

Kluwer Arbitration Blog

Asymmetrical Arbitration Clauses: A Perspective from Dubai

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Unilateral arbitration clauses (also referred to as asymmetrical arbitration clauses) have been the subject of considerable debate as they typically involve granting one party the right to choose between litigation and arbitration, while restricting the other party to one forum (as discussed [here](#)). As such, asymmetrical arbitration clauses create tension between the principles of party autonomy and equal treatment of the parties. Different jurisdictions have adopted different approaches to this question; some accept to enforce such clauses while others do not (as covered in previous posts [here](#) and [here](#)). The position of the Dubai courts cannot be considered settled, given the limited number of decisions available on the subject. This post examines the decisions issued by the Dubai courts in 2024 and concludes where the Dubai courts could be heading in this respect.

Decisions of the Dubai Courts

Prior to 2024, only one reported case existed on the issue of asymmetrical arbitration clauses. In a case from 2018, a bank filed proceedings before the Dubai courts on the basis of a clause which provided the bank with the choice between arbitration and litigation. The Dubai Court of Cassation (“COC”) accepted the validity of the clause (COC Appeal No. [1116/2018](#) (Commercial)).

In 2024, two decisions were rendered on the same issue reflecting what may seem to be opposing views: in COC Appeal No. [1522/2023](#) (Commercial) an asymmetrical arbitration clause was upheld, while in COC Appeal No. [735/2024](#) (Commercial) the COC refused to enforce what it considered a “*unilateral arbitration clause*”.

Dubai Court of Cassation Appeal No. 1522/2023 (Commercial)

COC Appeal No. [1522/2023](#) (Commercial) related to a claim in the amount of nearly 24 million AED. The dispute resolution clause provided for the non-exclusive jurisdiction of the English courts while allowing the claimant, a financial institution, to take action in any other court. The clause also offered the claimant the choice of referring the dispute to arbitration.

The claimant chose to bring the dispute before the Dubai courts. The defendant challenged the jurisdiction of the Dubai courts arguing that the contract between the parties included an arbitration clause. The challenge was dismissed by the lower courts. The defendant appealed said decision to

the COC. The latter **upheld** the lower courts' decision.

Dubai Court of Cassation Appeal No. 735/2024 (Commercial)

COC Appeal No. 735/2024 (Commercial) related to a dispute between a Contractor and a Subcontractor who had concluded a number of subcontracts in relation to five projects. Two of these subcontracts contained a dispute resolution clause, which stated that *“In case of a dispute relating to the interpretation or execution of any of the provisions of this agreement, the dispute shall be settled amicably by the parties and if that does not occur, the dispute shall be either referred to (a) arbitration at the Dubai Chamber of Commerce or (b) to the local court in the United Arab Emirates. The method that shall be used will be decided by the Contractor.”*

After completing the works, the Subcontractor initiated proceedings before the Dubai courts claiming the amount of AED 1,815,022 together with interest. This amount represented the value of the works that had allegedly remained unpaid. The Contractor challenged the jurisdiction of the courts in relation to two of the subcontracts, which contained the aforementioned dispute resolution clause. The Contractor argued that the dispute should be resolved through arbitration. The lower courts rejected the challenge made by the Contractor. The Contractor then filed a challenge before the COC. The COC **dismissed** the challenge.

The Reasoning of the Court of Cassation

In COC Appeal No. 1522/2023 (Commercial), the COC considers (as obiter dictum) what arbitration agreements are and the requirements they must meet. It does not provide a legal analysis beyond what seems to be the reliance on party autonomy to establish that a dispute resolution clause offering one party the choice between courts and arbitration is enforceable.

In COC Appeal No. 735/2024 (Commercial), the COC started its analysis by explaining the need for an arbitration clause to be clear, conclusive and non-ambiguous. It also explained that an agreement to arbitrate, similar to any other contract, requires an offer and acceptance which leads to the meeting of the minds in a manner that raises no doubts around the choice made by the parties to opt for arbitration.

The COC then explained that a “unilateral arbitration clause” is an arbitration agreement in which the parties agree to grant one of them the power to choose between courts or arbitration to settle their disputes.

Turning to the facts of the case, the COC stated that a clause providing for arbitration in parallel to litigation before the courts, or offering a choice between them, is not binding. The COC then referred to the Court of First Instance's (“CFI”) reasoning that for an arbitration clause to be enforceable, there should be a clear and explicit agreement demonstrating the parties' intention to take away from the courts their jurisdiction and opt for arbitration. Offering a choice between arbitration and litigation does not meet that requirement. The COC also mentioned that the dispute resolution clause prevented the Subcontractor from accessing any dispute resolution forum, as the appropriate forum was dependent on the Contractor's unilateral choice. The COC thus agreed with the analysis of the CFI and rejected the challenge made by the Contractor.

Analysis and Observations

The COC's decision in Appeal No. 1522/2023 (Commercial) does not provide much insight into the COC's reasoning. It can be concluded that the decision rendered by the COC was an application of the principle of party autonomy. On this basis, the COC upheld the asymmetrical arbitration clause, which is a welcome approach given how prevalent such clauses are and have as such become a necessity.

The decision of the COC in Appeal No. 735/2024 (Commercial) however raises a number of concerns and is worthy of a closer examination. To treat the dispute resolution clause in this case as a "unilateral arbitration clause" is not entirely accurate. A unilateral arbitration clause is one which offers one party the right to choose between arbitration and litigation while allowing the other party only one forum. This was not the case here. Arbitration and litigation were options offered to both parties; the Contractor as well as the Subcontractor except that the Contractor could determine the forum where the dispute will be heard. In any case, irrespective of whether this was a unilateral arbitration clause or not, the reasoning of the COC reflects a refusal to uphold unilateral arbitration clauses. The COC explicitly states that a clause, which offers two possible routes to resolve a dispute, i.e. arbitration and litigation, is not binding and the COC does not treat such clause as an agreement to arbitrate.

Lastly, allowing the Contractor to decide which forum the Subcontractor should have recourse to is an unusual stipulation, which the COC made a passing mention of. The COC stated that such condition deprives the Subcontractor from access to justice until a choice is made by the Contractor but did not elaborate further. It did not conduct an analysis of whether the clause infringes upon the concept of party equality, whether it constitutes an abusive condition, etc. The COC should have refused to uphold the dispute resolution clause on the basis of this specific condition, i.e. allowing one party to dictate which forum should be used rather than engaging in an analysis of the need to have an unambiguous agreement to arbitrate.

It is rather difficult to reach a conclusion on the effect of the COC decision in Appeal No. 735/2024 (Commercial). Although the COC reasoning clearly rejects asymmetrical arbitration clauses, the clause involved is not technically an asymmetrical arbitration clause. More importantly, it may be that the COC decided not to uphold the dispute resolution clause because it would have prevented one party from accessing justice as explained above. In the author's view, this decision should not be relied upon to conclude that the Dubai courts do not uphold asymmetrical arbitration clauses. This is particularly so given that the decision in COC Appeal No. 1522/2023 (Commercial), which upheld an asymmetrical arbitration clause, was also issued in 2024. Another reason to expect upholding such clauses is the liberal approach that have been adopted by the Dubai courts towards arbitration in recent years and the fact that they are up to date with international trends amongst which is the prevalence of asymmetrical arbitration clauses.

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