

Abu Dhabi Court of Cassation
Cassation No. 922-2020
27.10.20

Background

The Appellant brought AD Action No. 892-2019 [Commercial - Full Bench] against the Respondent to appoint an engineering expert and hold the Respondent liable to pay the amount assessed owed in the expert proceedings. The Appellant submitted that the Respondent is the main contractor for two projects who subcontracted the construction works to the Appellant pursuant to two subcontracts. The Appellant completed the works but remained unpaid by the Respondent. The Appellant then proceeded to court.

The Respondent pleaded that the action was barred by an arbitration clause and the Court of First Instance appointed an engineering expert who filed a report concluding that the Respondent owed an amount of AED 75 million.

Court of First Instance:

On 16.02.20, the Court of First Instance ruled the action barred due to an arbitration clause.

Court of Appeal:

The Appellant appealed (AD Appeal No. 674-2020 [Commercial]) and on 10.06.20, the Court of Appeal dismissed the appeal on the merits and upheld the primary ruling.

Court of Cassation:

The Appellant appealed in cassation arguing that the Court of Appeal erred because arbitration, being an exceptional method of dispute resolution, may not be presumed and is only valid if in writing - Article 203(2) of the Civil Procedure Law, since it entails a departure from conventional litigation before courts of law with its guarantees provided to litigants. Arbitration may not be agreed except by parties having the legal capacity to dispose of the right in issue or by the legal representative of the corporate entity who has the authority to agree to arbitration. Further, an arbitration clause in a contract does not extend to any other contracts between the same parties. The two subcontracts were executed on the Appellant's behalf, on 09.02.14, pursuant to a power of attorney dated 28.11.12. The power of attorney did not grant the Appellant's representative the express authority to agree to arbitration. The authority given to the Appellant's representative under the other power of attorney, dated, 14.05.18, to agree to arbitration, which both trial courts held to be a subsequent ratification of the arbitration agreements, is not applicable to the two subcontracts in question. The trial courts are wrong on this point and their conclusion evinces a lack of acquaintance with the facts and issues of the case. Moreover, the parties engaged in the expert proceeding for a long period of time, during which they reached an agreement on several detailed matters of expertise, and on the specific entitlements of the Appellant. In addition, the Respondent deliberated extensively on the merits. This means that the Respondent had waived its right to invoke the arbitration clause. The

Appellant had asserted this point before both trial courts but neither court gave the matter any attention in way of examination and inquiry, thereby prejudicing the Appellant's defense rights. The Court of Appeal, concurring with the findings of the court below, took a different view in its reasons and ultimate decision which indicates that both courts did not correctly apply the law and thoroughly acquaint themselves with the facts. They disregarded the Appellant's points of defense which should have been addressed as a matter of reciprocal engagement.

Court of Cassation's Response:

Granted. It is settled according to Article 8 of Law No. 6 of 2018 on Arbitration that:

"1. The court, before which an action was instituted regarding a dispute in respect of which an Arbitration Agreement exists, shall dismiss the action, if the Respondent moves to dismiss on this ground before making any other motions or plea on the subject matter of the action, unless the court finds that the Arbitration Agreement is void, or unenforceable.

2. Initiation of the proceedings referred to in the foregoing clause does not preclude the commencement or continuation of the arbitral proceedings or rendering of the arbitral award."

Article 58 of the Civil Procedure Law provides: "No admission or waiver of a right alleged or settlement or submission to arbitration or acceptance of or requisition for the oath ... or any other disposition in respect of which the law requires special authorization may be made without special authority."

It is further settled that arbitration may only be agreed by persons having authority to dispose of the right in issue or the capacity to agree to arbitration; otherwise the arbitration agreement shall be void in the interests of the party invoking its nullity.

It is further settled according to Article 246(1) of the Civil Transactions Law that contracts must be performed in accordance with their terms, and in a manner consistent with the requirements of good faith.

And, a subsequent affirmation of an act is treated as a prior grant of power of attorney, according to Article 930 of the Civil Transactions Law, and may be inferred from any act or statement indicating the same, whether expressly or by implication, with silence, in such cases, taken to be consent if by custom it indicates consent.

According to Article 217 of said law, If consent is given to a suspended transaction, it shall become effective retroactively to the time it was made, and the subsequent consent shall have the same effect as a prior agency.

It is further settled in the AD Court of Cassation that arbitration is valid only if made by a person having authority to dispose of the right in issue given arbitration's status as a type of waiver of the right to access courts of law, with its guarantees provided to litigants.

The authority of the attorney may be explicit, implicit, or apparent. Authorization is explicit if stated orally or in writing and implicit if inferable from the state of affairs, from what has been said or written, or from the ordinary course of dealing. Acts of an

attorney which fall outside the scope of the power are null and such nullity is relative in favor of the principal whose approval is necessary for such acts to be valid. Determinations on such matters are within the discretion of the trial court whose reasoning must be sound and demonstrative of the operative part of its decision.

It is clear from the documents and evidence of record that a power of attorney, duly notarized on 28.11.12, was given to the Appellant's representative delegating powers of management. The Appellant's representative had the full power and authorities to act for the Appellant company except for the authority to agree on arbitration, as expressly stated in the power of attorney: "without prejudice to Article 58 of the Civil Procedure Law etc." Article 58(2) of the Civil Procedure Law states: "No admission or waiver of a right alleged or settlement or submission to arbitration etc. may be made without special authority." The two subcontracts were approved and signed on 09.02.14 by the Appellant's representative as its authorized manager pursuant to said power of attorney. According to the expert's report, the works were completed on 07.07.17 (Addendum (1) to the two subcontracts). However, at the hearing of 01.06.20, held remotely before the Court of Appeal, the Respondent filed a reply to the appeal in which it noted that the Appellant had, during the course of performance of the two subcontracts, furnished the Respondent with a power of attorney given to the Appellant's representative and bearing a notarial attestation dated 20.05.18. That power of attorney, according to the Respondent's reply, was issued to confirm the attorney's authority to sign the two subcontracts and operates as a subsequent ratification of the arbitration agreements. Said power of attorney entrusts the Appellant's representative with all the powers of company management, including the authority to agree on arbitration, viz.: "particularly the powers provided for in Article 58 concerning civil procedure and the grant and revocation of powers of attorney etc."

The Court of Appeal relied, for its conclusion, upon this clause in the power of attorney, dated 20.05.18, which it construed as entrusting the attorney with all powers of management and the acts described in Article 58(2) of the Civil Procedure Law, including agreement on arbitration, and held to be a subsequent ratification having the same effect as a prior agency.

The Court of Appeal's conclusion is unsound. The Appellant's representative, acting pursuant to a valid power of attorney at the date of signing the two subcontracts (09.02.14), did not have the legal capacity to sign an arbitration agreement, given the express clause in his power of attorney which states: "without prejudice to Article 58 of the Civil Procedure Law." The subsequent power of attorney, dated 20.05.18, irrespective of how it came into the hands of the Respondent, was granted subsequent to the completion of the subcontract works, which, according to the expert's report, occurred on 07.07.17. The phrase in said power of attorney which reads: "particularly the powers provided for in Article 58 concerning civil procedure etc." is applicable only to new contracts and works and not to the subcontracts in question. Indeed, the arbitration agreement is an exceptional arrangement whereby its parties opt for arbitration rather than litigation before the ordinary courts of law. This exception may not be interpreted broadly or extracted through analogy and must be construed within the narrowest limits. Furthermore, the parties' intent must be clear and explicit and free from ambiguity and doubt.

It is plainly and patently clear that the Appellant's signatory to the two subcontracts did not have the authority to agree on arbitration and any divergent agreement or reversal of position must be clearly established and free from ambiguity and doubt. This is not the case with the power of attorney dated 20.05.18. The Court of Appeal, concurring with the court below, took a different view and its decision is accordingly flawed and will be reversed.

In ruling the Appellant's action barred due to an arbitration clause, the Court of First Instance did not examine the subject matter of the dispute and have its say on the matter. To ensure that no tier of litigation is missed, reversal will be with remand, to the Court of First Instance, for a decision on the subject matter of the dispute.

Wherefore, we reverse the Court of Appeal's ruling and, with respect to the merits of the appeal, vacate the primary ruling and order anew that the action be remanded to the Court of First Instance for consideration and adjudication of the subject matter of the dispute.

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