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Unilateral Option to Arbitrate: Valid in the UAE?

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Dispute resolution provisions in banking and finance transaction documents in the UAE sometimes include a unilateral option provision which, where a dispute arises, purports to reserve to the contracting bank, investment fund or lender, the right to choose arbitration or litigation, or sometimes litigation in a different forum to the local courts.

The rationale for such clauses is that it makes sense for a party to be able to choose between arbitration and litigation at the time that a dispute arises because it is only at that stage that the party may make an informed decision about which option will be the more effective forum for resolving the dispute. For example, a small debt claim may be more appropriately resolved by court proceedings than by arbitration proceedings.

Typically such clauses are drafted so that the financial institution has "the exclusive right, at their option" to choose between litigation and arbitration, with the counterparty having no say in the matter whatsoever. Such clauses therefore give the financial institution superior rights to their counterparty in the choice of forum for resolving the dispute. This often reflects the unequal bargaining positions of the parties to the agreement at the time of signing.

Bank lending agreements epitomise the issue. They usually provide for an agreement to arbitrate, but with an option only available to the bank to sue in any court of competent jurisdiction (or sometimes a specific court) together with a waiver of any *forum non conveniens* objection in that court.

A typical clause may provide as follows:

> 20. DISPUTES
>
> **20.1 Arbitration**
>
> **20.1.1** It is agreed that any dispute or claim arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement or the consequences of its nullity or any dispute regarding non-contractual obligations arising out of or in connection with this Agreement) (a "Dispute") shall be referred to and finally resolved by arbitration administered by the DIFC-LCIA Arbitration Centre. Disputes submitted to arbitration shall be resolved in accordance with the rules of the DIFC-LCIA Arbitration Centre (the "Rules") which

> are deemed to be incorporated by reference into this Clause. The tribunal shall consist of three arbitrators who shall, in the absence of agreement between the parties, be appointed in accordance with the Rules. The place of arbitration shall be the Dubai International Financial Centre and the language of the arbitration shall be English.
>
> **20.2 Jurisdiction**
>
> **20.2.1** Notwithstanding the provisions of Clause 20.1 above, it is agreed that a Finance Party may elect instead of arbitration to bring proceedings relating to a Dispute in the Courts of the Dubai International Financial Centre.
> **20.2.2** The Company agrees that the Courts of the Dubai International Financial Centre are the most appropriate and convenient courts to settle any Dispute and accordingly the Company will not argue to the contrary.
>
> **20.3 Benefit of this Clause 20**
>
> This Clause 20 is for the benefit of the Finance Parties only. As a result, the Finance Parties shall not be prevented from taking proceedings relating to a Dispute in any other jurisdiction. To the extent allowed by law, the Finance Parties may bring concurrent proceedings in any number of jurisdictions.

The risk with such a provision arises from the practice of the UAE courts to accept jurisdiction if a claim is brought by any party in connection with any agreement negotiated, signed, or performed in whole or in part within the UAE. Accordingly, by including both an arbitration clause and a clause which provides for the Courts of the DIFC (or any other courts) to have jurisdiction, a UAE court could disregard the arbitration provisions agreed between the parties and consider itself to have jurisdiction.

Less common is where the dispute resolution provisions provide for a dispute to be resolved by litigation, but with one party having a unilateral option to arbitrate. The question arises whether such a clause is a valid arbitration agreement as a matter of UAE law and would therefore be recognised and enforced by the UAE courts.

Until the mid-1980s, mutuality, i.e. that either party may, in the event of a dispute arising, refer it to arbitration, was presumed to be an essential ingredient of a valid arbitration clause under English law. That is certainly no longer the case in England, but the position in the UAE is far less clear. There have been no reported cases in the UAE in which the validity of unilateral option clauses has been considered. Save where an arbitration agreement is governed by DIFC law (where English law principles are relevant), the position adopted in England, or other common law jurisdictions, is unlikely to inform the position that the UAE courts adopt.

The starting point of analysis is the attitude of the UAE Courts to arbitration clauses generally.

Agreeing to arbitrate in the UAE

Arbitration is widely recognised and accepted throughout the Middle East as an alternative to local court litigation and federal law (Federal Law No. 11/1992, Article 203(5)) gives statutory force to arbitration agreements in the UAE.

However, great value is placed in the UAE on a citizen's right to have access to the local courts for protection and justice. The view that arbitration agreements amount to a sacrifice of that protection means that any doubt as to the existence of an effective agreement to arbitrate is resolved against the party seeking to establish its existence. The position was described by the Dubai Court of Cassation as follows:

> "It is settled that arbitration is an exceptional path for disputes between parties and it must be expressly agreed upon because it involves a departure from the path of litigating before the competent courts of law and the guarantee bestowed by the ordinary courts" (Dubai Cassation No. 51/1992 dated 24 May 1992).

Consequently, whereas, for example, the courts of England, Singapore and Australia will seek to construe arbitration clauses in a way that provides them with enforceable content, the UAE courts are much less forgiving. In the UAE, the validity of an agreement to arbitrate must be established with a high degree of certainty. This approach to arbitration clauses has led some arbitration practitioners to describe the UAE as being 'hostile' or 'suspicious' of arbitration.

Moreover, as a matter of UAE law, arbitration is a matter of the joint intention of the parties to refer their dispute to arbitration and the UAE Courts require proof of that joint intention. The position was described by the Dubai Court of Cassation in Petition No. 220 of 2004 as follows:

> "The arbitration agreement can only be valid when it is proved that the parties had the joint intention to refer their dispute to arbitration, which can be inferred from the existence of an arbitration clause within the agreement or from both parties signing a subsequent arbitration agreement."

It is far from certain that the UAE courts would accept that an agreement between two persons to confer on one them alone the right to refer a dispute to arbitration is proof of a joint intention to arbitrate.

Why have some jurisdictions found unilateral option clauses to be invalid?

In considering the likely attitude of the UAE Courts to unilateral option clauses, it is submitted that there is merit in understanding the reasons why courts elsewhere have found such clauses to be invalid and considering the extent to which those reasons may resonate with the UAE courts.

A review of decisions from other jurisdictions suggests that unilateral option clauses are typically exposed to the following broad lines of attack:

• Void as a matter of public policy;
• Void for uncertainty; and
• Void for unconscionability.

Public policy

In Resolution No. 1831 / 12 of the Presidium of the Supreme Arbitration Court dated 19 June 2012

featuring case No. ?40-49223/11-112-401 “Russian Telephone Company CJSC v. Sony Ericsson Mobile Communications Rus”, an arbitration agreement stated that all disputes arising out of a supply agreement would be referred to arbitration under the ICC Rules, but also gave one party (Sony) the right to file a claim to the state courts notwithstanding the arbitration clause. The Russian Supreme Court decided that the provision was invalid as a matter of public policy because it put Sony in a privileged position and therefore violated the principle of equality between the parties.

In the UAE, against the background that arbitration agreements amount to a sacrifice of a citizen’s right to have access to the local courts for protection and justice, it is submitted that there is a significant prospect that the UAE courts would find that, as a matter of public policy, a provision which does not provide for bilateral rights of reference to arbitration is not a valid agreement to arbitrate.

Uncertainty

In Decision No. 2013/16901 of the Turkish 11th Civil Division, the Turkish court noted the exceptional character of arbitration and emphasised the need for an arbitration agreement to state in clear and unequivocal terms that all or certain disputes are to be exclusively resolved through arbitration. The court held that a dispute resolution provision purporting to give the courts of Istanbul jurisdiction over disputes that could not be resolved by arbitration was incompatible with Turkey’s International Arbitration Law due to a lack of clear and definitive intent to arbitrate.

The exceptional character of arbitration is a concept that certainly will resonate with the UAE Courts. Arbitration in the UAE is typically described by the courts as an “exceptional” method of dispute resolution, meaning an exception to the default mechanism of the local courts. Accordingly, a dispute resolution provision with both a jurisdiction clause submitting any dispute to a court and an arbitration clause, both dealing with the same subject matter, may be invalid as a matter of UAE law due to a lack of clear and definitive intent to arbitrate.

Unconscionability

In *Bragg v Linden Research Inc.* (487 F. Supp. 2d 593, 605-11 (E.D. Pa. 2007)), a Californian court held that an arbitration clause was procedurally unconscionable as a take-it-or-leave-it contract of adhesion and substantively unconscionable for forcing the weaker party to arbitrate claims but allowing the stronger party a choice of forums, imposing high costs for arbitration, designating an inconvenient forum for arbitration and imposing confidentiality on the arbitration proceedings.

It is submitted that, again, these concepts will resonate with the UAE Courts. The UAE Civil Code (Articles 145 and 248) confers upon the courts the right to redress the balance between two contracting parties if the contract is a contract of adhesion and contains oppressive provisions. The court has the right to vary these oppressive provisions in such a way as to reduce the burden on the adhering party or to exempt him therefrom in accordance with the dictates of justice. Accordingly, where there is an inequality of bargaining power, a dispute resolution provision allowing the stronger party to choose the forum may amount to an unenforceable unconscionable contract of adhesion at UAE law.

By Article 246(1) of the UAE Civil Code, parties are obliged to perform their contract in a manner which is consistent with the requirements of good faith. Accordingly, the UAE Courts are unlikely

to recognise the reference of a dispute to arbitration as valid where it is made pursuant to a unilateral option clause which is exercised in bad faith.

Conclusion

The author's view is that a unilateral option to arbitrate may not be recognised by the UAE Courts as a valid arbitration agreement.

Even if the courts in the UAE were to accept the validity of such a clause, it is conceivable that they would impeach the exercise of such an option where there is an inequality of bargaining power or where the option was exercised in a manner that was oppressive, abusive or otherwise inconsistent with the obligations of good faith.

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