
RELIANCE ON ARBITRATION CLAUSE

Background

Purchaser signed a Reservation Agreement for purchase of a Unit. Subsequently the Sale Purchase Agreement ("SPA") was provided to the Purchaser (which was not executed), however the Purchaser denies receipt of the same as per his Memorandum of claim. The SPA contains an arbitration clause specifying that any dispute under the SPA will be referred to arbitration ("Arbitration Clause").

The Reservation Agreement did not contain any arbitration clause. Although it was envisaged at the time that the SPA between the Purchaser and the Developer would be executed at a later stage, this never materialized and accordingly the Reservation Agreement remained the only contract between these two parties.

Although Developer executed the Reservation Agreement, the terms of the SPA were never officially transmitted to the Purchaser and the Purchaser was never informed of the existence of the Arbitration Clause in the SPA.

The question is:

- (a) whether the Arbitration Clause contained in the SPA would be applicable to the dispute arising out of the termination of the Reservation Agreement between Purchaser and the Developer;
- (b) whether Purchaser and/or Developer could rely on the Arbitration Clause to submit the dispute to arbitration in Dubai;

Analysis

Although UAE Law does not specifically refer to "incorporation by reference", the UAE Civil Procedure Code allows the parties to a contract to "generally stipulate in the basic contract or by a supplementary agreement that any dispute arising between them in respect of the performance of a particular contract" to be referred to arbitration. There is a restriction on the form of an arbitration agreement under UAE Law in that for example the arbitration agreement must be clearly evidenced in writing. Further Dubai courts would also require the clear intention of the parties to subject themselves to arbitration, rather than the jurisdiction of the courts.

The Purchaser did not return the signed SPA to the Developer and therefore had not been made aware that the Arbitration Clause was part of such contract. Further the

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Reservation Agreement DOES NOT state the intention of the parties to be bound both by the specific and the general terms of the SPA.

Since the Reservation Agreement was executed prior to the SPA, at least the key terms of the SPA (including the Arbitration Clause) would need to have been agreed upon, whether in writing or orally by Purchaser and Developer by the time of the execution of the Reservation Agreement in order to allow incorporation by reference under UAE Law.

Hence, although it cannot be determined conclusively whether it was the intention of the parties to be bound by the Arbitration Clause in the SPA, particularly in light of the fact that the SPA was not executed, in order to resist a referral to arbitration Purchaser will show that no arbitration clause was mentioned in the Reservation Agreement which would reflect the intention of the parties at the time of its execution, because the Purchaser was not aware of the key terms of the SPA nor was provided with the same at the time of execution of the Reservation Agreement. The chances of success of such an argument by Purchaser would, however, be significantly higher if supported by evidence that the SPA including the Arbitration clause was not in existence at the time of the execution of the Reservation Agreement.

Therefore neither party will be able to rely on the arbitration provision, as the mutual intention of the parties is required for the existence of a valid and enforceable arbitration provision was lacking.

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