UAE Cassation Court addresses whether silence deemed acceptance in arbitration agreements

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Silence may be deemed consent

Article 135 of the Civil Code (Law No. 5/1985) states that (i) no statement may be attributed to a silent person. However, circumstantial silence shall constitute acceptance. And (ii) silence shall amount to acceptance namely in case of previous dealings between the contracting parties that are met by the offer made or where the offer is made to the benefit or the offeree.

The DIFC Court of First Instance addressed the meaning of Article 135 in *DAS Real Estate Owned and represented by Mussabeh Salem Mussabeh Humaid AlMuhairi v First Abu Dhabi Bank Pjsc* DIFC 002/2016 where Chief Justice Sir David Steel noted that:

"In the event of silence the secondary question arises as to whether there was a "need" to speak…Silence in the face of "need" amounts to "acceptance". Indeed Article 135(2) identifies the specific example of acceptance of an offer in the context of prior dealing between the parties. The commentary on the UAE Civil Code by James Whelan gives the example of a person who "has the right to prohibit the act by his words is regarded as consenting to it by his deliberately abstaining from saying anything."

In brief, silence may be considered acceptance under Article 135 of the Civil Code in certain circumstances.

Silence in arbitration agreements

Arbitration agreements have a high threshold in the UAE with respect to evident acceptance by the parties, such as in relation to capacity, authority to represent a principal, arbitration agreements in separate documents to the substantive agreement, or in reference to standard forms (such as the FIDIC forms of contract).

Article 7(2)(a) of the Federal Arbitration Law (No. 6/2018) states that:

"The requirement that an Arbitration Agreement be in writing is met in the following cases…If it is contained in a document signed by the Parties or mentioned in an exchange of letters or other means of written communication or made by an electronic communication according to the applicable rules in the State regarding the electronic transactions."

Article 7(2)(a) provides room for interpretation with respect to the nuances that arise in exchanges of electronic communication to conclude an arbitration agreement.

And the UAE Federal Supreme Court has previously confirmed that an arbitration agreement can be concluded through written electronic communication or through instant messaging.

Consequently, this raises questions as to whether an offer to bind a dispute to arbitration issued by some form of manuscript or – particularly – electronic communication may fall within the parameters of Article 135 of the Civil Code where silence is deemed acceptance.

On 17 May 2022, in a matter involving a payment order and whether the courts had jurisdiction vis-a-vis a purported arbitration agreement, the Abu Dhabi Cassation Court

explicitly addressed silence in arbitration agreement offers in finding that:

“It is not permissible to derive proof of an arbitration agreement from the mere silence of one of the parties regarding the response to the arbitration offer from the other party, or the implementation of what was presented to it by this party related to the invitation to conclude a specific contract as long as it is not proven that the party to whom this offer is addressed has accepted the writing of arbitration while accepting the contract. It is also not permissible to deduce the proof of arbitration also from the mere work between the two parties to arbitrate in certain contracts that the arbitration will apply to another contract between them that did not provide for arbitration since the agreement on arbitration is not presumed and may not be implicitly drawn.”

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