

Kluwer Arbitration Blog

Separability of Arbitration Clauses: A Perspective From Dubai

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In a recent decision, [Court of Cassation No. 585/2023 \(Commercial\)](#), the Dubai Court of Cassation (“COC”) concluded that the invalidity of a contract extends to the arbitration clause included in the underlying contract. This post blog examines this decision, the outcome of which is contrary to well-established UAE law as well as prior Dubai court decisions.

Summary of Court of Cassation No. 585/2023 (Commercial)

Two shareholders, an Emirati national and a foreigner, established a limited liability company (“Company”) in 1997. As per the Company’s Articles of Association (“AOA”), the Emirati shareholder owned 51% of the Company’s capital. In parallel to signing the AOA, the shareholders concluded an “addendum” to the AOA stipulating that the Emirati shareholder did not own any shares in the Company, is not liable for the Company’s obligations, and is entitled to 1.5% of the value of the Company’s business.

In 2022, the Emirati shareholder filed arbitral proceedings against the foreign shareholder and the Company under the Dubai International Arbitration Center (“DIAC”) Rules claiming his entitlements arising from the said addendum. The tribunal rendered a favorable award (“Award”) and the foreign shareholder sought to annul the Award before the Dubai Court of Appeal (“COA”). The COA [annulled the Award](#) on public policy grounds (Court of Appeal No. 46/2022 Nullification of Arbitral Award).

The Reasoning of the Court of Appeal

The [Federal Law on Arbitration No. 6 \(2018\)](#) (“UAE Arbitration Law”) sets out in Article 53, the grounds for the annulment of an award. The COA reasoned that one ground for annulment is the non-arbitrability of the subject matter of the dispute (Article 53(2)(a)). Amongst non-arbitrable matters are matters in which conciliation is not allowed (as per Article 4(2)). As per decisions of the COC, conciliation is not allowed in matters of public policy. In other words, when the subject matter of the dispute relates to public policy, it cannot be subject to conciliation and a matter that may not be subject to conciliation cannot, as a result, be arbitrated.

In the current dispute, the COA found that the subject matter related to public policy. As per

Article 29(3) of the Federal Commercial Companies Law No. 32/2012 (“Companies Law”), an agreement to deprive a shareholder of profit, exempt them from losses or granting them a fixed interest is invalid. According to the COA, this is further set out in decisions of the COC, which have held that such contracts are invalid as a matter of public policy. In this case, where the shareholders had agreed to exempt the Emirati shareholder from losses and obligations relating to the Company and agreed on granting him a fixed interest calculated on the basis of the value of the Company’s business and irrespective of whether the Company incurs losses, the agreement of the parties is deemed invalid on grounds of public policy. The COA thus concluded that as a result *“the arbitration agreement as well as filing the arbitral proceedings on the basis of such invalid contract is against public policy”* and declared the Award as annulled.

Such reasoning, where the award was annulled because the subject matter of the dispute related to public policy, is consistent with the UAE Arbitration Law and the decisions of the COC as explained by the COA. Indeed, such approach has been covered on the Blog [previously](#).

However, the wording used by the COA at the end of the decision causes confusion. By stating that *“the arbitration agreement as well as filing the arbitral proceedings on the basis of such invalid contract is against public policy”*, the COA has created a link between the invalidity of the contract and the arbitration agreement. Instead, the COA should have ended its analysis by concluding that the dispute was not arbitrable because the subject matter was against public policy.

The Reasoning of the Court of Cassation

The COC upheld the decision of the COA. In doing so, it referenced Article 53 relating to the grounds of annulment of an arbitral award amongst which the non-arbitrability of the subject matter of the dispute. The COC then provided the definition of public policy as determined by court decisions and what it encompasses under the law.

Moving on to the provisions of the Companies Law, the COC explained that sometimes shareholders agree on terms that are not in line with the contract of incorporation of the company. If, as a consequence of these terms, the company fails to meet its requirements, the agreement of the shareholders is void and such invalidity relates to public policy.

The COC then referenced several legal provisions and COC decisions relating to void contracts with the pertinent point being that a contract is void when its subject matter violates public policy. In the COC’s view, a decision to invalidate a contract extends to all its terms including the arbitration clause.

Analysis and Observations

The COC decision is flawed in several ways. The COC dedicated a section to the invalidity of contracts and the consequences thereof. It then explained that when the subject matter of the contract is contrary to public policy, the contract would be invalid. Such invalidity is a public policy issue and can be raised by the court. In other words, the invalidity cannot be waived by the parties and even if not raised as a defense by a party to the proceedings, the court should invoke it. There was no need for the COC to engage in an analysis of the invalidity of the contract as the

award was annulled on public policy grounds, i.e., because the COA concluded that the subject matter concerned public policy considerations. As such, it cannot be subject to conciliation and hence it is non-arbitrable.

After analyzing the invalidity of the contract, the COC concluded that the invalidity extended to the terms set out in the contract including the arbitration clause. This aspect of the decision is most worrying as it contravenes the notion of the separability of the arbitration clause, which is set out in the law and court precedents, and which is a key principle in international arbitration.

In relation to the law, Article 6 of the UAE Arbitration Law states that:

“An arbitration clause shall be treated as an agreement independent from the other terms of the contract. The nullity, rescission or termination of the contract shall not affect the arbitration clause if it is valid per se, unless the matter relates to an incapacity among the Parties”.

Article 6 sets out in clear and express terms the concept of separability of the arbitration clause from the underlying contract. It specifically deals with the instance where the contract is void and confirms that this will have no impact on the arbitration clause.

The same principle is in Article 6 of the Dubai International Arbitration Centre (“DIAC”) Rules (in both its previous 2007 version as well as its current 2022 version), which are the applicable rules according to which the arbitration was conducted. Furthermore, the separability of the agreement to arbitrate has been upheld by the courts over the last two decades. For example, in [Dubai Court of Cassation No. 190/2010 \(Commercial\)](#), the court reiterated that the invalidity of a contract containing an arbitration clause does not affect the arbitration clause, which remains in force unless the invalidity affects the arbitration clause itself. It explained that the arbitration clause is independent and has its own subject matter. The same principle and the exact same language by the court is also found in [Dubai Court of Cassation No. 164/2008 \(Civil\)](#) as well as in [Dubai Court of Cassation No. 167/2002 \(Rights\)](#).

As to international arbitration, the separability of the arbitration clause, or what is sometimes referred to as the autonomy of the arbitration clause, is a long-standing principle in international arbitration. Decisions of the French courts [refer to this principle](#) since as early as the 1960s and many jurisdictions have implemented this principle to such a degree that it has become [a subject of controversy](#) and scholarly writings.


It is very surprising for the COC to reach the conclusion that it has in this case in relation to the separability of the arbitration clause, in light of the clear wording of the law and the established case law. This decision may present an anomaly among UAE court decisions as the UAE aims to be an arbitration-friendly jurisdiction where courts are becoming more and more familiar with concepts of international arbitration.

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