Supreme Court Ruling: Agreeing to Arbitration by E-mail and Instant Messaging?

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In the last quarter of 2019, the United Arab Emirates Federal Supreme Court issued a judgment stating that agreeing to arbitration between parties could occur by electronic means and digital messaging. The judgment confirms Article 7(2)(a) of the Federal Arbitration Law which states that an arbitration agreement is deemed to be in writing if it is in the form of an electronic message.

This is an unprecedented development as the general consensus had been that an arbitration agreement must be signed in manuscript (by hand) by the parties to the agreement.

Moreover, the Federal Supreme Court added that the agreement to arbitration could occur before the respective subject matter contract is concluded, during its lifetime, post its termination or nullity, or even during litigation procedures at which point a court hearing the dispute would be mandated to stay proceedings for the parties to commence arbitration.

Case Facts

In 2017, an arbitration award was issued by Tahkeem (the Sharjah International Commercial Arbitration Centre) in relation to a real estate dispute. The arbitration agreement between the parties had been entered into as a separate agreement after the conclusion of the subject matter contract.

In 2018, after the issuance of the 2018 Federal Arbitration Law, the net winner of the arbitration submitted the award for confirmation before the Primary Court. The Primary Court

deferred the matter to the Appeals Court as the competent court for confirmation pursuant to the Federal Arbitration Law. The Appeals Court rejected confirmation of the award reasoning that a separate arbitration agreement is void and should instead had been a provision within the subject matter agreement itself.

The net winner of the arbitration challenged the judgment of the Appeals Court before the Federal Supreme Court, requesting that the Appeals Court judgment be overturned, and requesting confirmation of the validity of the arbitration agreement and the arbitration award.

Judgement

The Federal Supreme Court ruled that a separate arbitration agreement is valid and upheld the validity of the arbitration award; ordering the Appeals Court to confirm the award.

The Federal Supreme Court ruled that an arbitration agreement that is subject to the laws of the United Arab Emirates is valid even if the subject matter agreement is terminated or found void, or if the subject matter agreement is being litigated before the courts.

The Federal Supreme Court also confirmed the requirement for the arbitration agreement to be in writing, however, it also explicitly found that such agreement can be done through written electronic communication or through instant messaging, so long as such are compliant with the statutory requirements of electronic transactions.

Electronic Signing of an Arbitration Agreement

The Federal Electronic Transactions Law governs agreements between parties concluded through electronic devices and permits agreements (in whole or in part) to be conducted via electronic means, and the Federal Law on Evidence in Civil and Commercial Transactions governs the admissibility of

digital/electronic evidence before the courts.

The Dubai Cassation Court has ruled in (in separate trials) that the rules on evidence do not prevent the admission of a data message or electronic signature as evidence to substantiate a litigant's arguments.

A widespread point of concern in arbitration proceedings in the United Arab Emirates is the requirement of persons with specific authority to bind the parties to an arbitration agreement pursuant to Article 4(1) of the Federal Arbitration Law and Article 203(4) of the Federal Civil Procedures Law.

However, the Dubai Cassation Court has also ruled that authority may be express, implicit or apparent, particularly if the signatory is the registered manager (authorized representative) of the party. The exception to the manager's authority would generally be if the Articles of Association of the company explicitly restrict the manager from agreeing to an arbitration agreement.

The Electronic Transactions Law permits electronic signatures even if the law requires the existence of a specific form of a signature on a document; such as the specific authority to bind a party to an arbitration agreement.

To determine whether it is possible for a person to rely on an electronic signature, the party relying on the electronic signature must, amongst other elements, adopt appropriate steps to verify that the electronic signature is enhanced by an electronic authentication certificate, and if relying on an electronic signature is impossible, the party relying on the electronic signature shall be responsible for all the risks resulting from the non-validity of that signature unless otherwise established.

E-mails have a variety of tools that can create secure authentication of e-mail messages creating secured digital signatures to comply with the Electronic Transactions Law.

Generally, reliance on e-mails as evidence would be conditional on the parties' ability to evidence the authenticity or lack thereof of the e-mail exchange.

It is also prudent to address instant messaging technologies considering the Federal Supreme Court ruling in this article. The most popular instant messaging means of which in today's modern commercial landscape is the use of WhatsApp as a platform for agreements to be negotiated and concluded (at times mere heads of agreement, sometimes addendums, or even severable provisions).

In 2019, the Dubai Cassation Court ruled – in respect of a gold trade deal dispute – that an agreement concluded between parties via WhatsApp (and partly via e-mail) is binding.

Moreover, WhatsApp Inc. (the developer of the WhatsApp service) does not provide expert testimony but holds that WhatsApp records are self-authenticating pursuant to law and do not necessarily require the testimony of a records custodian.

In essence, and in reading the relevant UAE laws and reliance on UAE higher court rulings, those authorized on behalf of the parties can conclude an arbitration agreement via WhatsApp if the WhatsApp message exchanges between the parties have evidence of receipt (often indicated by the 'blue ticks') before or during the lifetime of the respective subject matter agreement, or post its termination or nullity, or even during a court trial on a dispute regarding the subject matter agreement.

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