

## inBrief



## Dubai Court of Appeal shuts down 'guerilla tactics' aimed at bypassing arbitration agreements

By Chatura Randeniya and Nazim Hashim | 10 July 2023

There are a number of reasons why parties who have agreed to arbitrate disputes (ordinarily by way of an arbitration clause in a contract) may later wish to litigate their dispute in the UAE courts. A common reason is the cost of arbitration, which can be quite significant compared to the cost of litigating in the UAE Courts. Further reasons may be that the party wishes to take advantage of the relative unpredictability of outcomes in the UAE Courts, which do not follow a system of binding precedent as understood in common law jurisdictions and, perhaps more importantly, do not award legal costs except in a token amount, thereby minimizing the cost of a failed claim.

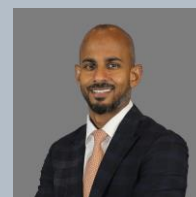
Irrespective of the reason, a popular strategy deployed by parties wishing to bypass an arbitration agreement and invoke the jurisdiction of the UAE Courts (ordinarily a claimant) is to add parties who are not party to the arbitration agreement, as in cases which involve multiple defendants, a UAE court which has jurisdiction over one defendant has jurisdiction over all the defendants.

In a recent judgment issued by the Dubai Court of Appeal, this strategy was comprehensively rejected. The case in question involved a contract for the construction of a pavilion at Expo 2020, which contained an arbitration clause. The contractor asserted several claims against the employer and, in an attempt to bring the matter within the jurisdiction of the Dubai Court, impleaded the employer's manager as a co-defendant.

The Dubai Court of Appeal saw through this stratagem, and held that the courts have no jurisdiction over the dispute because the proper parties to the contract have agreed to resolve disputes arising out of the contract by arbitration. In its judgment, the Dubai Court of Appeal laid down several clear principles:

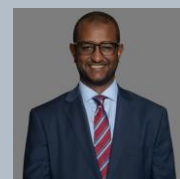
- while a claimant may add multiple defendants, and while a court which has jurisdiction over one defendant will have jurisdiction over all the defendants, there must be 'real claims' against each of the defendants;

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- what constitutes ‘real claims’ is a matter to be determined by the trial court based on the evidence and any applicable presumptions of law [in this case, the court found that the claimant’s cause of action was clearly a contractual one, and there were no ‘real claims’ against individuals who were not party to the contract; and
- adding parties solely for the purpose of invoking the court’s jurisdiction is not permitted.

Interestingly, while the multiplicity of defendants was the principal argument advanced by the claimant in this case in its attempt to bypass the arbitration agreement, this issue was not the basis of the judgment of the Court of First Instance which held that the courts have jurisdiction. The basis of the judgment of the Court of First Instance was that the amendment to the contract between the parties (necessitated by the delay to Expo 2020 due to the Covid-19 pandemic) did not expressly refer to the arbitration clause, and consequently that it did not meet the requirements of Article 7(2)(b) of the UAE Federal Arbitration Law, which provides that an arbitration agreement shall be deemed to be in writing if *there is a reference in a written contract to any model contract, international agreement, or any other document containing an arbitration clause and the reference is such as to make that clause part of the contract*. This finding was set aside by the Dubai Court of Appeal, which held that there was no requirement to expressly refer to the arbitration clause as the amendment clearly formed part and parcel of the contract which contained the arbitration clause (i.e. as opposed to standard terms or a different contract containing an arbitration clause which is incorporated by reference). Nevertheless, following the judgment of the Court of First Instance, the prudent practice appears to be to make express reference to an arbitration clause in the main document in all subsequent contractual documents, even where the subsequent document is only an amendment to the contract. ■

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