UAE Supreme Court Rules on Unclear Arbitration Clause

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When drafting an arbitration clause, it is vital to make sure that the clauses are simple and clear in order to avoid uncertainty and disputes over their semantics and effect. This is the first step to ensuring the time and cost-effectiveness of a potential dispute as it will minimize the risk of possible disagreements regarding the jurisdiction of the tribunal or the process of appointing the arbitrators. At the very outset of drafting the arbitration clause, it must be explicit that the parties wish to have their disputes resolved via arbitration and to waive the original jurisdiction of the courts. If this intention cannot be inferred, it means that the 'medium' used has missed its target.

The repercussions of the failure to express clarity and intention of the parties to refer to arbitration in case of a dispute manifested in a case leading to a Federal Supreme Court judgment issued recently.

The Case in Question

The case in question revolves around an agreement that was executed in March of 2013, relating to the non-payment of medical supplies.

The language used in the arbitration clause was in English and the issue arose out of whether or not the clause was explicit in commanding the parties to refer to arbitration as the dispute resolution mechanism.

The arbitration clause stated in case the parties could not reach an amicable settlement in relation to any dispute within 30 days, either party may trigger arbitration dispute

proceedings to be seated in Abu Dhabi, conducted in English and subject to the rules of the Abu Dhabi Commercial Conciliation & Arbitration Centre.

When the dispute arose for non-payment over the sale of the medical supplies, one of the parties filed the dispute before the Primary Court. The Primary Court found it had no jurisdiction to hear the case due to the arbitration clause.

The Primary Court judgement was appealed with the argument that the original language used in the arbitration clause did not obligate the parties to refer to arbitration, but rather, was an optional method for dispute resolution. The Appeals Court accepted the appeal argument and remanded the case to the Primary Court to apply its jurisdiction and rule on the merits of the dispute.

The party arguing that the arbitration clause was obligatory challenged the ruling of the Appeals Court before the Federal Supreme Court on the basis that it had submitted a translation of the arbitration clause from English to Arabic, provided by a judicially certified legal translator, to the court which evidenced that the arbitration clause was obligatory.

The Federal Supreme Court ruled that the judgement of the Appeals Court was unfounded as it did not debunk the translation presented by the party advocating for the obligatory language of the arbitration clause.

The Federal Supreme Court found that the Appeals Court could have ordered the appointment of a language expert from the respective expert registry, or the party advocating for the courts' jurisdiction could have submitted a counter-translation evidencing that the arbitration clause was indeed optional. Neither of these potential procedures had occurred.

The Federal Supreme Court overturned the Appeals Court judgement.

But what if the Appeals Court of its own accord or by litigant’s request ruled for the requirement of a court-appointed language expert to opine on the English text of the arbitration clause?

Or what if the party advocating for litigation had submitted a translation by a judicially certified translator that arbitration clause was optional?

In both hypotheticals; the result would have been an even further prolongation of the dispute and an increase in costs.

The moral of the case is the importance of clear and effective arbitration clauses (or agreements); that include the seat of arbitration, number and selection of arbitrators, institutional or ad hoc, governing law of the subject matter in dispute and possibly governing law of the arbitration agreement (if different), capacity to agree to arbitration, the authority to sign arbitration agreements, multiple party arbitration, enforcement, opt-in and opt-out provisions (although they may be problematic), sovereign immunity if a party to the transaction is a State, scopes of disputes covered, and other matters.

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