

Abu Dhabi Commercial Court of Appeal
Appeal No. 449-2024
24.04.24

The Appellant (Claimant) filed AD Commercial Action No. 1046-2023 against the Respondent (Defendant) seeking judgment against the latter for US\$ \$7,560,725.22 (or its UAE Dirhams equivalent) plus 9% legal interest per annum from the date of claim until payment.

The Claimant submitted that they had entered into a contract with the Defendant, dated 22.12.15, for the supply and installation of US\$ 35 million worth of outpatient clinic services and IT services. On 29.08.17, by addendum to said contract, the supply operations were divided into two streams and the contract price was adjusted to US\$ 45,671,271. In compliance with the contract, the Claimant delivered the agreed-upon supplies within the contract scope of works and the Defendant was able to commence operations on 24.02.21. The Claimant contacted the Defendant on 03.08.21 regarding a completion certificate but the latter did not respond. Then, on 15.09.23, the Claimant sent the Defendant a final payment request for all outstanding payments but received no response. In addition to the accrued amounts due from the Defendant under invoices related to the work, the Claimant is entitled to compensation totaling US\$ 7,560,725.22 for the termination of the contract and the consequent retention of technicians, workers, and administrative personnel from August 2021 to December 2022. Hence, the Claimant's action, supported by a docket containing the following exhibits: the contract in question and its addenda, notice dated 03.08.21, letter dated 31.01.23, invoice no. AD-058-2021, purchase order dated 21.07.20, two schedules of variation works, final payment request dated 15.09.23, and a consultative expert report.

During the proceedings before the Court of First Instance and the Case Preparation Office, both parties were represented by their respective counsel. At the first hearing, dated 28.11.23, the Defendant's counsel raised a motion to dismiss the proceedings by virtue of an arbitration clause. The parties exchanged briefs defending their positions before the Court of First Instance until, on 26.02.24, the action was dismissed based on the existence of an arbitration agreement.

Dissatisfied with this judgment, the Claimant appealed seeking judgment against the Defendant for US\$ 7,560,725.22 (or its UAE dirhams equivalent) plus 9% legal interest per annum from the date of claim until payment.

The appeal is based on errors of fact and law. The Appellant argues that the Court of First Instance upheld the validity of the arbitration clause despite its invalidity. The Appellant had maintained, before the Court of First Instance, that the arbitration clause was invalid and void, as the underlying contract was concluded and executed on 22.12.15 between the Respondent, as it was formerly known, and the Appellant, as a contractor. However, the Respondent did not exist at that time and was not incorporated until 24.10.16. The subsequent amendments to the contract addressed changes in the contract parties without addressing the arbitration clause, which, being an exceptional clause independent from the contract, should have been agreed upon by the new parties.

Furthermore, the Court of First Instance contradicted and misapplied the law and offered contradictory and erroneous legal reasoning by affirming the validity of the arbitration agreement despite the impossibility of adhering thereto because of the abolition of the DIFC Arbitration Institute, the choice of forum under the arbitration clause. In doing so, the Court of First Instance took a broad approach to its examination, scrutiny, and analysis of the arbitration agreement, contrary to the UAE Courts' settled view that arbitration is an exceptional means of dispute resolution and a departure from the general rule that the courts have jurisdiction over disputes. The Court of First Instance wrongly relied for its conclusion (that the arbitration clause was valid) on foreign law and judgments.

The appeal came before the Court of Appeal in chambers and the Respondent filed a reply which the Court of Appeal sighted. The appeal, as it stood, was considered ripe for judgment and set down for judgment today.

The appeal was filed on time and, having met its formal requirements, is admissible in form.

Turning to the merits and the totality of the arguments made under the grounds of appeal, it is settled that the Court of Appeal cannot be faulted for adopting and citing outright the reasoning of the Court of First Instance where it finds that the issues raised on appeal are essentially the same as those which came before the Court of First Instance and were addressed in its reasoning as to obviate the need for further reasoning, provided that the reasoning supporting the Court of First Instance's decision is sufficient to sustain its holdings and overcomes the grounds of appeal (AD Cassation No. 1195-2023 [Commercial] - 29.01.24).

In dismissing the action because of an arbitration clause, the Court of First Instance noted that the addendum dated 20.03.18 explicitly refers to the parties' agreement to correct the contract by confirming the Defendant's current legal structure. Clause 2 of the addendum states that the contract shall be read and construed in its currently amended and corrected form as of the date of correction and shall remain in force as if the employer (owner) were a limited liability company that had been duly incorporated at the date of signature. Clause 2 further states that the rights and obligations of each of the contracting parties shall be deemed to have arisen at the date of signature of the contract and shall endure throughout its term. Clause 4 of the addendum states that, save as corrected or amended, the provisions of the contract shall remain in full force and effect.

In addition to all of the foregoing, clause 2.8 states that the provisions of clause 20 (claims and dispute resolution) of the contract shall apply to the addendum as if fully set forth therein and that the nullity, rescission, or termination of the main contract containing the arbitration clause shall not affect the arbitration clause if it is valid per se.

It is clear to this Court reading the underlying contract that it was signed by the Appellant's owner in his capacity as such, as per its trade license, and no attempt to set aside his acts would be entertained. The Appellant cannot claim lack of liability or deny acts it previously undertook and represented and agreed with the other party. Moreover, the extinction or abolishment of the arbitration centre is no reason to

consider the arbitration clause impossible or incapable of performance. This is because the rules of arbitral institutions are not permanent or fixed in their nature and, therefore, their amendment or development would not render the arbitration agreement inoperable or unenforceable. Likewise with rolls of arbitrators, which cannot be deemed inherently permanent or fixed. Notably, the DIFC-LCIA Rules had in fact been amended in October 2020 since the parties entered into their contract and the Appellant had not argued that any substantial differences in the rules would harm them should they proceed to arbitration outside the DIFC-LCIA.

Accordingly, the Appellant may not avoid the arbitration clause embedded in the subject contract (whereby they agreed to submit any disputes arising thereunder to arbitration) by claiming different rules and statutory timeframes. The arbitration agreement is not invalidated or rendered unenforceable by the absence of an agreed-upon procedure for the appointment of arbitrators. In such a scenario, recourse is available to the competent court, upon request of the interested party, to carry out the necessary procedure. The Court of First Instance's decision to dismiss the action because of an arbitration clause cannot, per se, be considered an order that either party arbitrates before a specific arbitration institution. Rather, the decision ensures that neither party will breach its obligation to perform the arbitration clause by approaching the courts, contrary to what was agreed, so long as the arbitration clause is not void and can be enforced. The Court of First Instance had properly and exhaustively addressed the defenses and arguments and had made conclusions consistent with the facts put before it. Thus, its decision is correct in fact and law and is sufficient and supportive of the final outcome. The arguments made on the grounds of appeal are no different from those made at first instance. The Court of First Instance had its say and these arguments do not change anything.

Given the foregoing, the Court of First Instance got it right in its holdings given the underlying reasoning for its decision. The appeal will be dismissed while the primary judgment, which is in order, will be upheld.

The costs, inclusive of advocate's fees, will be borne by the Appellant under Articles 133(1),(2), and 170 of the Civil Procedure Code, in accordance with Federal Decree-Law No. 34 of 2022 regulating the Advocacy and Legal Consultancy profession.

Wherefore, the Court hereby decides in chambers to formally admit the appeal and dismiss the same on the merits, while upholding the primary judgment. Appellant to bear the costs and advocate's fees.