

# Arbitration in the UAE: End of Year Round-up - From Apparent Authority and shipping arbitration under the EMAC Rules to Kompetenz-Kompetenz under the DIFC Arbitration Law (Part 2)

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In a sequence of recent rulings starting in 2015, the Dubai Courts have confirmed that the **doctrine of apparent authority** does, after all, find application to the formation of arbitration agreements. The former prevailing position was that apparent authority did not have a place in arbitration, which requires a special – rather than just a general – power of attorney for an attorney’s agreement to arbitrate to bind the original rights holder (see Art. 58 read together with Art. 203(4), UAE Civil Procedures Code, and the extensive commentary provided in G. Blanke, *Commentary on the UAE Arbitration Chapter*, Sweet & Maxwell, 2016, forthcoming, at II-017 and II-032-II-037). In its more recent case law precedent, the Dubai Court of Cassation takes the firm view that a natural person signing an arbitration agreement on behalf of a legal person binds that person to arbitration unless proven otherwise. In this sense also, an agent has been taken to bind a principal to arbitration to some extent in the past (see again G. Blanke, *Commentary on the UAE Arbitration Chapter*, at I-108 and II-018). This development is encouraging and demonstrates yet again the often-understated arbitration-friendly nature of the UAE and in particular the Dubai Courts. Given their importance to the successful enforceability of arbitration agreements against original rights holders, all three Dubai Court of Cassation judgments under scrutiny here deserve closer scrutiny. One of the traditional arguments raised by award debtors in defense to an action for enforcement by an award creditor of a domestic arbitral award within the UAE is the incapacity of the original signatory of the underlying arbitration agreement and the resultant nullity of the arbitral award as against the legal person on whose behalf the arbitration agreement is purported to have been signed (see Art. 216(1)(b), UAE Civil Procedures Code; and again G. Blanke, *Commentary on the UAE Arbitration Chapter*, at II-140). Even though that argument had some credit under the former case law precedent, it will hardly succeed following the findings of the Dubai Court of Cassation in the more recent rulings discussed here. At least two of these rulings deal with a request to enforce an arbitration award rendered under the auspices of the Dubai International Arbitration Centre, in shorthand the “DIAC”, against limited liability companies (LLCs), whose general managers are presumed to have the power to bind the company to arbitration under the prevailing provisions of UAE law and established case law precedent

(see Art. 237, UAE Commercial Companies Law; and G. Blanke, *Commentary on the UAE Arbitration Chapter*, at I-073 and II-021).

In the first ruling (see Appeal No. 547/2014 – **Palm Jebel Ali LLC v. Alan Stenet**, ruling of the Dubai Court of Cassation of 21<sup>st</sup> October 2015), Palm Jebel Ali LLC (“PJA”), the award debtor, sought the nullification of the award on the basis that the underlying arbitration agreement was not signed by an authorized representative of PJA’s and therefore not enforceable against it. According to PJA, given its status as a limited liability company (LLC), it was only its manager that had authority to sign, no other person having been authorized by the manager to do so. The Dubai Court of Cassation rejected PJA’s motion for nullification: According to the Court, bland allegations that the signature of a contract did not accord with that of a company’s manager (despite submission in evidence of specimen signatures) could not succeed without a formal filing for forgery; there was a presumption that the signature placed on behalf of the company was that of an authorized person or representative. In addition, in the Court’s view, the apposition of the company stamp was, in itself, sufficient to confer authenticity and hence a binding effect on the underlying arbitration agreement. In the second ruling (see Appeal No. 293/2015 – **Middle East for Development LLC v. Safir Real Estate Investments LLC**, ruling of the Dubai Court of Cassation of 27 January 2016), Middle East for Development LLC (“MED”), the award debtor, was equally rebuffed by the Dubai Court of Cassation in its endeavours to nullify on the basis of lack of capacity a DIAC award rendered in favour of Safir Real Estate Investments LLC (“Safir”) in relation to the late delivery of an off-plan real estate unit. MED regarded as defective and flawed in its reasoning the Dubai Court of Appeal’s ruling according to which MED had failed to prove that the person who signed the underlying arbitration agreement was not MED’s general manager or a duly authorized signatory. The Court of Appeal also relied on MED’s failure to raise the defense of incapacity before the DIAC Tribunal itself. Before the Dubai Court of Cassation MED sought to argue that MED’s signatory (not being a general manager) had only been granted a general – as opposed to a special – power of attorney and could therefore not bind the company to arbitration.

In response, the Dubai Court of Cassation found that the burden of proof for a successful action for nullification rested upon the award debtor. In particular, the Court held that a person that signed for and on behalf of a corporate entity (indicated by the signature block reading “*Signature of the authorized Seller*”) a sale and purchase agreement that contained an arbitration clause had to be understood to be a fully authorized signatory, including with respect to the arbitration clause. The Court also reminded that the authorization issue had not been raised before the tribunal. In the third ruling (see Case No. 310/2015 – **Al-Firjan LLC v. JNR Development Limited**, ruling of the Dubai Court of Cassation of 27 April 2016), the Dubai Court of Cassation concluded that “*[i]t is [...] well established before this Court that if the name of a certain company has been included in the beginning and introduction of a contracted while another person signed at the bottom of that contract, this establishes a legal presumption that whoever signs the contract has done so in the name of and for the company irrespective of whether the company’s name is associated with that of the individual signatory.*” This, so the Court, also held for the arbitration clause contained in the underlying main contract.

Taken in the round, the above-mentioned rulings confirm the application of the concept of apparent authority to the formation of arbitration agreements. There also now appears to be a legal presumption in favour of capacity to sign where an award debtor has entirely failed to raise the capacity defense before the arbitral tribunal. The most recent rulings of the Dubai Court of Cassation give rise to the proposition that failure to do so amounts to a waiver to raise the capacity defense at the enforcement stage. For the avoidance of doubt, the burden to prove lack of capacity rests on the award debtor. In a similar vein, in one recent case before the DIFC Courts (see Claim No. XXXX – **Ginette Pjsc v. (1) Geary Middle East FZE (2) Geary Limited**, order of the DIFC Court of First

Instance of 7 April 2016), the DIFC Courts refused to set aside a DIFC-LCIA award on the basis that in reliance on the doctrine of apparent authority, the underlying arbitration agreement was validly executed (whether under DIFC or UAE law).

Turning to the DIFC, not only has the DIFC-LCIA adopted a revised set of rules, but also has the Emirates Maritime Arbitration Centre (EMAC), established in April 2016 (for some history on the EMAC's establishment, see [G. Blanke, "Dubai announces plans to establish Emirates Maritime Arbitration Centre: Do they hold water?"](#), [Kluwer Law Arbitration Blog](#), 2nd October 2014 and [G. Blanke, "The EMAC finally established: Welcome on board!"](#), [Kluwer Arbitration Blog](#), 4 June 2016, now adopted its own rules, the **2016 EMAC Rules of Arbitration**. The EMAC has been empowered to oversee disputes both under the EMAC Arbitration Rules or any other rules chosen by the parties, seeks co-operation with other regional and/or international arbitration centres and aims to establish a roster of maritime arbitrators for appointment in EMAC arbitration. The EMAC Arbitration Rules came into effect on 23 June 2016. These constitute a modern set of arbitration rules that combine the best of other internationally leading arbitration rules and contain provisions, such as the appointment of an emergency arbitrator, an extensive arsenal of interim measures and a fast-track procedure that may be of particular assistance in the resolution of maritime disputes. Most importantly for present purposes, arbitrations under the EMAC Rules are default-seated in the DIFC. This will naturally import the efficiencies of the DIFC Courts in their role as curial courts into an EMAC arbitration process.

It further bears mentioning that the DIFC Dispute Resolution Academy has recently entered into a memorandum of understanding with the Jebel Ali Free Zone Authority (JAFZA) (see **Memorandum of Understanding between the DRA and JAFZA**, dated 16 October 2016), which *inter alia* envisages the promotion by JAFZA and its member companies of the DIFC-LCIA as an arbitration centre for the resolution of disputes involving JAFZA or one of its member companies (see Memorandum, Cl. 4.1.2.5).

Finally, in one case earlier this year (see CFI 036/2014 - **Vannin Capital PCC PLC v. (1) Al Khorafi and Others**, Amended Order of Justice Sir Richard Field of 18 April 2016), the DIFC Court of First Instance confirmed that the DIFC Court's curial powers to intervene in ongoing arbitration proceedings under the DIFC Arbitration Law were subject to the principle of **kompetenz-kompetenz** and did not empower the Court to make findings on the tribunal's proper jurisdiction in advance of the tribunal itself determining that issue. A discretionary power to stay the proceedings will be exercised in favour of the tribunal's power to determine its own jurisdiction in a first instance.