Authority to Conclude Arbitration Agreements in the UAE: What About Public Joint Stock Companies?

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The authority required to agree to arbitration on behalf of a juristic person has been a heavily debated issue in the United Arab Emirates ("UAE"). This blog post examines relevant legislation and case law with respect to limited liability companies and public joint stock companies in an attempt to reach a conclusion on what type of authority may be required with respect to the latter category of companies.

Article 4(1) of the Arbitration Law

Article 4(1) of the UAE Federal Arbitration Law No 6. Year 2018 ("Arbitration Law") stipulates that an arbitration agreement can only be concluded by the representative of a juristic person who is authorized to agree to arbitration. Consequently, the representative should have special authority to sign the arbitration agreement as opposed to merely a general authority to represent the juristic person. Such special authority can, for example, be expressly stated in the power of attorney granted to the representative. The rule set out in Article 4(1) is

simply a reaffirmation of the requirements under prior legislation and court decisions.[fn]Article 58(2) of the Civil Procedures Law ("CPL") requires special authority to arbitrate a right. Article 203(4) of the CPL which has been repealed stated that an agreement to arbitrate can only be concluded by a person who has the capacity to dispose of the right subject matter of the dispute. Article 216(1)(b) of the CPL which has also been repealed provided as a ground of nullification in the instance where the arbitration agreement is signed by a person who lacks the capacity to conclude an arbitration agreement. On the basis of these provisions, court decisions established that special authority is required to conclude an arbitration agreement.[/fn]

Presumptions of Special Authority – Limited Liability Companies

Over the years, court decisions established two presumptions in favor of there being a special authority. The first presumption is that the general manager of a limited liability company is presumed to have the authority to agree to arbitrate. Such presumption was based on Articles 235 and 237 of the previous UAE Federal Commercial Companies Law (prior to its amendment in 2015) ("Companies Law"). The aforementioned articles stipulate that the general manager has the full power to manage the company. The same principle is reflected in Article 83 of the current Companies Law (Federal Law No. 2 of 2015). For the manager to be deprived of the power to conclude arbitration agreements, a limitation on his power should be stated in the articles of association. (See *Dubai Court of Cassation No. 190/2010 Commercial*, *Dubai Court of Cassation No. 462/2002 Commercial* and *Dubai Court of Cassation No. 38/2016 Real Estate*).

A second presumption has been established in recent years and is best summarized in *Dubai Court of Cassation No. 386/2015 Real Estate*. This decision explains that when the agreement shows in its preamble the name of the corporate entity without specifying the name of its authorized representative, and includes the signature of someone on the contract, there is a presumption that the signatory was authorized to sign the arbitration agreement. Such reasoning is based on Article 70 of the UAE Federal Civil Transactions Law ("CTL"), which states that *"If a person seeks to set aside what he has (conclusively) performed, his attempt shall be rejected."*

Both presumptions were relied on in *Dubai Court of Cassation No. 547/2014 Real Estate*, as the court explained that the general manager of the limited liability company has the power to manage the company and to dispose of its rights including the power to agree on arbitration unless he has been deprived of such powers. The general manager may also delegate his powers to others. Furthermore, when the name of a company appears in the recitals of a contract and another person signs the contract, that is considered as legal evidence that the signatory has done so in the name of the company and on its behalf unless proven otherwise.

Public Joint Stock Companies – A Restrictive Approach

The presumptions explained above are established in the context of limited liability companies, which are widely used in the UAE. They have not been historically applied to public joint stock companies where courts have adopted a restrictive approach. In this context, courts have held arbitration agreements invalid when special authority has not been proven or when the arbitration agreement was not signed by specific persons.[fn]Provisions applicable to public joint stock companies apply to private joint stock companies on the basis of Article 265 of the Companies Law, which states that, with the exception of public subscription provisions and in the absence of specific provisions, all provisions related to public joint stock companies apply to private joint stock companies.[/fn]

The restrictive approach may have stemmed from the provisions of the Companies Law applicable to public joint stock companies. As per Article 154, the board of directors may not agree to arbitration unless authorized through the articles of association or with a special resolution of the general assembly. As per Article 155, the chairman of the board of directors is the legal representative of the company unless the articles of association state that the representative is the general manager. The chairman may delegate his powers to other members of the board of directors.

There are hardly any court decisions on this point as public joint stock companies are not widely used. We find one example of the restrictive approach in *Dubai Court of Cassation No. 277/2014 Real Estate*. In this case, the defendant, a bank established as a joint stock company, argued that the authority to conclude an

arbitration agreement is vested with the manager whose name appears in the license, and the chairman of the board. Given that the signatory of the arbitration clause was neither of these two individuals, the bank argued that the clause was invalid. The Court of Cassation accepted this argument and nullified the award issued on the basis of the arbitration clause.

(For another example of the restrictive approach, see here).

Public Joint Stock Companies – A Shift in the Approach

In spite of consistently applying a restrictive approach, in a very recent decision, the court shifted its approach and relied on the second presumption explained above. This was *Dubai Court of Cassation No. 236/2020 Civil*, where the defendant was a public joint stock company which argued that the arbitration clause in the insurance policy is not binding upon it because it was not signed by the chairman of the board. The Court of Cassation rejected the argument and found the arbitration clause to be binding. It explained that when the name of a company appears in the preamble of a contract and a person signs the contract, that constitutes evidence that the signatory did so on behalf of the company and was empowered to agree on the arbitration clause. The court referenced in its analysis Article 70 mentioned above. In the case examined, the name of the company's representative, i.e., the chairman, was not mentioned in the contract and the contract was signed by a person whose name did not show and was stamped by the company.

It is too early to determine whether the restrictive approach will change over time. There is a big difference between public joint stock companies and limited liability companies with respect to the powers of the manager and the board of directors. In a limited liability company, the general manager is presumed to have the authority to conclude an arbitration agreement because he is vested with all the powers necessary to run the company unless specifically deprived of a certain power. In a public joint stock company, the situation is reversed. The right to conclude an arbitration agreement can only be granted to the board of directors (who are represented by the chairman) by an express provision in the articles of association or by the decision of the general assembly. Therefore, with respect to the first presumption mentioned above, it will not be possible to apply a

presumption that the chairman has the authority to conclude an arbitration agreement.

With respect to the second presumption, it appears from *Dubai Court of Cassation No. 236/2020 Civil* that the courts might be willing to implement the said presumption. That may be so because the rationale (i.e., that the signatory was empowered to agree on the arbitration clause) and the legal provision (i.e., Article 70) supporting the second presumption do not vary from one form of company to another. Unfortunately, the examined decision does not provide sufficient detail on the underlying facts. It would have been useful to know, given the restriction in Article 154, whether there was an express authorization to agree on arbitration, which influenced the court's decision.

Adopting a less restrictive approach in relation to public joint stock companies would be a welcome step. It will increase the number of arbitration agreements that would be upheld and prevent instances where parties argue the invalidity of the arbitration clause purely out of bad faith with the aim of hindering the arbitration process.