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PROCEDURAL DEFECTS DURING THE ARBITRATION:

Getting the target right

In a jurisdiction where adherence to procedure may play a very predominant role, ensuring that arbitration succeeds in form is just as important as it succeeding in substance.

Assuming the fundamental cornerstone of an arbitration agreement/clause is watertight and has survived all possible challenges to its validity, the next task of a hopeful claimant is to ensure that both parties are named correctly in the proceedings that will follow. Failure to ensure this may mean that even the slightest oversight could result in nullification of the award at the stage of ratification before the UAE Courts.

Both for the claimant that wishes to ensure enforcement and the respondent that is on the look out for procedural lapses, having all eyes on ultimate ratification starts and ends with **correctly naming the parties to an arbitration.**

Incorrectly named parties

Few would underestimate the importance of commencing arbitration proceedings, or any judicial process, against the correct opponent. However, there are several dimensions to this seemingly simple principle including the potential claimant having to ensure that:

- the spelling of the respondent's name is correct,
- the respondent's corporate status correctly identified e.g. limited liability company, establishment etc,
- the location of the foreign mother company of a UAE branch is set out e.g. branch of a company incorporated in France, US, UK etc,
- the stated emirate of domicile of a UAE company corresponds with the incorporation documents belonging to the party to the arbitration agreement.

The first three points are relatively self explanatory and errors should be possible to avoid with adequate attention to detail. The fourth point may require further explanation, given that the UAE company incorporation system is somewhat different from that in many other jurisdictions.

There is no Federal company register in the UAE, therefore upon incorporation of a new company, the registrar would only ensure that the company's proposed name does not conflict with another entity registered in that same Emirate. This means that normally no federal search in all Emirates would be conducted. Therefore, it is entirely possible to have more than one company registered under exactly the same name/style in different Emirates. Indeed the use of identical company names is common in case of groups of companies under the same management carrying out the same type of business in several Emirates.

Therefore, inadequate understanding of the UAE company incorporation system can result in an arbitration commenced against an entity which has an identical name to the party that signed the arbitration agreement, yet is nevertheless the wrong party taking part in the proceedings.

For example:

- a Dubai incorporated entity is the contractual party but
- the party named (or appearing) in the arbitration case is:

- a separate and distinct legal entity
- with an identical name,
- owned by the same group
- with a registered address in Abu Dhabi.

This would mean that the arbitration proceedings are set to a course firmly against the wrong party and therefore any award issued is may become unenforceable because:

- ❖ If enforcement is attempted against the contractual party, it could plead that the arbitration award is not against it and
- ❖ If enforcement is attempted against the party named in the proceedings and the award, it could plead it never signed the contract and the relevant arbitration agreement/clause.

Correctly named parties but one party is represented by a holder of a PoA by another entity owned by the same group

Most respondents will take part in the arbitration proceedings either by managing the process in-house through the company's legal team or outsourcing the defence(possibly counterclaim) to an external legal counsel.

When instructing an external legal counsel, the requirement for procuring a Power of Attorney ("PoA") for the conduct of the arbitration proceedings is mandatory under UAE law and practice. However, what is not frequently given sufficient consideration is the identity and the authority of the principal granting the power of attorney.

For example:

A PoA supposedly on behalf of the respondent may be granted from

- a different legal entity
- within the same group,

- incorporated in another Emirate,
- the name of which may be identical to the respondent company.

The UAE Court notary, before whom the PoA is executed, will verify the individual's authority to grant PoAs on behalf of that company, but almost certainly will not enquire into the real parties to the arbitration in relation to which PoA is being executed.

Whether such an error is made inadvertently or as part of a strategy to disrupt the arbitration process, the fact of the matter is that it could all have disastrous consequences for the eventual ratification of the award, enabling the real respondent to argue that it was never duly represented in the arbitration and that it was never given a fair opportunity to do so.

What this means at the stage of ratification

At the end of the time consuming and resource intensive process that any arbitration amounts to, no claimant wants to find that the ladder has been all along leaning against a wrong tree. It is an unenviable position for a claimant to have a favourable award in its hands only to realise that the Courts would not assist it in turning that award into a cash deposit into the claimant's bank account. This, however, is exactly the position an unwary claimant may find itself by not paying due attention to the named parties at the commencement of the arbitration process.

What can be done to rectify the position

It is not possible to stress enough the importance for the claimant to ensure that a right respondent entity is brought into the arbitration process, by reference to its correct name as well as its actual legal and contractual standing. Errors of the nature discussed above are easy to avoid, yet not so easy to rectify once the arbitration has commenced.

Depending on the error and provided at the end of the arbitration process the respondent has not caught on to the fact that there is an issue with the entity that has been brought into the arbitration process, the claimant may consider filing for ratification proceedings nevertheless,

in the hope that neither the respondent nor the Court identify the error – which is possible. However, errors in the respondent’s identity can be pleaded at any time before the court proceedings become final, therefore this would not be the most practically watertight option.

The rules of arbitration authorities which commonly govern arbitration process in UAE (such as DIAC, ICC etc) often allow for an application to be made to the tribunal, within a particular time frame after the award has been issued, to correct errors of typographical, clerical and computational nature. Therefore if the particular error can be cloaked as being of a purely typographical nature, the tribunal may be of assistance in correcting the error.

In the event that:

- the respondent successfully opposes this correction or
- the tribunal declines to accommodate the claimant’s request, or
- the time limit for making the application for correction has expired,

the claimant may still seek the rectification by making an application to the Court to effect the correction. The Court is not, however, likely to be sympathetic to the claimant’s plight if it deems that the error goes to the very essence of the arbitration agreement. This would be so if, for example, it considers it fundamental that an entity incorporated in different Emirate has been named as the respondent or that the wrong domicile of the parent company is mentioned in the award.

In summary, the higher the potential for confusion is deemed to exist, the less likely for the Court to accommodate the claimant’s request for a correction. Conversely, the more benign the error is deemed by the Court to be, the higher the chances for a correction to be allowed at the ratification stage.

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