



Bin Shabib & Associates (BSA) LLP Advocates & Legal Consultants

## THINK BEFORE YOU START:

### Verifying the authorisation status of a signatory to an arbitration clause

Keen to start what is generally perceived to be a faster, more efficient and impartial dispute resolution process, claimants often embark upon filing for arbitral proceedings in a country fraught with procedural pitfalls for the unwary: from unsigned arbitration clauses, to un-sworn witness, arbitration in the UAE is all about due process.

By way of a first example, the article below examines the consequences of relying on an arbitration clause that is not signed by what is - under UAE law and practice - deemed to be **an authorised signatory**.

#### Unauthorised arbitration

It is common knowledge amongst the legal community that for contracts to be binding, they must be executed either by a corporate entity's actually authorised representative or by a person that has at least an apparent authority to do so. Under UAE jurisprudence, the latter has been held to be evidenced towards third parties by:

- the use of a corporate stamp or
- the apparent delegation of authority through correspondence or
- by the position such representative may have within an organisation, or
- by the day to day conduct from such person of a corporate entity's business affairs.

However, a lesser known and often mistakenly assumed fact is that although an authorised representative may generally have an actual or apparent authority to bind the company to a contract, that person may nevertheless not have the very specific authority to accede to any agreement to arbitrate.

### **Proving a definite abandonment of litigation**

The rationale for such departure from a trodden path, specifically with regard to arbitration, is that under UAE jurisprudence, acceding to an arbitration agreement/clause amounts to an effective waiver of the default and fundamental right of resorting to litigation, i.e. any potential plaintiff's right to approach the Court and seek resolution of a dispute. This waiver needs to be carried out so unequivocally, that it should be impossible to revert back to litigation, in the absence of an express agreement to do so by the opposing party to an arbitration.

Such is the importance given to this waiver that for it to be valid, it needs to be granted either by the natural person most closely identified with a corporation's legal entity, or by any other person duly empowered by such natural person – usually through a notarised Power of Attorney containing specific wording to this effect. Failure to do so may result in the legal entity denying the validity of the arbitration clause, the repercussions for which can be very costly, particularly if such denial takes place after the arbitration proceedings are concluded.

### **Acquiescence to arbitrate not possible**

At this point it must be stressed that, a defective arbitration clause (whether by reason of it being signed by an unauthorised natural person or due to other reasons to be examined in subsequent articles) cannot be deemed to have been retrospectively rectified at any stage of the arbitral proceedings simply by the respondent's inadvertent or even intentional participation.

The only exception to this is an express acceptance of its validity by a representative of the respondent duly and specifically authorised and empowered to "arbitrate" as opposed to simply represent the respondent in arbitral proceedings.

Naturally, such an unlikely eventuality would make matters for the aspiring claimant very straightforward and is, for this reason, almost certain not to take place. This position applies even more unambiguously if the respondent reserved its position as to the validity of the arbitration clause or expressly stated – at any stage - that it disputed such validity and then defended the arbitral proceedings both on the merits and on procedural grounds.

### **Profile of an authorised representative**

Usually, a representative that would have authority to bind an entity to an arbitration agreement/clause is the general manager appearing on the commercial trade licence issued by the relevant UAE Government authority such as, for example, the Dubai Economic Department.

Whilst it is reasonable to ask for such licence to be produced at the time of entering into a commercial transaction, in practice this is often not done. The ensuing risk is that the natural person having apparent authority to bind the legal entity contractually, may actually not be the general manager and be instead the Financial Director or the Commercial Manager, COO etc - all being natural persons that would regularly enter into otherwise binding contracts and commercial transactions.

Consequently, that natural person may be deemed by the UAE Courts – if asked to by a defendant wishing to obstruct the ratification of an arbitral award issued against it - not to have sufficient authority to validly enter into an arbitration agreement on behalf of the legal entity it otherwise duly represents. Therefore, the capacity to bind a legal entity into a commercial transaction evidenced by a written contract does not necessarily imply a capacity to bind that entity into arbitration.

To ensure arbitration proceedings in the UAE can be validly commenced based on opposing parties' duly warranted authority, various precautionary practices may be considered.

### **Recognising an authorised representative**

In order to determine whether the representative holds the powers to bind their principal to arbitration, the initial and most sensible approach is to request review of the corporate documents during the execution phase of an agreement.

These would ideally include:

- trade licence
- Articles/Memorandum of Association,
- shareholders' resolutions if applicable and
- Power of Attorney that the signatory to an arbitration clause may have.

Whilst it may appear extreme to request such documents at the time of entering into a contract, the chances of them being produced then are much higher than if this exercise were to be carried out after a dispute has arisen. Upon review of such documents, both parties may be better informed on whether they can validly enter into a binding arbitration agreement.

This approach should generally be deemed to be preferable when compared to parties blindly, as is often the case, cutting and pasting a standard arbitration clause into a contract on which both parties are just keen to sign off. This is usually then followed by a hope that either matters will never become contentious or that, if they do, arbitral proceedings will ensure a swift a no-nonsense resolution of any unlikely dispute.

The next articles on UAE Court ratification of arbitral awards will throw some light on more topics relevant to the “think before you start” stage of an envisaged arbitral process , before moving onto the procedural errors that can prove fatal to an arbitral award - even after arbitration proceedings have been validly commenced.

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