

Dubai Court of Appeal  
Appeal No. 19-2020  
[Annulment of Arbitral Award]  
9 September 2020

Ishtar Decor LLC  
- Claimant

Shapoorji Pallonji Mideast LLC  
- Defendant

Background:

The Claimant brought an action against the Defendant, filed online on 21.04.20, seeking judgment, primarily, setting aside an Arbitral Award for being illegal or, alternatively, setting it aside in part pertaining to the ruling that a single arbitration proceeding may not be filed for the six Subcontracts in question. The Claimant, a Subcontractor, had entered into six Subcontract Agreements with the Defendant, a contractor, to execute fit-out work on the Dubai Inn Hotel project: 1- Subcontract Agreement dated 14.05.15; Dubai Inn Hotels - Za'abeel Project, 2- Subcontract Agreement dated 17.06.15; Dubai Inn Hotels - Za'abeel Project (Public Areas), 3- Subcontract Agreement dated 13.06.15; Dubai Inn Hotels - Port Saeed Project, 4- Subcontract Agreement dated 25.11.15; Dubai Inn Hotels - Port Saeed Project (Public Areas), 5- Subcontract Agreement dated 13.06.15; Dubai Inn Hotels - Oud Metha Project, and 6- Subcontract Agreement dated 20.11.15; Dubai Inn Hotels - Oud Metha Project (Public Areas). The Subcontracts all contained a standard Arbitration Clause (clause 20) which states:

“1- If a dispute of any kind whatsoever arises between the Contractor and the Subcontractor in connection with, or arising out of, the Subcontract or the execution of the Subcontract works, whether during the execution of the works or after their completion and whether before or after a repudiation or other termination of the Subcontract, then the Contractor or the Subcontractor may give a notice of such dispute to the other party, in which case the parties shall attempt for the next 56 days to settle such dispute amicably before the commencement of Arbitration.”

“2- Any dispute which has not been amicably settled within 56 days after the day on which notice of dispute is given pursuant to Sub-clause 20(1), shall be finally settled under the Rules of Commercial Conciliation and Arbitration of the Dubai Chamber of Commerce and Industry, or such other arbitration institution that may be substituted for the Dubai Chamber, by an Arbitral Tribunal consisting of three members, one member from each party being appointed within 28 days of one party receiving a written notice from the other party to commence Arbitration proceedings. The third member shall be mutually chosen by the first two members and shall chair the Tribunal and issue its decision which shall be by a majority vote and shall be binding on both parties.”

The Claimant (Claimant in the Arbitration) fulfilled their obligations in accordance with the Subcontract Agreements. The Defendant (Respondent in the Arbitration), however, defaulted on their obligations in failing to pay sums of money owed to the Claimant. When all attempts at amicable settlement, since 2017, failed, the Claimant submitted a Request for Arbitration, dated 30.10.18, claiming AED 9,949,390.29, plus interest and costs from the Defendant and seeking the return of letters of guarantee and other security. The Defendant filed an Answer to the Request for Arbitration, objecting to the Arbitral Tribunal's jurisdiction on the grounds that the Claimant did not comply with the pre-conditions to commencing an ad-hoc arbitration in terms of giving notice of the dispute to the Defendant in order for amicable settlement to be attempted within 56 days. The Defendant's other reason for objection was that the Claimant consolidated six separate Subcontracts, each of which has its own stand-alone Arbitration Agreement, into a single set of arbitration proceedings, which is not permissible under the rules of the Dubai International Arbitration Centre (DIAC) and the UAE Arbitration Law (Federal Law No. 6 of 2018).

The proceedings ran their course and the Arbitral Tribunal issued an award on 01.04.20 ruling that it does not have jurisdiction to determine the Claimant's claims in the arbitration proceedings.

#### Court of Appeal:

The Claimant was not satisfied with the award and challenged it on the following grounds:

- 1- The parties used the word "may" in the preconditions to arbitration clause. The term "may" has a clearly defined meaning. It expresses possibility, not necessity. Therefore, the Arbitral Tribunal's interpretation of this term as expressing necessity is unsound and goes beyond the meaning intended by the contracting parties. And so, the notice of dispute to be given before commencing arbitration proceedings is not mandatory, but optional. Either party may, at its discretion, give such notice to the other. This accords with the dissenting opinion of the panel member who held that the Respondent's submissions on jurisdiction should be rejected. Further, the precondition has been met because notices were sent by email to the Defendant, to which they did not respond. Given the significant period of time that has elapsed, which exceeds the agreed notice period, the Claimant may commence arbitration proceedings.
- 2- The Arbitral Tribunal contradicted the law by finding, in a majority opinion, that the Arbitral Tribunal did not have jurisdiction because the Claimant has no right to arbitrate claims arising out of a number of separate Subcontracts, each of which has its own stand-alone Arbitration Clause. The Arbitral Tribunal's rationale for its finding is that both the DIAC Rules and the UAE Arbitration Law (Federal Law No. 6 of 2018) refer to the Arbitration Agreement in the singular. However, nothing in the DIAC Rules or the UAE Arbitration Law explicitly prohibits the Claimant from filing a proceeding based on multiple contracts, each containing an Arbitration Clause. The Arbitral Tribunal's interpretation of the term "Arbitration Agreement,"

found in the DIAC Rules and the UAE Arbitration Law, as referring to a singular agreement has no legal basis. This accords with the dissenting opinion of the panel member. Moreover, the parties selected UAE law as the governing law and UAE law permits this procedure. Thus, the Arbitral Award, which violates the applicable law, is void under Article 53(e) of the UAE Arbitration Law. The award is also void under Article 53(h) of the UAE Arbitration Law for having dealt with a matter not falling within the scope of the Arbitration Agreement, namely the issue of whether it is permissible to initiate a single arbitration based on multiple contracts.

The Claimant filed, in support of their action, a docket comprising a copy of the Subcontract Agreements in question, the Arbitral Award, the notification of the Arbitral Award issued to the parties, and the arbitration invoice.

The matter ran its course before the Court of Appeal, as recorded by the minutes of hearings, with each party represented by its respective counsel. Counsel for the Defendant filed a brief in defense of his client and at the final hearing, the matter was reserved for judgment today.

As to form, the Claimant received notice of the Arbitral Award on 08.04.20 and filed their action on 21.04.20. Thus, the action was filed within the statutory time limit and is admissible in form.

Turning to the merits, it is settled, according to Article 204 of the Civil Procedure Law, that arbitration is an express agreement by the parties to have their disputes decided by an arbitrator, rather than the courts, and that the parties may impose preconditions to commencing arbitration. Therefore, a provision for amicable settlement of disputes would not preclude or conflict with another provision, in the same contract, for recourse to arbitration if no amicable settlement is reached.

It is further settled that the essence of Articles 258(1), 259, and 265(1) of the Civil Transactions Law is that the trial court retains discretion to interpret contracts according to their plain meaning, viewing their wording and terms as a whole, without giving regard to individual words to the exclusion of others. The court's interpretation must not go beyond the meaning borne out by the language of the writing or contract and must be based on sound reasoning which is supported by the contract (Cassation No. 165-2015 [Commercial] - 12.02.16).

It is further settled that while, normally, each action must, by law, be filed separately, multiple actions may be filed under a single statement of claim provided that it includes the necessary particulars of each action, as required by law under Article 42 of the Civil Procedure Law (Cassation No. 129-2012 [Property] - 09.12.12).

Clause 20 of the Subcontract s in question provides:

“1- If a dispute of any kind whatsoever arises between the Contractor and the Subcontractor in connection with, or arising out of, the Subcontract or the execution

of the Subcontract works, whether during the execution of the works or after their completion and whether before or after a repudiation or other termination of the Subcontract, then the Contractor or the Subcontractor may give a notice of such dispute to the other party, in which case the parties shall attempt for the next 56 days to settle such dispute amicably before the commencement of Arbitration.”

“2- Any dispute which has not been amicably settled within 56 days after the day on which notice of dispute is given pursuant to Sub-clause 20(1), shall be finally settled under the Rules of Commercial Conciliation and Arbitration of the Dubai Chamber of Commerce and Industry.”

Therefore, the parties had agreed to settle any disputes that may arise between them out of the Subcontracts through amicable settlement within 56 days after the day on which notice of dispute is given to the other party. If an amicable solution cannot be reached, the dispute shall be finally settled under the Rules of Commercial Conciliation and Arbitration of the Dubai Chamber of Commerce and Industry.

As per the record, the Claimant (Claimant in the Arbitration) had given notice to the Defendant (Respondent in the Arbitration) before proceeding to arbitration, as confirmed by the parties’ email exchanges, on 12.03.17 and 11.05.17, concerning the Claimant’s claim for AED 7,456,075.2 in outstanding payments owed by the Defendant on the projects in respect of which the Subcontract Agreements were concluded and the Claimant’s request to receive payment amicably and, should the Defendant so agree, schedule a meeting that week. Therefore, the requirement to give notice of the dispute before the commencement of arbitration has been met, per the above precondition, but the Defendant did not respond to the notice. This points to a failure of the parties’ negotiations with a view to reaching an amicable settlement of the dispute. Further, the fact that the Claimant proceeded to arbitration after giving notice of its intent to the Defendant means that negotiations failed to lead to an amicable settlement of the dispute and that the Claimant could then commence arbitration. Therefore, the Claimant’s Request for Arbitration, dated 30.10.18, filed after the deadline agreed upon in the notice, was duly filed.

The Defendant is not served by arguing that said notice was given by Ittihad International Investment, which is not a party to the dispute. Clearly, after all, Ittihad International Investment sent the notice and appeared before the Arbitral Tribunal on the Claimant’s behalf as its legal representative, represented by Ayman Makarim and Azza Al Sayed. Ittihad International Investment was served notice of the Arbitral Award as the Claimant’s representative. The Arbitral Tribunal ruled that it did not have jurisdiction to determine the Claimant’s claims because the Claimant failed to comply with the contractual pre-conditions to arbitration, even though those pre-conditions were met, as noted earlier. In so doing, the Arbitral Tribunal has contradicted the law and the evidence. As regards the Defendant’s assertion that the Claimant has no right to file an arbitration proceeding based on multiple Subcontract Agreements, each with its own stand-alone Arbitration Clause, it is clear to us that nothing in the DIAC Rules or the UAE Arbitration Law explicitly prohibits or bars the filing of a single Request for Arbitration based on multiple contracts, each containing

an Arbitration Clause. As to the Defendant's further point that the Arbitral Tribunal's rationale, in this regard, is that both the DIAC Rules and the UAE Arbitration Law refer to the Arbitration Agreement in the singular, not plural, which makes it a single agreement and bars the Claimant from filing an arbitration proceeding based on multiple contracts, this argument finds no support in fact or in law and reads more into the provisions than is actually there. This is confirmed by Section 2 of Article 1 ("Definitions") of the DIAC Rules. Section 2 reads: "Words used in the singular include the plural and vice versa." Furthermore, the parties had agreed that UAE law shall apply to the arbitration and its administration. UAE law does not prevent the filing of multiple actions under a single statement of claim or an action based on multiple separate contracts that exist on a standalone basis, provided that the action is valued on the basis of the price of each contract and the fee is assessed on such basis. Accordingly, the Arbitral Tribunal should have applied UAE law when determining whether the Claimant was entitled to file an arbitration proceeding based on multiple contracts, given that there is no express provision in the DIAC Rules or the UAE Arbitration Law governing the issue. Therefore, the Arbitral Tribunal has violated the governing law specifically chosen by the parties, which renders invalid its award in which it determined that it did not have jurisdiction to hear the dispute. The Claimant proceeded correctly by filing DIAC Arbitration No. 135-2018 pursuant to the parties' agreement and the Arbitral Tribunal may not then rule that it has no jurisdiction for the reasons mentioned and explained above. Our conclusion is reinforced by the dissenting opinion of the Arbitral Tribunal's third member who found that the Arbitral Tribunal had jurisdiction. After reviewing all documents, submissions, and evidence filed and recorded on the Arbitration file by both parties, said panel member held that the Respondent's submissions on jurisdiction ought to be refused due to the following reasons:

"The Claimant and the Respondent entered into six Subcontract Agreements related to the same project (Dubai Inn Hotels), and the Arbitration Clauses are identical in all the six Subcontract Agreements. Even the DIAC Rules or Federal No. 6 of 2018 on Arbitration have not specified definitively that no more than one agreement may be consolidated into a single arbitration request. So, in the light of the above and as a matter of law, equity and good conscience, I found that the Claimant has the right to file an Arbitration proceeding for the six subcontract agreements as a single Arbitration Proceeding for determination by one Arbitral Tribunal, and the Request for Arbitration is valid, and the Arbitral Tribunal has the right to hear the dispute, and the Respondent's submissions on jurisdiction are rejected."

These findings are correct as a matter of law. Based upon, and in view of the above, the Arbitral Tribunal's award ruling that it has no jurisdiction to determine the Claimant's claims is invalid because the Arbitral Tribunal did not apply the rules designated by the parties as applicable to the substance of the dispute. Therefore, the Claimant's action was filed on a proper basis in fact and in law and, as such, the Arbitral Award issued in DIAC Arbitration No. 135-2018, dated 01.04.20 will be set aside, as hereafter set out in the dispositive section.

The Court fees and costs shall be borne by the Defendant pursuant to Article 55-1 of the executive regulations of Federal Law No. 11 of 1992 (Civil Procedure Code) and Article 168 of said law.

Wherefore, judgment is hereby rendered, in the presence of the parties, admitting the action in form and, on the merits, setting aside the Arbitral Award issued in DIAC Arbitration No. 135-2018, dated 01.04.20. Defendant to pay the Court fees, costs, and AED 1,000 as advocate's fees.