

Kluwer Arbitration Blog

Interpretation of Pathological Clauses by UAE Courts

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Pathological clauses are not an infrequent occurrence in the arbitration world. We [often](#) see arbitration clauses which are poorly drafted and may result in rendering the clause inoperable. Being able to predict how a court would treat a pathological clause would help the parties and specifically the party wishing to file proceedings decide whether they should follow the arbitration route or file proceedings before the courts.

There are not many UAE court decisions providing guidance on how such clauses would be dealt with but a recent [decision](#) by the Dubai Court of Cassation is very helpful in this context particularly that it reminds us of the approach UAE Courts take in narrowly interpreting an arbitration clause.

Case Summary

The complainant filed proceedings before the Court of First Instance (“CFI”) for an amount slightly exceeding two million Dirhams. The claim arose from a contract for the supply, execution, and operation of a thermal reservoir (“Contract”) concluded between the complainant and the defendant. The latter challenged the jurisdiction of the court on the basis of the arbitration clause (“Arbitration Clause”) found in the Contract. According to the Arbitration Clause, any dispute arising out of the Contract shall be settled amicably between the parties and if amicable settlement is not reached there would be recourse to arbitration under the rules of the Dubai International Arbitration Center “*without prejudice to the jurisdiction of Dubai Courts.*” (??? ?????? ?????? ????? ???).

The CFI rejected the defendant’s challenge to the jurisdiction of the Court and rendered a [decision](#) awarding the complainant part of the amount claimed. According to the CFI, although arbitration is agreed, the Arbitration Clause did not take away from Dubai courts their jurisdiction as the courts are the default forum for hearing disputes and the Arbitration Clause included the sentence “*without prejudice to the jurisdiction of Dubai Courts.*”

The case was then referred to the Court of Appeal (“COA”) which [upheld](#) the decision of the CFI adding that the parties had agreed that the courts would have jurisdiction in case of dispute and have waived the Arbitration Clause as clearly indicated in the Arbitration Clause itself.

The decision of the COA was then challenged before the Court of Cassation (“COC”) which

upheld the decision of the lower courts.

In its submissions before the higher courts, the defendant argued that the CFI had interpreted the arbitration clause incorrectly when it concluded that arbitration is optional. The complainant argued that the parties' intent was clear in that disputes should be referred to arbitration and that the phrase relating to the jurisdiction of Dubai courts covers instances in which an arbitration tribunal cannot have jurisdiction.

The COC dismissed the argument of the complainant explaining that arbitration is an exceptional route for resolving disputes and is a deviation from the principle that courts have jurisdiction over all disputes except those carved out by a special provision. It further explained that the arbitration clause should be interpreted narrowly and effort should be made to identify grounds which indicate waiver of the said clause. It then relied on the rules of interpretation of contracts set out in the Civil Transactions Law to conclude that the use of the sentence providing for arbitration does not “close off” the route to the judiciary as clearly indicated from the phrase “*without prejudice to the jurisdiction of Dubai Courts.*” The aforementioned phrase means giving the parties the option to refer their dispute either to Dubai courts or to arbitration.

The Courts' Reasoning

Looking at the decisions of the three courts, we conclude that the language relating to the jurisdiction of the Dubai Courts was interpreted by the courts as indicating that although the parties have agreed on arbitration, they did not intend to take away from Dubai courts their jurisdiction. As a result, it was the courts' view that the Arbitration Clause provided the parties with two options to settle their disputes: recourse to arbitration or to the Dubai Courts. By filing its claim before the Dubai Courts, the complainant was deemed as having waived the arbitration route and opted to have the matter settled through the courts.

In reaching the above conclusion, the courts were interpreting the parties' intent but also their conclusion seems to have been largely affected by their view that that arbitration clauses should be interpreted narrowly and that the courts should look for signs of its waiver.

The conclusion reached by the courts and their approach is consistent with prior decisions that set out the principle that an arbitration clause should be interpreted narrowly. In fact, court decisions which adopt the said approach are abundant and relate to a variety of scenarios. For example, in DCC No. 261/2002 Rights, the parties had agreed to arbitrate disputes arising during the construction and maintenance phases. According to the Court, the dispute arose after the completion of the project. Therefore, the Court has jurisdiction over the dispute as arbitration clauses should be narrowly interpreted. This coherence in the approach of UAE Courts certainly provides for predictability. However, a question arises on whether such approach is in line with international practice.

International Practice

Jurisdictions which have adopted a pro-arbitration approach tend to uphold pathological clauses. A very useful analysis on how the Arbitration Clause could have been approached is found in a

decision by French courts that goes back to 1979 where the court of first instance [explained](#) that *“an ambiguous arbitration clause should be interpreted by considering that if the parties had not wished to submit their disputes to arbitration, they would simply have refrained from mentioning the possibility of doing so.”*

If the parties had wished to have both options of arbitration and having recourse to the Dubai courts, it would not have been difficult to draft the arbitration clause in a manner which would indicate such intent. We do not see in the arbitration clause the conjunction “or” nor any other wording, which offers the parties two alternatives. The insertion of the phrase *“without prejudice to the jurisdiction of Dubai Courts”* was clearly the result of poor drafting. At best, it could have meant that the Dubai Courts would maintain jurisdiction over all matters that cannot be referred to arbitration. In fact, the latter interpretation was the argument put forward by the defendant and rejected by the courts.

As mentioned above, what underlies the courts’ approach is the conviction that arbitration is an exceptional route for resolving disputes and as a result any arbitration clause should be interpreted narrowly and the courts should look for signs that the parties have waived their agreement to arbitrate. This principle is very deeply rooted in the UAE’s legal system. Although courts have in recent years adopted an arbitration friendly approach and a lot of progress has been achieved on that front, at this stage, there are no signs that the said principle would change anytime soon.

Therefore, a question remains on whether the interpretation of pathological clauses would always result in dismissing arbitration or if there could be room to save the arbitration clause by putting the emphasis on the parties’ intent as the parties would not have inserted arbitration relation language if they did not intend to have recourse to arbitration.

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