case reference: 43/2018 in favor of the Contractor.

Hence, the Developer and the Project Manager filed an annulment case before Dubai Court of Appeal on the below basis:

1- The Contractor did not follow the path set out in the contracting agreement to resolve the dispute and referred the dispute to the arbitration prematurely, without referring it to the Engineer as per the contracting agreement.
2- Arbitral award was issued against the Project Manager, although the Project Manager was not party in the contracting agreement.

The Court relied on the general rules of the contracts by which a contract may include any condition that the contracting parties deem appropriate without violating public order or morals, hence the contracting parties have the right to set preconditions before referring a dispute to arbitration, and if any of these preconditions were not met, the referral to arbitration will not be valid on the basis that the contract is the law of the contracting parties, and the burden of proving that these preconditions are actually fulfilled before referring to arbitration falls on the Contractor who has requested for arbitration in this case. Neither party may refer the dispute to arbitration

before submitting the dispute to the Engineer, as set out in the contracting agreement, unless the contracting parties agree otherwise after concluding the contract.

The Court of Appeal found that the Contractor failed to prove his compliance with the preconditions for settling the dispute before referring to arbitration, and his claim about following the prescribed and agreed-upon path between the two parties to settle the dispute was sent without evidence, hence the Court decided that the Contractor's referral to arbitration was premature and the arbitral award was nullified.[82]

It is evident from the above case that the courts will not give effect to Arbitration Agreement if the parties failed to comply with the agreed preconditions prior commencing arbitration, however it is noteworthy to mention that when the preconditions are not clear and the court has no objective approach to determine the satisfaction of the preconditions, as an example if trying to reach an amicable settlement is a precondition, the court will overlook such precondition because determining objectively if the parties have genuinely tried to reach amicable settlement is impossible. For instance, one phone call to discuss the dispute or a large number of workshops to discuss the dispute, may be both seen as trying to reach an amicable settlement.

This can be emphasized through International Chamber of Commerce (ICC) arbitral decision in Case No. 8445 (1994), wherein the agreement between the parties required the parties to resolve the dispute amicably prior initiating arbitration proceedings, and the parties exchanged number of letters and attended different meetings and workshops in a trial to solve the dispute amicably, however the dispute was not resolved and no settlement was reached.

One party had initiated arbitration proceedings, however the respondent argued that the claimant had not complied with the preconditions and the arbitration was prematurely initiated. The arbitral tribunal rejected the respondent's objection and stated the following:

> "The arbitrators are of the opinion that a clause calling for attempts to settle a dispute amicably are primarily expression of intention, and must be viewed in the light of the circumstances. They should not be applied to oblige parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute. Accordingly, the arbitrators

[82] Dubai Court of Appeal, 32/2019 ((Nullifying Arbitral Award))

have determined that there was no obligation on the claimant to carry out further efforts to find an amicable solution, and that the commencement of these arbitration proceedings was neither premature nor improper."[83]

To sum up, parties should always comply with any preconditions stated in their contracts prior referring the dispute to arbitration.

4.7 Inconsistent Dispute Resolution Mechanisms in Multiple Contracts Related to the Same Dispute

A dispute may arise between multiple parties who are directly and indirectly related to each other. For example, party A & party B entered into a contract, whereas party B & party C entered into another contract which is linked to the first contract by its nature. To solve a dispute between party A & party B, party C should be engaged, so there will be an indirect relation between party A and party C. In such circumstances the dispute resolution mechanism that must be followed may be confusing if the two contracts have two different dispute resolution mechanisms.

The inconsistency in the dispute resolution mechanisms in different, but related, contracts may lead to disregarding an agreed mechanism, such as arbitration, by the competent court, on the basis that one of the parties did not agree on the same mechanism.

To provide an illustration, Damac Gulf Real Estate L.L.C (herein referred to as the Developer) filed a case before Dubai Court of First Instance against Ztach Zemin Technology Anonym Sherketty - Dubai Branch (herein referred to as the Contractor) and Ramboll Middle East Limited - Dubai Branch (herein referred to as the Consultant), wherein the Developer had requested the Court to oblige the Contractor and the Consultant to pay damages for the Developer on the basis that on 20th July 2008 the Contractor issued a letter of acceptance for Damac Heights Tower (herein referred to as the Project) enabling works that includes, but not limited to, excavation, foundation, wall supports and dewatering. Also, on 5th October 2008 an engineering consultancy agreement was signed between the Developer and the Consultant to provide basic engineering services, supervision and control on the Contractor's works.

[83] ICC Case No. 8445, (1994)

The Contractor commenced the works under the supervision of the Consultant, and in 2011 the Contractor handed over the Project to the Developer who had entered into another agreement with Arabtec Construction (herein referred to as the Finishing Contractor) to complete the finishing works, after the Contractor claimed that all the enabling works were completed in accordance with the contract provisions and technical specifications.

The Finishing Contractor was not able to start the finishing works because of the incidents that began to occur at site due to the poor quality and the Contractor's failure to implement the enabling works in accordance with the contract provisions and technical specifications, in addition to the Consultant's failure to control the enabling works carried out by the Contractor. The Developer registered a case before the Court to appoint an expert to determine the losses and the damages, and a panel of experts was appointed by the Court and issued a report in favor of the Developer. The panel stated in its report that the Contractor and the Consultant were in default and failed to perform their contractual obligations and they are both obliged to pay damages to the Developer.

The Developer took the panel of experts' report to the Court of First Instance seeking the execution of the conclusion enclosed in the panel of experts' report, however the Court decided to dismiss the case against the Consultant due to lack of jurisdiction, since the contract between the Developer and the Consultant included an arbitration clause, whereas the contract between the Developer and the Contractor did not include such clause, and to return the file back to the panel of experts to look into the parties' objections.[84]

The Developer was not satisfied with the Court of First Instance decision, hence he appealed before the Court of Appeal, and requested to accept the case against the Consultant on the basis that the dispute relates to one transaction and to ensure justice the dispute shall be considered entirely before one body, which is the Court since it is the original jurisdiction by law and since the Contractor and the Developer have not agreed on arbitration in their contract.

The Court of Appeal overturned the Court of First Instance decision, and stated the following:

> In order to ensure the proper conduct of justice and so that there is no conflict in the rulings, the entire dispute shall be examined before one party, and since there was no agreement on

[84] Dubai Court of First Instance, 806/2020 (Commercial, full jurisdiction)

> arbitration between the Developer and the Contractor, then the Consultant shall rely on the Courts with the original jurisdiction, and the agreement on arbitration between the Developer and the Consultant become not binding.[85]

The Consultant was not satisfied and he strongly believed that he has the right to refer the dispute to arbitration rather than the Court, hence the Consultant appealed before the Court of Cassation, which upheld the Court of Appeal decision, and additionally stated that:

> "Under UAE Law, arbitration is exceptional dispute resolution mechanism, and agreement to arbitrate must be construed narrowly, and it shall not bind any party who did not agree on arbitration."[86]

This decision shows that interest of justice may force a party to litigate, although it has agreed on arbitration. Inconsistency of dispute resolution mechanisms in different contracts may render an Arbitration Agreement invalid. Hence, to ensure that an Arbitration Agreement will be binding on all parties, a consistent dispute resolution mechanism must be adopted in all the related contracts.

Anna Cook had correctly commented on this matter and underlined that "arbitration is confidential and agreements to arbitrate are only binding on the parties to that agreement. These features of arbitration make it very difficult to join third parties to an existing arbitration. Therefore, if there is a chance that a dispute will involve multiple parties, this should be considered at the time the Arbitration Agreement is negotiated, this is a complex issue"[87].

A similar case involved Electico Electromechanical Works LLC (as the Subcontractor) and Beacon Construction Company LLC (as the Main Contractor) and Rashid Ali Hamad Saeed Bu Hleiba (as the Employer), wherein the subcontract between the Subcontractor and the Main Contractor did not involve an arbitration clause, however the main contract between the Contractor and the Employer contained arbitration clause, the Court of Cassation decided that the Arbitration Agreement between the Employer and the Main Contractor is not binding on the Subcontractor

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[85] Dubai Court of Appeal, 2845/2020 (Commercial appeal)

[86] Dubai Court of Cassation, 290/2021 (Objection, Commercial)

[87] Anna Cook, 'Arbitration clauses: drafting tips' (2021) <https://inquisitiveminds.bristows.com/post/102gtl3/arbitration-clauses-drafting-tips>

since he did not agree on arbitration and decided that the Court has jurisdiction over the case filed by the Subcontractor against the Main Contractor and the Employer.[88]

4.8 Suspensive Clause

Arbitration Agreement must be certain and clear, to ensure its enforceability, some contracts may involve a dispute resolution clause which does not provide sufficient detail to establish the consent of the parties to resort to arbitration. An Arbitration Agreement must be detailed, it is advisable to include at least the details related to the number of arbitrators, the seat, the language and the rules. If an arbitration clause was not detailed in a sufficient manner, it will not be enforceable and it will be considered as "suspensive clause".

As an illustration, in one case, a dispute arose between Contractor and Employer who were parties of a construction contract, this dispute was related to the additional works that were instructed by the Employer. The Contractor filed a case before Abu Dhabi Primary Court seeking the payment of the due amount that was attributable to the additional works performed by the Contractor. The Court ruled in favor of the Contractor for the amount of AED 12 million despite the Employer's objection on the jurisdiction of the Court on the basis that the contract contained an arbitration clause which reads as follows:

> "In arbitration, the Laws of the United Arab Emirates shall be applied"

The Employer was not satisfied with Abu Dhabi Primary Court decision, and filed an appeal. Abu Dhabi Court of Appeal upheld the decision in regards to the jurisdiction of the Court, however the quantum of the claim was reduced to AED 8.5 million. The Court stated as follows:

> "The appendix of the construction contract between the two parties stipulated in Clause 18(a) thereof that, in arbitration, the Laws of the United Arab Emirates shall be applied, and it is a text that does not indicate that the two parties have agreed to resolve the dispute through arbitration, but rather is a suspensive condition.

[88] Dubai Court of Cassation, 139/2021 (Objection, Commercial)

> Where the contract provisions lack a requirement to resort to arbitration, and no subsequent agreement to arbitration was made, which means that the current arbitration clause [Clause 18 (a)] is an unfulfilled suspensive condition."[89]

The Employer did not give up, and an appeal was filed before Abu Dhabi Court of Cassation by the Employer. The Court upheld the previous decisions and ruled the following:

> "Whereas the decision was made in the jurisdiction of this Court – and in accordance with Articles 5, 6, and 7 of the Arbitration Law – for the Court to reject its jurisdiction on a dispute requires the existence of an arbitration clause to evidence that the parties have agreed in writing to resort to arbitration as an exceptional means to settle disputes between them, whether through a special clause in the original contract or via an agreement independent of the main contract, given that the consent of the parties is the basis of arbitration and that the arbitrator derives their authority from the contract in which the arbitration was agreed upon.
>
> Therefore, the judge must verify that the will of the litigants matches the agreement on arbitration and the underlying dispute, and the interpretation of the contract to identify the intent of the parties is the authority of the trial Court.
>
> The clause subject of dispute in the contract states (governing law: the Laws of the United Arab Emirates shall govern arbitration) and hence does not disclose the parties' express will in the agreement to resort to arbitration."[90]

The significance of this decision is to highlight that the Court will not merely rely on the existence of Arbitration Agreement, and it will further examine the scope of the clause and the parties' intention to agree on arbitration.

Mahmoud Abuwasel validly commented on this judgement as follows:

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[89] Mahmoud Abuwasel, 'UAE Cassation Court rules arbitration clause is suspensive condition' (2021) <https://www.lexology.com/library/detail.aspx?g=544d9436-6d03-47fd-bdb5-216cd7d0df05#:~:text=In%20March%202021%2C%20the%20highest,explicit%20scope%20to%20any%20disputes>

[90] Abu Dhabi Court of Cassation, 1173/2020 (Commercial)

> "Essentially, finding that an Arbitration Agreement could be deemed a suspensive condition unless the parties explicitly state that any dispute (or a particular dispute) shall be resolved by arbitration means that Arbitration Agreements could include minimum standards such as language, number of arbitrators, rules, etc. but could nevertheless be deemed a suspensive condition in the absence of an explicit agreement that disputes shall be resolved via arbitration."[91]

4.9 Contract Novation - No Oral Modification Clauses

Many contracts contain provisions which prescribe that the contract may not be changed, except by writing and the signature of all parties, these provisions are practically called "No Oral Modification Clauses". In such contracts, contractual obligations, such as referring a dispute to arbitration, may not be transferred by novation, which involves the substituting of one contracting party by another party who was not originally part of the contract.

In one case, a franchise development agreement (herein referred to as the FDA) was entered between Kababji (herein referred to as the Licensor) and Al Homaizi (herein referred to as the Licensee) by which the former gives the later the license to operate Kabaji restaurants for ten years in Kuwait. The FDA contained "No Oral Modification" clauses as follows:

> "Article 3 [Grant of Rights of the FDA]: This grant is intended to be strictly personal in nature to the Licensee and no rights hereunder whatsoever may be assigned or transferred by Licensee in whole or in part without the prior written approval of Licensor."
>
> "Article 17 [Waiver]: waiver of any term or condition of the Agreement must be in writing and signed by the affected party"
>
> "Article 19 [Rights not Transferable]: The parties hereto agree that all rights granted to Licensee under this Agreement are personal in nature and are granted in reliance upon various personal and financial qualifications and attributes of Licensee. License's interest

[91] Mahmoud Abuwasel, 'UAE Cassation Court rules arbitration clause is suspensive condition' (2021) <https://www.lexology.com/library/detail.aspx?g=544d9436-6d03-47fd-bdb5-216cd7d0df05#:~:text=In%20March%202021%2C%20the%20highest,explicit%20scope%20to%20any%20disputes>

under this agreement is not transferable or assignable, under any circumstances whatsoever, voluntarily, by operation of law or otherwise without the written consent of Licensor or purported transfer or assignment of all or any part of such interest shall immediately terminate this Agreement without further action of the parties and without liability to Licensor or its designee of any nature."

"Article 24 [Entire Agreement]: No interpretation, change, termination, or waiver of any provision hereof, and no consent or approval hereunder, shall be binding upon the other party or effective unless in writing signed by Licensee and by an authorized representative of Licensor or its designee."

"FDA Article 26 [Amendment of Agreement]: The Agreement may only be amended or modified by a written document executed by duly authorized representatives of both Parties."

A corporate reorganization took place, in which the Licensee became a subsidiary of Kout Food Group (herein referred to as KFG). A dispute arose and the Licensor filed an arbitration case against KFG only, under the rules of the International Chamber of Commerce in Paris.

KFG objected on the jurisdiction of the arbitral tribunal on the basis that it was not party to the Arbitration Agreement, however the arbitral tribunal decided that, by applying the French Law, which is the law governing the seat of Arbitration, KFG was party to the Arbitration Agreement because the original agreement was novated. The arbitral tribunal issued an arbitral award in favor of the Licensor for an amount of $ 6.7 million.

The Licensor filed a case before the Commercial Court to enforce the award, and the Court decided that:

"The validity of the Arbitration Agreement in the FDA was governed by English Law and that, subject to a point left open, as a matter of English Law KFG was not a party to the FDA or the Arbitration Agreement."[92]

[92] Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2020] EWCA Civ 6

An appeal was filed by the Licensor, and the Supreme Court upheld the decision of the Court of Appeal found the following:

> "Kababji contends that KFG became a party to the Arbitration Agreements by becoming a party to the FDA by novation because of the parties' conduct and the performance by KFG of various contractual obligations over a sustained period of time. It cannot, however, point to any agreement in writing to this effect between itself and Al Homaizi. The FDA contained a number of provisions which prescribe that it may not be amended save in writing signed on behalf of both parties - No Oral Modification Clauses."[93]

The Supreme Court decided to dismiss the appeal.

It is evident from the above case that "the way in which a contract operates in practice can differ from the wording of the agreement and whilst one part of a corporate group may perform obligations entered into by another group company, that does not ordinarily alter the obligations owed under the contract. It is vitally important to address such changes during the course of the contract."[94]

4.10 Arbitration Clause in a Draft Contract

Finalization of an agreement or a contract is usually a lengthy process, wherein parties will negotiate all the contractual and commercial provisions governing their transaction. Agreeing on a draft contract without making it enforceable by formal consent of the parties shall risk the validity of the contract and consequently will risk the validity of the Arbitration Agreement.

In the case of Black Sea Commodities Ltd (herein referred to as the Seller) and Lemarc Agromond Pte Ltd (herein referred to as the Buyer) the parties were negotiating a sale for goods agreement, in which the price and some other provisions were concluded whilst negotiations on some other provisions did not succeed and parties have not signed the agreement. The draft agreement

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[93] Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48

[94] Michael Frisby, 'Supreme Court underlines the power of "No Oral Modification clauses" in upholding an agreement to arbitrate' (2021) <https://www.lexology.com/library/detail.aspx?g=ce3f3dea-43a3-44bb-90d3-cf661c1a6069>

contained an arbitration clause, and during negotiations none of the parties have raised an objection on the proposed arbitration clause.

Although the agreement was not signed, but the parties have partially started performing the scope of works, to avoid any delays in the performance of the agreement, and the parties were not considering the probability of having a dispute between them, this idea has emerged at the beginning of the transaction because the parties were very keen to perform and to benefit from the agreement.

However, a dispute arose, and the Buyer initiated an arbitration case against the Seller who had objected on the arbitral tribunal jurisdiction on the basis that an agreement was not reached or signed by parties, but the arbitral tribunal did not agree on the objection and issued its award in favor of the Buyer.

The Seller was seeking to nullify the award; hence he had filed a case before the Court. Upon hearing both parties and looking into the facts of the case, the Court decided to nullify the award and held that:

> "The doctrine of separability enshrined in s. 7 of the 1996 Act was irrelevant; the parties were not agreed on the terms of a formal contract and so they did not conclude an Arbitration Agreement capable of being separated.
>
> Lemarc Agromond was not allowed to pick and mix the terms of the draft conditions. Analyzing the communication of the parties from the perspective of offer and acceptance, there was no meeting of the minds."[95]

A lesson to be learned from this case is that when parties have intention to solve any dispute, that is related to an agreement which is in the negotiations stage, by arbitration, they should agree on this at the beginning of the negotiations and formalize it by signing an Arbitration Agreement. Parties shall state that if any dispute arises out of the negotiated agreement, it shall be resolved by arbitration, and neither party should assume that an arbitration clause included in a draft agreement is binding because the other party did not object on it during the negotiations.

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[95] Black Sea Commodities Ltd v Lemarc Agromond Pte Ltd [2021] EWHC 287

4.11 Amended Agreement

Parties may agree on arbitration in one contract, and due to different circumstances, the parties may wish to enter into an amendment agreement which amend the original contract. Although the amendment agreement is related to the original contract, however it should be considered as separate contract and the contractual provisions in the original contract shall not apply on the amendment agreement, unless otherwise clearly stated in the amendment agreement.

When it comes to Arbitration Agreement, the situation may be more stringent, and a mere referral to the terms and conditions that were included in the original contract in the amendment agreement does not qualify to transfer the Arbitration Agreement to the amendment agreement.

In 1987 the inheritor of Ajay Bjondas Bhatia and Manish Bjondas Bhatia passed away and left a number of properties, companies, real estate and bank accounts. In 2005, the two heirs signed two agreements, the first agreement was related to companies, bank accounts, commercial licenses, agencies, real estate and businesses that were passed to them by inheritance, the second agreement was related to personal real estate, cars, and bank accounts passed to them by inheritance. The same dispute resolution mechanism was introduced in both agreements, contained in the first agreement under clause no. (17) and in the second agreement under clause no. (8), wherein the dispute resolution mechanism involved several procedures prior to resorting to arbitration.

Firstly, the parties must try to settle the dispute amicably before resorting to arbitration by sending 15 days written notice to hold a meeting to resolve the dispute amicably. In the event of no agreement to hold the meeting or the failure of negotiations within 30 days, the dispute shall be referred to mediation. If this mediation fails in solving the dispute within 100 days, then the dispute shall be referred to arbitration.

In 2006, the two parties concluded two amendment agreements according to which the previous two agreements were amended, without including any arbitration clause, but there was a general reference to the rest of the terms and conditions of the two original contracts without specifying the disputes resolution clause contained therein.

Later on, Manish had initiated an arbitration case before the International Chamber of Commerce (ICC), and an arbitral award was issued in the arbitration case no. 19741 TO c19742 TO, hence

Ajay filed a case before the Court of Appeal to nullify that award on the basis that the dispute is related to the amendment agreements which do not include an arbitration clause.

Upon looking into the case, the Court of Appeal decided to accept Ajay's application and nullify the award, and stated the following:

> It was clear from looking at the two amendment agreements, signed by the two parties, that there was no referring expressly and clearly to the arbitration clause included in the two original contracts, rather the reference to the original contracts was just a general reference to their texts without a specification to the arbitration clause.
>
> The arbitral award is rendered by someone who has no jurisdiction, the matter with which it is necessary to judge the invalidity of the arbitral award that is the subject of the dispute.[96]

It is imperative to note that an amendment to an original agreement must be drafted carefully, and the possibility of a dispute must not be excluded by the parties, hence the dispute resolution mechanism intended to be followed by the parties must be clearly specified and if the parties wish to use the same method stated in the original agreement, an explicit and clear reference to the dispute clause must be made.

4.12 Exceeding the Time Limit for Requesting a "Referral to Arbitration"

As stated earlier, article 8 of the UAE Arbitration Law states that whenever a case is filed before the court, and the court finds that an Arbitration Agreement exists and the other party objected on the jurisdiction and requested referral to arbitration "before making any other motions or plea on the subject matter of the action"[97], the court should dismiss the case and refer it to arbitration.

However, "if a party fails to raise the request in a timely manner, it may be considered that it has waived the right to arbitrate and that the Arbitration Agreement becomes inoperative. Most

[96] Dubai Court of Appeal, 28/2020 (Nullifying Arbitral Award)

[97] The UAE Arbitration Law, Article 8

national laws provide that the referral to arbitration must be requested before any defense on the merits, i.e., in limine litis."[98]

[98] ICCA's Guide to the Interpretation of the 1958 the New York Convention: A Handbook for Judges, ICCA (2011) 41.

5 Conclusion

Arbitration is considered by many industry and legislation experts to be one of the most effective dispute resolution mechanisms because of its numerous advantages. The cornerstone of arbitration is the Arbitration Agreement which must be absent of any loopholes or defects. Unequivocally, no party wishes to obtain an arbitral award that is unenforceable after spending time and money in arbitral proceedings, merely because the Arbitration Agreement is surprisingly invalid within the boundaries of the applicable law or international conventions. Similarly, no party wishes to be deprived from referring its dispute to arbitration, albeit having agreed on arbitration, due to an invalid Arbitration Agreement.

The adequate drafting and language of an Arbitration Agreement is paramount, so an agreement must be drafted by experts whether in the form of a submission agreement or an arbitration clause within a contract. A thorough study and acknowledgement of the articles and statutes of the governing law is inescapable during the process of drafting an arbitration clause.

Legal principles such as “Separability” and “Arbitrability” govern the validity of Arbitration Agreements. As stated earlier, even though a contract may be invalid for any reason, the Arbitration Agreement can on the contrary remain valid, unless the Arbitration Agreement is considered invalid due to any other reason. Moreover, not all disputes can be settled through arbitration, this is basically the “Arbitrability” principle, and it can be determined by the arbitral tribunal and/or the competent court.

Writing and signature requirements manifests the enforceability of Arbitration Agreement, and these requirements are variable in different law systems and international conventions. If the writing and signature requirements are not satisfied, the Arbitration Agreement may be considered as void as if it did not exist at the first place.

The invalidity of Arbitration Agreement has a severe impact on the referral to arbitration and on the recognition & enforcement of arbitral awards, hence the mere existence of Arbitration Agreement does not necessarily mean that the Arbitration Agreement is valid.

Moreover, if arbitration is incorporated in a contract as a dispute resolution route whether through a submission agreement or a clause and one of the parties refers a dispute to a court, the defendant has the right to request a referral to arbitration, subject to submitting that request within the

specified time frame and failing to do so will render the Arbitration Agreement as inoperative agreement. Another example of inoperative Arbitration Agreement is the case of Res Judicata, where an Arbitration Agreement will cease to have effect because “a matter was decided”.

In addition, if an Arbitration Agreement is made by improper reference to a standard form of contract or was entered by a party that is not authorized or lacks the capacity to do so, it will be considered invalid. Also, an arbitration clause in the form of “optional clause” or “suspensive clause” will not be valid.

It is imperative for the dispute parties to comply with all the preconditions which may be specified in a dispute resolution clause prior commencing arbitration to prevent invalidating the entire Arbitration Agreement. Should the dispute resolution clause for instance set the referral of the dispute to a third party as a condition precedent to the arbitration referral, a recorded corroboration of such referral must be available for presentation at least by the claimant to negate any chances of dismissal.

In related contracts, it is essential to consider the consistency of the dispute resolution clauses, to avoid preventing one party from referring to arbitration even though it had genuine intention to arbitrate. In addition, when a contract is novated, the rights and obligations under an Arbitration Agreement are not automatically transferred from one party to another unlike most of rights and obligations, therefore Arbitration Agreements must be expressly mentioned in novation agreements.

In some cases, contracting parties may engage into physical works based on a draft contract, which is under negotiations, prior to the date on which the contract is signed, however if a dispute arises between the parties which drives either of them to refer the matter to arbitration, a dismissal is inevitable due to the fact that the arbitration clause did not come into effect prior to the date on which the dispute was referred to arbitration.

When two contracting parties wish to amend an existing contract for any reason, such as varying the scope of works or extending the time for completion, it is required to specifically emphasize and explicitly refer to the Arbitration Agreement as valid, effective and applicable in the amendment.

There are other situations in which an Arbitration Agreement may be found invalid. However, the validity of Arbitration Agreement standards is ultimately tied with doctrinal changes in the different law systems, "it is a curious feature of international commercial arbitration that the formal validity of the very cornerstone of the whole process, the Arbitration Agreement, remains the subject of significant uncertainty"[99].

[99] Toby Landau, The Requirement of a Written Form for an Arbitration Agreement: When "Written" Means "Oral" (2002) 11 ICCA Congress series

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