

INTERNATIONAL JOURNAL OF ARAB ARBITRATION



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A review of the law in the United Arab Emirates regarding the exceptional nature of arbitration agreements

**By Jennifer Paterson, Mohammad Rwashdeh,
Catherine Jordan and Sholto Hanvey***

1. Introduction:

Consistent with historic practice, the general approach in the United Arab Emirates (the "UAE") continues to be that an arbitration agreement is an exceptional arrangement whereby contracting parties agree to resolve disputes by arbitration rather than by litigation through the national courts. The exceptional nature of such an arrangement presents certain threshold issues relating to capacity/authority and the enforceability of an arbitration agreement.

More specifically, under UAE law, an individual may generally only bind a company to arbitration, by signing an arbitration agreement on behalf of the company, if he/she has legal capacity and specific authority to do so. A signatory's lack of capacity/authority to bind a company to arbitration is often the basis for challenging the validity of an arbitration agreement and seeking to annul an arbitral award rendered pursuant to such an agreement. If the signatory was not properly authorised, the arbitration agreement may be invalid, and any award made pursuant to such an agreement may be annulled. It is therefore important to fully understand the legal requirements for entering into an arbitration agreement and to ensure that clear and precise drafting is used when delegating powers.

This article explores the different approaches to arbitration agreements under onshore UAE law and in the offshore financial free zones, the Dubai International Financial Centre (the "DIFC") and the Abu Dhabi Global Market (the "ADGM"). It also describes the instances where UAE law grants certain individuals the legal capacity to act on behalf of a company and authority to bind a company to arbitration, without the express inclusion of this right in the company's constitutional documents or a power of attorney ("POA"), and the requirements of a valid POA under UAE law.

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2. Special authority is required to enter into arbitration agreements:

Under onshore UAE law, an arbitration agreement is generally considered an exceptional arrangement. This has been confirmed repeatedly by the onshore UAE Courts, including by the Dubai Court of Cassation in Case No. 304 of 2019/Commercial and, more recently, by the Abu Dhabi Court of Cassation in Case No. 922 of 2020/Commercial, in which the court confirmed that arbitration is considered a "*departure from conventional litigation before courts of law*."¹ Given that arbitration is considered as an exception to the default position of litigation before the national courts, the court held that arbitration agreements must "*be construed within the narrowest limits*" and the parties' intention to arbitrate must be "*clear and explicit and free from ambiguity and doubt*."

Consequently, any submission to arbitration requires the signatory to have legal capacity and special authority to do so. Article 58(2) of Federal Law No. 11 of 1992 Concerning Civil Procedure as amended (the "**Civil Procedures Law**") states that no submission to arbitration or waiver of a right (for example, to litigate) may be made without special authority: "[n]o admission or waiver of a right alleged or settlement or submission to arbitration [...] or any other disposition in respect of which the law requires special authorisation may be made without special authority."

This requirement has been interpreted to mean that the power to agree to arbitration as a method of dispute resolution cannot be delegated without special authority to that effect. Abu Dhabi Court of Cassation Case No. 922 of 2020 establishes that such special authority must be in writing, in addition to being clear and free from ambiguity or doubt.

Article 4(1) of Federal Law No. 6 of 2018 Concerning Arbitration (the "**Arbitration Law**") further provides that: "[a]n Arbitration Agreement may only be concluded by a physical [natural] person who has the legal capacity to act or by the representative of the juristic person authorised to conclude the Arbitration Agreement, or otherwise the Agreement shall be null and void."

Statutes (for example, the commercial companies law of the UAE, which is described in further detail below) govern the question of who has legal capacity to act on behalf of a company, which is usually reflected in that company's constitutional documents.

If the signatory to an arbitration agreement does not have the capacity to act, or the requisite authorisation to enter into arbitration agreements pursuant to Article 4 of the

1. It is worth noting that there is no system of binding precedent in the UAE. Whilst onshore Court of Cassation judgments are persuasive and their established general principles may be binding, each case will be determined on its merits and particular facts; therefore, there is no guarantee that the decisions considered in this article will be followed in subsequent proceedings.

Arbitration Law, a party may seek to annul any arbitral award subsequently rendered pursuant to that arbitration agreement. Article 53(1) of the Arbitration Law provides (in relevant part) that, for an arbitral award to be annulled, a party must prove one of the following:

- "a- There was no Arbitration Agreement, or such agreement was null and void, or forfeited pursuant to the Law chosen by the Parties, or according to the present Law if no reference is made to a certain law.*
- b-A party was, at the time of conclusion [of] the Arbitration Agreement, incapacitated or lacking capacity according to the Law governing his legal capacity.*
- c-A party has no legal capacity to act in [assert] the disputed right, according to the law governing his legal capacity, set out in Article 4 of the present Law."*
[Emphasis added.]

Further, Article 8 of the Arbitration Law makes clear that a court should dismiss a dispute subject to an arbitration agreement (if the defendant invokes the arbitration agreement before submitting any request or pleading regarding the substance of the claim), unless the court finds that the arbitration agreement is void and unenforceable (for example, due to a signatory's lack of legal capacity or special authorisation). It is therefore important to ensure that a party representative has legal capacity and is properly authorised to enter into arbitration on behalf of that party. Careful attention to this matter may reduce the risk of challenges to the arbitration agreement, subsequent disputes over jurisdiction, and challenges to the enforceability of any arbitral award.

3. Powers of attorney:

A POA is the most commonly used mechanism in the UAE to evidence that a company has duly authorised a representative of the company to bind it to arbitration. A POA is a legal instrument, which provides one party (the representative) with the authority to act on behalf of - and bind - another party (the principal). The representative may enter into contracts or other legal documents on behalf of the principal, binding the principal to the obligations contained therein, including the obligation to resolve disputes by way of arbitration.

In the UAE, POAs are usually signed before a notary public. The role of the notary public is to verify the identity of the signatory and ensure that such individual is duly authorised by the principal company to delegate powers to another individual. For example, the notary may require the signatory to produce the underlying constitutional documents of the company to ascertain whether the signatory has authority to grant the powers contained in the POA.

If the principal company is a foreign entity, the authorised signatory of the company may execute a POA in the home jurisdiction. However, such POA will need to be notarized and legalized for use in the UAE. A POA that is intended to be used in the UAE must be in Arabic or subsequently translated into Arabic. It may also be bilingual.

In light of the exceptional nature of arbitration agreements, any POA containing the power to enter into arbitration agreements should be carefully drafted to ensure that it clearly and unambiguously identifies the specific authority that has been granted to the representative. In the event of any ambiguity or doubt as to the representative's authority to bind the principal to arbitration, the authority granted under a POA will be narrowly interpreted; and it is likely to be decided that an arbitration agreement entered into pursuant to the POA is not valid and enforceable.

This was recently confirmed by the Abu Dhabi Court of Cassation in Case No. 922 of 2020. In that case, a contractor subcontracted construction works to a subcontractor pursuant to two subcontracts. The subcontracts were signed by the subcontractor's representative, who was acting under a duly notarized POA ("**First POA**"). The First POA granted the subcontractor's representative full power and authority to act on behalf of the subcontractor, yet that authority was stated to be without prejudice to Article 58(2) of the Civil Procedures Law (which, as detailed above, states that no submission to arbitration may be made without special authority). Several years later and after completion of the subcontract works, the subcontractor granted a further POA to its representative ("**Second POA**"), which granted the subcontractor's representative all of the powers of company management and the power to perform the acts described in Article 58(2) of the Civil Procedures Law, including the authority to bind the subcontractor to arbitration. The question before the court was whether the Second POA - which granted the representative the authority to bind the subcontractor to arbitration - ratified the earlier arbitration agreements, which were signed when the subcontractor's representative did not have the authority to agree to resolve disputes by arbitration.

The Court of Cassation confirmed that, at the time of executing the contract, the signatory must have authority to agree to resolve disputes by arbitration, and such authority must be clearly established without any ambiguity or doubt. In other words, it must be plainly and expressly included in any POA issued to the company representative/signatory of the arbitration agreement. The court rejected the argument that the Second POA ratified the earlier arbitration agreements. Although it is possible to ratify an existing arbitration agreement, the court found that there was no such ratification in this case, as the Second POA was granted after the completion of the subcontracts and was only applicable to new agreements.

4. The statutory powers of company directors and managers in onshore UAE:

There are certain instances where a POA is not required, as UAE law provides individuals holding certain positions in a company with the power to bind the company to arbitration. This commentary sets out below what those positions are in respect of the three most common types of companies in the UAE: limited liability companies ("LLCs"), public joint stock companies and private joint stock companies. In general, public and private joint stock companies have similar rules regarding the powers of directors and managers and are thus addressed together, whilst the rules of LLCs are different.

a. Limited liability companies

The formation and governance of commercial companies in the UAE is governed by Federal Law No. 2 of 2015 Concerning Commercial Companies as amended (the "**Commercial Companies Law**"). Pursuant to Article 83(1) of the Commercial Companies Law, the management of an LLC will be *"undertaken by one or more Managers as determined by the partners in the Memorandum of Association."*

The manager of an LLC is responsible for the day-to-day management of the company and therefore has relatively wide statutory powers. Pursuant to Article 83(2) of the Commercial Companies Law, unless the manager's powers are restricted contractually or in the company's memorandum of association, *"such Manager shall be authorised to exercise full powers to manage the Company and his acts shall be binding to the Company, provided that the capacity of [the] Manager is stated upon doing such acts."*

Accordingly, as a general rule, the manager of an LLC is considered to have full authority to carry out the affairs of the company. Therefore, provided that the individual makes clear to third parties that they are acting in their capacity as manager of the LLC, he/she has the authority to enter into binding legal contracts containing arbitration agreements on behalf of the company. There is no requirement for this power to be included within the company's constitutional documents.

This was confirmed by the Dubai Court of Cassation in Case No. 1259 of 2020/Commercial. In this case, the general powers of the manager of an LLC were identified in the company's memorandum of association. However, the manager's authority to bind the company to arbitration was not expressly mentioned in that document, and no POA containing such authority was executed. It was argued that the arbitration agreement between the parties was invalid, as the company's manager, who had signed the arbitration agreement, was not expressly authorised to do so. The Court of Cassation held that the manager of a LLC is the legal representative of the company, with full authority

and capacity to manage and conduct the company's affairs, unless such authority is expressly restricted. As the company's memorandum of association did not restrict the manager's authority to bind the company to arbitration, the arbitration agreement signed by the manager was valid and legally binding.

In a case dealing with the same issue, the Abu Dhabi Court of Cassation arrived at the same conclusion. In Case No. 597 of 2020/Commercial, one of the parties argued that the manager of an LLC does not have the power to agree to arbitration, unless he/she has obtained specific authorisation from the company's shareholders. The court dismissed this argument and held that managers of an LLC have the requisite authority to bind a company to arbitration, provided that such authority is not specifically and expressly restricted. Any restriction of the powers of a manager of an LLC must be specific and should be incorporated in the company's constitutional documents (such as the memorandum of association) or set out in the manager's contract of appointment.

These cases clearly establish the power of a manager of an LLC to bind the company to arbitration without any further special authorisation.

b. Public and private joint stock companies

The management structure of private and public joint stock companies ("PSJCs") differs from that of an LLC, in that management is carried out by an elected board of directors rather than by one or more managers.

The default position under UAE law is that specific authorisation is required before the board of directors can bind a public joint stock company to arbitration. This also applies to private joint stock companies, pursuant to Article 265 of the Commercial Companies Law, which states that unless specifically provided otherwise, all the provisions of the law concerning public joint stock companies shall apply to private joint stock companies.² Article 154 of the Commercial Companies Law (which is identical to the now repealed Article 103 of the previous companies law³) provides that the board of directors of a PJSC does not have the automatic power to enter into certain types of agreements on behalf of the company, which includes arbitration agreements. The board of directors of a PJSC may, however, be specifically provided with the authority to bind the company to arbitration. This authority may be granted under the company's articles of association or by specific resolution issued by a general assembly of the shareholders.⁴

2. With the exception of the provisions relating to public subscriptions.

3. Federal Law No. 8 of 1984 Concerning Commercial Companies.

4. The board of directors may not delegate its authority to bind the company to arbitration unless expressly authorised to do so (in the company's articles of association or the specific resolution of the shareholders).

This position has been confirmed by various Court of Cassation judgments. For example, in Dubai Court of Cassation Case No. 670 of 2017/Commercial, it was argued that the arbitration agreement in question was invalid, as it was signed by an individual who did not have the capacity to bind the private joint stock company to arbitration for the following reasons:

1. the signatory's authority to enter into arbitration agreements was not specified in the company's articles of association;
2. entering into the arbitration agreement was not by its nature within the objectives of the company; and
3. the signatory was not authorised by a general assembly of the company to enter into arbitration agreements on behalf of the company, and a POA to the same effect had not been granted.

The Court of Cassation concluded that the arbitration agreement was entered into by a person without the capacity to bind the company and was therefore void and unenforceable.

A similar conclusion was reached in Dubai Court of Cassation Case No. 182 of 2018/Commercial, where the court found that a private joint stock company could not be bound to arbitration in circumstances where the director who signed the arbitration agreement was not authorised to do so, whether by the company's constitutional documents or by a resolution of the general assembly.

These cases clearly establish that signatories to agreements intended to bind PJSCs to arbitration require specific authorisation, either in the constitutional documents, by resolution of the general assembly of the company, or by way of POA, to enter into such agreements. If the signatory to an arbitration agreement on behalf of a PJSC does not have the requisite authority to bind the company to arbitration, it may be considered void, and any arbitral award rendered thereunder may be unenforceable. The fact that the parties may proceed with arbitration does not remedy the fact that the signatory to the arbitration agreement lacked authority and will not be considered a waiver of a party's legal right to seek an annulment of any arbitral award rendered.

5. Implied or apparent authority:

Given that specific authority is required to bind a company to arbitration, the UAE Courts have consistently denied the application of the doctrine of apparent authority. For example, in Dubai Court of Cassation Case No. 182 of 2018/Commercial, the court expressly

Any express authority to delegate the board's power in this respect must again be clear and unambiguous.

stated that the doctrine of apparent authority does not apply to cases in which the validity of an arbitration agreement is in question. It was held that "[t]he doctrine of apparent authority is inapplicable in the context of an agreement to arbitrate as the parties are required to verify each other's capacity and competence to enter into such agreement; as this agreement entails a waiver of [the] right [to file] legal proceedings before the courts."

However, the Abu Dhabi Court of Cassation recently adopted a different approach in Case No. 961 of 2021/Commercial. In that case, a party applied to annul an arbitral award on the basis that the signatory of the arbitration agreement (the company's CEO) was not an authorised signatory of the company and did not have explicit authority to agree to arbitration. Despite the long-standing approach taken by the UAE Courts in this regard, the court held that the facts of the case contributed to the establishment of an implicit or apparent authorisation of the signatory to enter into the arbitration agreements on behalf of the claimant company. Notwithstanding the absence of specific authority to bind the company to arbitration, the Abu Dhabi Court of Appeal and Court of Cassation both considered that the parties' transactions under the subcontracts, and the fact that the claimant company communicated with the signatory CEO in relation to those transactions, was evidence that the claimant company had authorised the signatory CEO to enter into, and intended to be bound by, the arbitration agreements. In reaching this conclusion, the Court of Cassation relied upon Article 4 of the Arbitration Law and held that the authorisation of the signatory to enter into the arbitration agreement can be explicit or implicit. Where the authorisation is implicit, it can be inferred from the facts, written statements and course of conduct between the parties. The Court of Cassation further held that the applicant had failed to establish any of the grounds for annulling an arbitral award set forth in Article 53 of the Arbitration Law.

It remains to be seen whether Case No. 961 of 2021/Commercial marks the beginning of a change in approach of the onshore UAE Courts, from the strict position historically adopted in favour of an increased willingness to consider whether implied or apparent authority exists.

6. Offshore Jurisdictions:

a. Authority to enter into arbitration agreements

A different approach applies in offshore UAE regarding the determination of whether a party representative has authority to enter into arbitration agreements on behalf of a company.

Article 3(2) of Federal Law No. 8 of 2004 Concerning Financial Free Zones provides that the financial free zones shall be exempt from the application of civil and commercial

federal laws. Accordingly, the Arbitration Law and Civil Procedures Law, which generally apply to arbitrations onshore, do not apply to arbitrations seated in the financial free zones of the DIFC or ADGM (unless the parties agree otherwise).

Both the DIFC and ADGM have their own arbitration laws, DIFC Law No. 1 of 2008 as amended (the "**DIFC Arbitration Law**") and the ADGM Arbitration Regulations 2015 (the "**ADGM Arbitration Regulations**"), which govern arbitrations seated in those jurisdictions.

The DIFC Arbitration Law and ADGM Arbitration Regulations are based upon the UNCITRAL Model Law and generally reflect international standards in arbitration. Article 12 of the DIFC Arbitration Law and Article 13 of the ADGM Arbitration Regulations set out the requirements for a valid arbitration agreement, and neither stipulate the requisite capacity or authority of a signatory to enter into such agreement. Accordingly, as with the approach adopted in other common law jurisdictions, no special authorisation or express power is required before a party representative may enter into an arbitration agreement on a company's behalf in the DIFC or ADGM.

In the case of *Ginette and Geary* [2016] ("**Geary**"),⁵ the DIFC Court of Appeal considered the apparent authority of a party representative to bind a company to arbitration through the lens of Article 41 of the DIFC Arbitration Law. Article 41 sets out the limited grounds on which an arbitral award rendered in the DIFC may be set aside by the DIFC Court, stating, in relevant part, that:

"[a]n arbitral award may be set aside by the DIFC Court only if:
(a) the party making the application furnishes proof that:
(i) a party to the Arbitration Agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication thereon, under the law of the DIFC;" [Emphasis added.]

By way of background, the parties to the case had entered into a settlement agreement in relation to various outstanding payments and disputes between them. The settlement agreement was expressly stated to be governed by UAE law and contained an arbitration agreement, providing for arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, seated in the DIFC. Arbitration proceedings were commenced in the DIFC, leading to the issuance of an award in favour of the respondents.

The claimant (a private joint stock company incorporated onshore in the UAE) sought to set aside the award on the basis that the signatory to the settlement agreement, the claimant's Executive Managing Director ("**Director**"), did not have authority to enter into the

5. *Ginette PJSC v. (1) Geary Middle East FZE and (2) Geary Limited* [2016] DIFC CA 005.

arbitration agreement, pursuant to either statute or the company's constitutional documents. The DIFC Court of First Instance and Court of Appeal held that, as the seat of the arbitration was the DIFC, the law governing the validity of the arbitration agreement was DIFC law, and that even if the Director lacked actual authority, the arbitration agreement was binding under the principle of apparent authority.

The Court of First Instance found that despite the absence of express authority to enter into arbitration, the Director had held himself out as having the requisite authority and was therefore deemed to have "*apparent authority*" pursuant to Articles 130 and 131 of DIFC Law No. 6 of 2004 Concerning Contract Law:

"Apparent authority

130. Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's conduct towards such third persons.

Creation of apparent authority

131. Except for the conduct of transactions required by statute to be authorised in a particular way, apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him. [Emphasis added.]

It was stated that the company's conduct had caused the parties to believe that the company consented to the Director signing the settlement agreement, and therefore the arbitration agreement, on its behalf. This suggests that if a representative holds himself out as being authorised to sign an arbitration agreement, and is believed, the company may be bound by his actions. As noted above, this is a markedly different approach from the position that has been historically adopted by the onshore UAE Courts.

The DIFC Courts in *Geary* also considered the application of UAE law and, in particular, Article 58(2) of the Civil Procedures Law, to the facts of the case. It was expressly noted by the Court of Appeal that the signatory to the settlement agreement did not have special authorisation to enter into the arbitration agreement on behalf of the company, pursuant to Article 58(2) of the Civil Procedures Law. Notwithstanding this observation, the court considered that the Director had authority to enter into the underlying settlement agreement and, as a result, had "*authority to commit the appellant to the arbitration agreement in clause 18 [of the settlement agreement] as one of its provisions.*"

This can be clearly contrasted with the position of the onshore UAE Courts. In Dubai Court of Cassation Case No. 621 of 2018/Commercial, the claimant, an onshore LLC, filed a

claim before the Dubai Courts against two defendants, also both onshore LLCs, seeking to circumvent the arbitration agreement. The defendants argued that the Court of First Instance lacked jurisdiction due to the arbitration agreement between the parties. The Court of First Instance rejected this argument on the basis that the signatory to the arbitration agreement, on behalf of the claimant, was its sales manager, who did not have special authorisation from the manager of the claimant LLC. Therefore, he had no capacity to bind the claimant LLC to arbitration. This ruling was upheld by both the Court of Appeal and the Court of Cassation. The Court of Cassation held that, whilst the signatory to the arbitration agreement had authority to enter into the underlying contract between the parties, such authorisation did not extend to the agreement to arbitrate contained therein. Consistent with the ruling of the Abu Dhabi Court of Cassation in Case No. 922 of 2020, the court confirmed that special and express authorisation was required for the signatory to bind the company to arbitration.

In circumstances where the seat of the arbitration is specified as the DIFC (or ADGM), notwithstanding the DIFC Courts' application of the doctrine of apparent authority, the onshore UAE Courts' approach may still be relevant, and signatories to arbitration agreements providing for arbitration seated offshore may still require special and express authority, despite the fact that this is not required by the law of the seat. Where such authority is not provided, there is a greater risk that a party may challenge the validity of the arbitration agreement in the onshore courts, in an attempt to circumvent the arbitration proceedings, and/or that the onshore UAE Courts may not enforce any arbitral award rendered pursuant thereto.

When considering whether a special POA may be beneficial, one important factor is the location of the counterparty's assets in circumstances where the enforcement of a favourable arbitral award is required. If the counterparty's assets are found in onshore UAE, but the arbitration is seated elsewhere, the UAE Courts may be less inclined to enforce the relevant arbitral award if the signatory to the arbitration agreement did not have the requisite authority to enter into that agreement on behalf of the company. Dubai Court of Cassation Case No. 613 of 2015 illustrates this risk.

This case concerned enforcement in onshore UAE of an arbitral award issued in London. The parties had entered into a charter party agreement that provided for arbitration seated in London as the agreed forum of dispute resolution. Arbitration proceedings were subsequently initiated, and an award was rendered. The Dubai Court of First Instance recognized and ratified the foreign arbitral award for enforcement against the award debtor, an LLC established in onshore UAE. The award debtor appealed the decision of the Court of First Instance on the basis that the signatory to the charter party agreement did not have special authority to bind the award debtor to arbitration and had executed the charter party agreement as a witness only. Therefore,

the arbitration agreement between the parties was invalid. The Court of Appeal upheld the decision of the Court of First Instance, but the Court of Cassation found in the appellant's favour and agreed that there was no valid and enforceable arbitration agreement. The Court of Cassation held that the signatory to the charter party agreement did not have the requisite authority to execute the arbitration agreement and, as a result, such agreement and the award rendered pursuant to it were invalid and unenforceable in the UAE. The court again made clear that to exclude the parties' rights to resolve any disputes arising between them in court and instead grant jurisdiction to the arbitral tribunal, the signatory to the arbitration agreement must agree explicitly and have the requisite capacity to do so.

In rendering its decision, the court specifically considered its obligations under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") and the limited grounds to refuse enforcement under Article V. The court determined that the signatory's lack of requisite authority to sign the arbitration agreement fell within Article V(a), which provides that a signatory state may refuse to recognize and enforce an award if the parties to the arbitration agreement "were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." [Emphasis added.] The court considered that the "law applicable to" the parties and to the question of the signatory's capacity to bind the appellant company to arbitration was the UAE companies law in force at the time.⁶ The appellant company was able to prove that the signatory was not one of the company's managers and, as such, he did not have capacity to bind the company to arbitration.

As noted above, a signatory's authority should also be considered in circumstances where there is a risk that the counterparty may seek to circumvent the arbitration agreement, notably by alleging before the onshore UAE Courts that the arbitration agreement is invalid under UAE law. If the court accepts that the signatory was not duly authorised to enter into the arbitration agreement, and the court would otherwise have had jurisdiction over the dispute in the absence of a valid arbitration agreement (such as where the defendant is a UAE corporate entity), the onshore UAE Court may seize jurisdiction of the dispute.

Accordingly, even where parties agree to arbitration seated offshore in the UAE or abroad, the requirements for a valid and enforceable arbitration agreement under onshore UAE law may still apply if:

6. Federal Law No. 8 of 1984 Concerning Commercial Companies.

- (i) absent a valid arbitration agreement, the onshore UAE Courts would otherwise have jurisdiction over the dispute; or
- (ii) enforcement of the award is required in onshore UAE.

In any such circumstances, if the requirements under UAE law regarding the authority to enter into an arbitration agreement are satisfied, this will reduce the risk of the onshore UAE Courts seizing jurisdiction of the dispute (should an action be brought before them by either party) or determining during enforcement proceedings that the award is unenforceable in the UAE because it was rendered pursuant to an arbitration agreement that is invalid under onshore UAE law.

b. The statutory powers of company directors and managers

The powers of those in management positions in companies incorporated offshore, in the DIFC and ADGM, are governed by DIFC Law No. 5 of 2018 and the DIFC Companies Regulations 2018 (together, the "**DIFC Companies Law**") and the ADGM Companies Regulations 2015 (the "**ADGM Companies Regulations**"), respectively. Similar to PJSCs, the management of DIFC and ADGM companies is generally carried out by its directors.

The DIFC Companies Law and ADGM Companies Regulations are broadly based on English law and grant directors wide powers to manage the affairs of the relevant company. These general statutory duties of directors (such as the duty to act in accordance with the company's constitution, to act within their powers, and to exercise reasonable skill, care, and diligence) can be supplemented in the company's articles of association, the documentation by which the directors are appointed, and the other constitutional documents of the company. The powers of the directors of companies incorporated in the DIFC and ADGM may therefore be restricted or extended as the company desires, and the statutory obligation for directors to act within their powers means that they must only use their powers for the purposes for which they have been conferred.

Accordingly, whether a director has authority to act on behalf of the company and to bind it to arbitration will depend upon the director's powers as stipulated in the company's constitutional documents and their documents of appointment.

However, the DIFC Companies Law and ADGM Companies Regulations generally work to protect and uphold the decisions made by company directors, provided that they are not contrary to the statutory duties contained therein. For example, Article 20(2) of the DIFC Companies Law provides that "[t]he validity of an act done by a Company shall not be called into question on the ground of lack of capacity by reason of anything in its Articles of Association or by any act of its Shareholders." Article 20(3) states that "a person acting

in good faith when dealing with the Company is not affected by any limitations in its Articles of Association relating to its Directors' powers to bind the Company, or authorise another to bind the Company." [Emphasis added.] Further, according to Article 80, "[t]he acts of a Director of a Company are valid notwithstanding any defect that may afterwards be found in his appointment or qualification."

There is little in the way of case law from the DIFC Courts and ADGM Courts to demonstrate how the offshore courts will approach challenges to the validity of an arbitration agreement due to lack of capacity or authority of a signatory of a company incorporated in the DIFC or ADGM; however, given the approach in *Geary* and the application of the doctrine of apparent authority in the DIFC, it is likely that the offshore courts will seek to uphold the validity of an arbitration agreement concluded under such circumstances.

7. Conclusion:

Recent UAE Court of Cassation judgments, including the judgment from the Abu Dhabi Court of Cassation in Case No. 922 of 2020, have reiterated that the general approach in the UAE remains that arbitration is an exception to the default position of litigation before the national courts and, as such, the parties' intention to arbitrate must be "*clear and explicit and free from ambiguity and doubt*." Accordingly, there are currently strict requirements under onshore UAE law for a valid and enforceable arbitration agreement, and a signatory to an arbitration agreement must have legal capacity and specific authority to enter into that agreement. As the judgments detailed above demonstrate, irrespective of whether the agreement provides for arbitration seated onshore in the UAE, offshore in the UAE, or abroad, if the signatory is not properly authorised, there is a risk that the arbitration agreement may be deemed invalid, and any award rendered thereunder could be annulled. However, as the UAE seeks to affirm itself as an 'arbitration friendly' jurisdiction, there may be a relaxation by the UAE Courts of the strict requirements for entering into arbitration agreements and an increasing reliance upon the doctrines of apparent or implied authority to bind a party to arbitration, similar to the approach taken by the Abu Dhabi Court of Cassation in Case No. 961 of 2021/Commercial.