

# Kluwer Arbitration Blog

## The Abu Dhabi Court Considers Special Authority is Required to Conclude an Arbitration Agreement by Power of Attorney

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The Abu Dhabi Court of Cassation in Case No. 922 of 2020 recently considered the requirements that must be satisfied to conclude an arbitration agreement by powers of attorney. The judgment is the latest in a line of authorities confirming that special requirements apply to the formation of arbitration agreements (a courtesy translation of the judgment is available [here](#)).

In summary, the Court of Cassation held that:

- Whether a party has authority to conclude an arbitration agreement is a matter which the court rather than the tribunal is competent to determine.
- An arbitration agreement is an “exceptional arrangement” as a form of waiver of the right to access courts. As such a party’s intention to arbitrate must be explicit and free from doubt.
- A special, rather than a general power of attorney or authorization is required for an agent (such as a company director or general manager) to bind a company to an arbitration agreement. A lack of the requisite special authority will result in an arbitration agreement being void and unenforceable.

The decision indicates that some courts in the UAE continue to consider that an arbitration agreement is an exceptional arrangement that must be authorized in a special way. This is problematic because it is based on the notion that heightened requirements apply to the formation of arbitration agreements, including international ones, to ensure that parties are aware they are waiving their otherwise available access to judicial remedies in national courts. This view has, rightly, been rejected by the decisive weight of international authority. The notion that an agreement to arbitrate is an exceptional waiver of judicial remedies should be abandoned by national courts as it has no place in modern international commerce where arbitration is the natural mode of dispute resolution. Indeed, the [New York Convention](#) forbids the imposition of heightened requirements for arbitration agreements to be valid.

### Background

The underlying dispute arose from a construction project. The main contractor subcontracted works under two subcontracts that were subject to arbitration agreements (“Subcontracts”).

The Subcontracts were signed by a representative of the subcontractors under a power of attorney dated 28 November 2012. The power of attorney did not grant the subcontractor's representative express authority to conclude arbitration agreements. Instead, it provided that the subcontractor's representative had full power to act on behalf of the subcontractor "without prejudice to Article 58 of the Civil Procedure Law etc." Article 58(2) of the Civil Procedure Law provides that "[n]o admission or waiver of a right alleged or settlement or submission to arbitration etc. may be made without special authority."

The subcontractor completed the works in July 2017 but remained unpaid by the main contractor. In May 2018, the subcontractor executed a new power of attorney which expressly confirmed that the authority of the subcontractor's representative extended to "the power provided for in Article 58 concerning civil procedure".

In 2019, the subcontractor commenced proceedings in the Court of First Instance against the main contractor. Following an expert's decision in the subcontractor's favour, the main contractor challenged the court's jurisdiction to hear the case on the basis that the Subcontracts were subject to arbitration agreements. In February 2020, the Court of First Instance concluded that the dispute should be arbitrated. The subcontractor appealed to the Appeals Court which upheld the first instance decision in June 2020.

The subcontractor subsequently appealed to the Court of Cassation arguing that: (i) the arbitration agreements were void and unenforceable because the subcontractor's representative did not have the requisite authority to agree to arbitration; and (ii) the contractor waived its right to invoke the arbitration agreements.

### **Decision of the Abu Dhabi Court of Cassation**

The Court of Cassation overturned the Appeals Court's decision, holding that the subcontractor's representative lacked authority to bind the subcontractor to the arbitration agreements in the Subcontracts. The arbitration agreements were, therefore, null and void.

The Court of Cassation reasoned that arbitration is a waiver of the right to access national courts. As such, an arbitration agreement will only be valid if made by a person with authority to dispose of this right and any agreement to arbitrate that is concluded without such authority will be null and void.

The Court held that the original power of attorney did not grant the subcontractor's representative authority to bind the subcontractor to arbitration because the authority granted to the subcontractor's representative in the original power of attorney was "without prejudice to Article 58 of the Civil Procedure Law etc." (Case No. 922 of 2020, at p. 3.) The Court considered that this meant that the power of attorney gave the subcontractor's representative full authority to act for the subcontractor except the ability to conclude an arbitration agreement. In reaching this conclusion, the Court referred to the requirement in Article 58(2) that submission to arbitration may only be made with "special authority." (Id. p. 2)

The Court also held that the subsequent power of attorney concluded in 2018 was incapable of ratifying the arbitration agreements in the Subcontracts. The Court reasoned that the subsequent power of attorney was only applicable to new contracts and did not apply retrospectively to the

Subcontracts.

The Court justified this surprisingly narrow construction of the subcontractor's powers of attorney by explaining that arbitration is an exceptional dispute resolution method:

“an arbitration agreement is an exceptional arrangement whereby its parties opt for arbitration rather than litigation before the ordinary courts of law. This exception may not be interpreted broadly or extracted through analogy and must be construed within the narrowest limits. Furthermore, the parties' intent must be clear and explicit and free from ambiguity and doubt.” (Id. p.3)

Applying this approach, the Court of Cassation held that it could not be clearly established that the subcontractor's representative that signed the two Subcontracts had authority to bind the subcontractor to arbitration. Accordingly, the Court reversed the decision of the Appeals Court and remanded the matter to the Court of First Instance to consider the merits of the dispute. Having determined that the arbitration agreement was null and void, the Court of Cassation did not consider whether the contractor had waived its right to arbitrate by litigating the dispute.

## Implications

This judgment is the latest in a series of decisions in which UAE courts have (mistakenly) referred to arbitration, including international arbitration, as an “exceptional” means of dispute resolution to justify the imposition of special requirements to the formation of arbitration agreements.

In [DCC Case No. 946/2018](#), the Dubai Court of Cassation concluded that arbitration is an “exceptional” means of dispute resolution requiring “special” authorization for any person other than the general manager to bind a company to arbitration. Similarly, in [DCC Case No. 182/2018](#), the Dubai Court of Cassation held that “[t]he doctrine of apparent authority is inapplicable in the context of an agreement to arbitrate whose parties must verify each other's capacity and competence to enter into such agreement which entails a waiver of filing the case to the courts, including related guarantees.” More recently, in [DCC Case No. 990/2019](#), the Court of Cassation partially annulled an arbitral award on the basis that a party's legal representatives were not authorized under a general power of attorney (pursuant to which they were acting) to agree to grant a sole arbitrator the authority to award legal costs. According to the Court, a party representative should be specifically authorized to empower an arbitral tribunal with the right to award legal costs. Another [post on DCC Case No. 236/2020](#) previously highlighted a UAE court holding arbitration agreements as invalid when special authority has not been proven or when the arbitration agreement was not signed by specific persons.

This line of decisions stand in marked contrast to another body of authority, including [DCC Case No. 547/2014](#) and [DCC Case No 386/2015](#), where UAE courts appear to have relaxed the strict requirements for special powers of attorney. UAE courts have applied the doctrine of apparent authority or a presumption of validity to the formation of arbitration agreements in those cases. There remains some hope that other UAE courts will restrict this decision of the Court of Cassation to its particular facts, i.e., cases where an arbitration agreement is concluded by a power of attorney that is expressly stated to be “without prejudice to Article 58 of the Civil Procedure Law.”

There is no system of binding precedent in the UAE judicial system and the two approaches, one friendly, and one hostile, to arbitration are difficult to reconcile. The weight of international

authority makes clear that the Court of Cassation's decision is mistaken. For most commercial parties, arbitration is the natural and preferred mode, rather than an exceptional means, of international dispute resolution. International arbitration avoids jurisdictional uncertainties, enforcement difficulties and concerns about neutrality, speed, appropriate experience and expertise that are associated with proceedings in national courts. These, in themselves, are good reasons not to impose special requirements on arbitration agreements.

More fundamentally, the decision of the Court of Cassation is at odds with the pro-arbitration treatment of agreements to arbitrate under the New York Convention. Article II (1) of the [New York Convention](#) expressly requires each Contracting State to recognize an "agreement in writing" for parties to submit their disputes to arbitration. Courts and other authorities around the world have interpreted Article II, and parallel provisions of the [UNCITRAL Model Law](#) as prohibiting states, like the UAE, from imposing heightened or discriminatory requirements on international arbitration agreements. Put simply, the approach endorsed by the Court of Cassation wrongly singles out agreements to arbitrate for heightened requirements to be valid, which is inconsistent with the presumptive validity and enforceability of arbitration agreements under the New York Convention (see G. Born, *International Commercial Arbitration* 802 (3d ed. 2021)). The approach could potentially have more far-reaching consequences for the enforcement of arbitral awards in the UAE. Commercial parties can be expected to reconsider decisions to seat arbitrations in the UAE, in light of the uncertainties that arise as to the validity of such agreements.

It is unfortunate that Federal Law No. 6 of 2018 on Arbitration ("Federal Arbitration Law") reinforced, rather than removed, the requirement of special authority to conclude an arbitration agreement. Article 4.1 of the [Federal Arbitration Law](#) provides that "[a]n Arbitration Agreement may only be concluded, on pain of nullity, by a natural person having the legal capacity to dispose of his rights or on behalf of a juridical person by a representative with specific authority to arbitrate" and Article 53.1(c) provides that an award can be set aside if "a person does not have the legal capacity to dispose of the disputed right under the law governing his capacity, as provided for in Article 4 of this Law." The Court of Cassation did not expressly rely on these provisions, presumably because the arbitration agreement in issue was concluded prior to the entry of the Federal Arbitration Law. However, the existence of these provisions confirms that a special authority requirement to conclude an arbitration agreement is the law in the UAE (and emboldens UAE courts to issue judgments along these lines).

The Court of Cassation did not expressly consider the subcontractor's second argument of waiver. However, the argument that a claimant has waived its right to arbitrate by seeking to resist court proceedings brought in breach of an arbitration agreement is similarly common in the UAE, and equally problematic in terms of compliance with the [New York Convention](#). Waiver is not expressly identified in the [New York Convention](#) as a basis for denying effect to an otherwise valid arbitration agreement and the application of rigid rules of waiver or technical defaults is clearly inconsistent with the fundamental pro-enforcement treatment of arbitration agreements under the [New York Convention](#).

### **Lessons For Foreign Parties Operating in the UAE**

There are preemptive steps that parties can take to protect themselves from arguments that an arbitration agreement is void due to lack of authority. Foreign parties operating in the UAE

commonly assume that a director, in particular a managing director or general manager, of a UAE company will have authority to enter into arbitration agreements on behalf of their company, or that general authority is sufficient. The Court of Cassation's decision makes it clear that this assumption is mistaken and it remains essential for parties contemplating arbitration in the UAE to draft powers of attorney, and review other contractual documentation, carefully. Foreign investors are advised to review their company by-laws and shareholder resolutions carefully, and to check the authority of directors or general managers to enter into arbitration agreements on behalf of their company.

Ultimately, the key lesson to be learned for foreign investors dealing with Emirati companies, and negotiating arbitration agreements with a UAE seat, is to consider selecting the Dubai International Financial Centre ("DIFC") or Abu-Dhabi Global Markets ("ADGM") as the arbitral seat. Both the DIFC and ADGM have their own arbitration laws that do not have this specific authority requirement and any awards issued in the DIFC or ADGM would be fully insulated against the special authority issue that arose in this case. The DIFC Courts, in particular, have been robust in maintaining that they are not bound by the decisions of the onshore Dubai Courts, whether by common law principles of *res judicata* or by Art 5(A)(4) of the [Dubai Judicial Authority Law](#), that have been obtained in proceedings brought in breach of arbitration agreements.

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