

RECENT DUBAI COURT OF CASSATION DECISIONS ON ENFORCEABILITY OF ARBITRATION AGREEMENTS

8 MARCH 2024 • ARTICLE



In a series of recent Dubai Court of Cassation (“DCC”) decisions, the DCC has issued important rulings on the enforceability of arbitration clauses in construction disputes. This article looks at these rulings and their practical implications for parties involved in construction projects in the UAE.

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THE DCC RULINGS

Separability of the arbitration clause (DCC Case No. 585 of 2023)

The dispute arose from a disagreement between two shareholders of a limited liability company founded in 1997 and operating within the construction sector. At that time, the UAE applied restrictions on the foreign ownership of companies, requiring the majority shareholder in a private limited company to be a UAE

national. In this case, the UAE national owned a 51% stake in the company and the foreign national shareholder the remaining 49%. The company’s articles of association (the “AoA”) reflected this arrangement. The parties also signed an addendum to the AoA stating, *inter alia*, that the majority shareholder did not own any shares in the company and was not entitled to a portion of any of its profits (the “Addendum”). Instead, in consideration for the inclusion of his name in the AoA, the UAE national was entitled to an annual salary or percentage of the value of the business conducted by the company. The parties had agreed to settle shareholder disputes by arbitration under the DIAC Rules.

In 2022, the majority shareholder commenced arbitration proceedings against the minority shareholder and obtained an award ordering them to make various payments under the Addendum. The minority shareholder sought to set aside the award before the Dubai Court of Appeal (“DCA”) arguing that the Addendum was invalid as it included arrangements which contravened public policy.

The DCA annulled the award. The DCA relied on the UAE Federal Commercial Companies Law which provides in relevant part that a company's AoA depriving a partner from profits or exempting him from sharing losses (or granting a fixed percentage of profits) *"shall be deemed null and void"*. The DCA also relied on the UAE law principle that conciliation is not permissible in matters related to public policy. These findings are uncontroversial and line with previous decisions. However, the DCA also found that: *"the arbitration agreement as well as filing the arbitral proceedings on the basis of such an invalid contract is against public policy."* The UAE national appealed the DCA's decision before the DCC. The DCC upheld the DCA's judgment and ruled that since the company documents were invalid this meant that, as a result, all the underlying contractual terms including the arbitration clause were also invalid.

This ruling on the invalidity by extension of the underlying arbitration clause is somewhat controversial. The DCC's finding conflicts with the wording of the UAE Federal Arbitration Law, which expressly recognises the separability of an arbitration clause under Article 6(1) in the following terms:

"An arbitration clause shall be treated as an agreement independent from the other terms of the contract. The nullity, rescission or termination of the contract shall not affect the arbitration clause if it is valid per se, unless the matter relates to an incapacity among the Parties."

"This case also serves as a good reminder for parties to check any outdated shareholding arrangements and ensure that they are fully in compliance with UAE public policy."

In previous judgments, the UAE Courts have upheld the principle of separability of the arbitration agreement, a well-established principle of international arbitration. The overarching implication of this decision is that parties now bear the risk that a finding of invalidity of a contract based on public policy grounds may extend to the underlying arbitration clause.

This case also serves as a good reminder for parties to check any outdated shareholding arrangements and ensure that they are fully in compliance with UAE public policy.

Conflicting dispute resolution clauses in related contracts (DCC Case No. 618 of 2023)

The dispute arose out of a subcontract to carry out mechanical and electrical works for a project at "Expo 2020 Dubai". The parties initially signed a Letter of Acceptance ("LoA") which incorporated the subcontractor's earlier offer and set out the scope and value of the contracting works. The LoA included an arbitration clause. A year later, the parties signed an addendum which made provision for variation works and included a dispute resolution clause in favour of the Dubai Courts (the "Addendum").

The subcontractor claimed for outstanding payment for works performed under the LoA and the Addendum and obtained a payment order from the Dubai Courts against the contractor. Upon the contractor's failure to satisfy the payment order, the subcontractor started formal proceedings before the Dubai Courts.

The contractor unsuccessfully attempted to challenge the jurisdiction of the Dubai Courts (both at first instance and on appeal) based on the existence of the arbitration clause in the LoA. The lower courts considered that the Addendum superseded the LoA and that the jurisdiction clause in favour of the Dubai Courts constituted a waiver of the arbitration clause.

"This ruling reinforces the position of the UAE as a pro-arbitration jurisdiction and demonstrates the willingness of the local courts to enforce arbitration agreements in accordance with their terms."

However, upon further appeal by the contractor to the DCC, the DCC reversed the lower courts' decisions and ruled that the lower courts had no jurisdiction to hear the parties' dispute. In doing so, the DCC reasoned that (i) the Addendum was a complementary agreement to the LoA and (ii) the jurisdiction clause in the Addendum in favour of the Dubai Courts was strictly limited to disputes which directly arose out of that Addendum. The DCC also found that the arbitration clause in the LoA was clear and valid and extended to disputes stemming from the LoA itself and from any subsequent agreement which related to the same project.

This ruling reinforces the position of the UAE as a pro-arbitration jurisdiction and demonstrates the willingness of the local courts to enforce arbitration agreements in accordance with their terms.

Extension of the arbitration clause to subsequent purchase orders (DCC Case No. 828 of 2023)

The dispute arose out of contract for works on several villas on the Palm Jumeirah in Dubai. The parties entered into a contract which included an arbitration clause and subsequent purchase orders for the supply of materials, equipment and labour for various works forming part of the same project. The purchase orders did not contain any choice of dispute resolution forum.

The contractor started proceedings against the employer claiming for outstanding sums under the original contract and the subsequent purchase orders. The Court of First Instance ("CFI") awarded the contractor the sums due under the purchase orders but dismissed the contractor's claims relating to sums outstanding under the original contract on the grounds that the contract included an arbitration clause. Upon appeal, the DCA rejected the contractor's claim in its entirety based on the existence of the arbitration clause.

The contractor appealed to the DCC and argued that the purchase orders were separate from the original contract and constituted new contracts. The purchase orders did not include any arbitration clause and so the contractor argued that its claims were subject to the jurisdiction of the local Dubai Courts.

The DCC did not agree and confirmed the DCA's decision. It held that the arbitration clause in the original contract was clear and extended to cover the later purchase orders in relation to the same project. In support of its reasoning, the DCC noted that:

- (i) the purchase orders were concluded between the same parties and in relation to the same project; and
- (ii) that they did not include any *"agreement on the jurisdiction of the State's courts to consider any dispute rising from their implementation"*.

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The DCC held that: *“Pursuant to the “accessory follows the principal” principle and based on the implicit will of the parties deduced from all previous elements, all disputes regarding subsequent contracts are subject to the arbitration clause”*. The DCC noted that this was the case *“especially taking into account the technical nature of the construction industry, which makes it unlikely that the parties intended to limit arbitration to specific matters and resort to state courts in other matters, which may be technically related to the matters subject to arbitration given the single nature of the subject matter of those contracts”*.

This ruling is particularly relevant to the construction industry where parties often sign multiple contracts or purchase orders to e.g. govern the supply and/or installation of material or a particular scope of work. If parties agree to arbitrate in their original contract, then unless they subsequently specifically agree to an alternative form of dispute resolution, the arbitration agreement may well extend to govern disputes arising under those subsequent arrangements provided they arise in respect of the same project.

CONCLUSION

The above rulings emphasise the UAE’s commitment to promoting arbitration as a preferred method for dispute resolution, particularly in the construction sector. These decisions also serve as a useful reminder for parties to take particular care when drafting their dispute resolution clauses to avoid future arguments about the proper forum for dispute resolution and competing arbitration and court proceedings arising out of the same project or fact pattern.

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