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Incorporation of Arbitration Clauses by Reference: Recent Developments in Dubai

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The Dubai Court of Cassation, in its recent judgement, DCC 1308 of 2020, explored the effect of incorporation of arbitration clauses by reference. Typically, "*incorporation by reference*" refers to parties agreeing to incorporate arbitral clauses found in separate standard-form agreements ("SFAs") into the agreement between the parties by making reference to the same. Such reference can be specific, where the agreement between the parties refers to the specific clause in the SFA, or general, where the agreement between the parties makes a generic reference to the SFA as a whole without specifying the arbitral clause in particular. The Court of Cassation in DCC 1308 of 2020 held that parties might not necessarily be bound by arbitration clauses incorporated through general reference.

Very few debates in the legal field cut across international jurisprudence in the way as discussions regarding the validity and binding nature of arbitration agreements incorporated by reference. The reasons are clear: in a construction contract for example, parties generally agree to SFAs (such as FIDIC, AIA, etc.) with certain specific modifications. The preference for adopting pre-existing SFAs in a specialized and high contract volume industry is understandable. Such documents have a few distinct advantages, in that they allow parties a sense of fairness and to save time which they otherwise would spend negotiating the contract.

As discussed by the Court of Cassation in DCC 1308 of 2020 and stated above, this practice of adopting pre-existing SFAs also extends to arbitration clauses found in such agreements. Parties agreeing to such arbitration agreements can be certain that a wider gamut of possible disputes would be covered, and that there would be a deemed acceptance of the arbitration clause. Naturally, with incorporation of arbitration clauses through reference to standard form agreements, questions pertaining to validity are bound to arise, especially when truant parties would like to derail the process.

The First Instance Judgment

The dispute related to construction works for 5 villas in Dubai. The parties (respectively, the Employer and the Contractor) had executed an agreement for the said construction works and had made a general reference to incorporate the terms of the 1987 FIDIC Red Book General Conditions of Contract ("FIDIC Red Book"). The FIDIC Red Book is one of the agreements in the suite of

FIDIC documents, which governs different aspects of construction agreements. Clause 67 of the FIDIC Red Book provides a detailed and multi-step dispute resolution process, requiring that all disputes must first be referred to the project Engineer, and if the parties unable to resolve the dispute in that forum, they may then proceed to arbitration under the ICC rules.

The Employer sued the Contractor before the Court of First Instance, Dubai, for over AED 41 million, and VAT and interest. The Contractor objected to the Court of First Instance's jurisdiction by virtue of an arbitration clause present in the abovementioned FIDIC Red Book which was incorporated by reference through a signed agreement between the parties.

This objection was rejected by the Court of First Instance. The Court held that the arbitration clause did not impact the court's jurisdiction. The Court of First Instance held that because there was no specific reference to the FIDIC Red Book arbitration clause in the signed contract between the parties, the agreement between the parties did not contain a valid arbitration clause. It took the position that an arbitration clause contained in another document can be incorporated by reference only through a specific reference to that clause. According to the Court of First Instance, it was necessary that the consent to arbitrate seem obvious from a review of the contract. Unlike a clause concerning arbitration, which the Court of First Instance described as an "exceptional clause", general terms contained in schedules and annexures could be incorporated by general reference.

The Court of Appeal Decision

Aggrieved, the Contractor approached the Court of Appeal, Dubai. The Court of Appeal disagreed with the Court of First Instance and set aside its decision. It held that the arbitration clause was validly incorporated by reference: a general reference to the FIDIC Red Book was sufficient to incorporate a valid and binding arbitration agreement between the parties.

The Court of Cassation Decision

The Employer then applied to the Court of Cassation, which overturned the Court of Appeal's decision, holding that a mere general reference would be insufficient to prove that the parties were explicitly aware of the existence of an arbitration agreement. The Court of Cassation upheld the reasoning of the Court of First Instance.

Comparative Analysis

Because arbitration requires the consent of the parties, the debate around incorporation of arbitration agreement through reference is also an interesting insight into one of the central pillars of arbitration: party autonomy. A final, credible challenge to the incorporation of arbitration clauses through reference depends on the interpretation of the scope of the parties' consent to have their disputes resolved through arbitration instead of local courts. It is important to ascertain by looking at national laws whether, in case of incorporation of an arbitration agreement by reference, a specific reference would be required for a valid and binding arbitration agreement under the New York Convention.

It is interesting to note that the national courts in the UAE have been consistent in their view that, since resolving disputes through arbitration deprives parties access to local courts, arbitration agreements are to be treated as "exceptional arrangements" and, as such, must be clearly drafted. Therefore, parties are generally encouraged to take preemptive steps so as to avoid a situation wherein the arbitration agreement incorporated through general reference is void.

Article II (1) of the New York Convention 1958 ("New York Convention") simply requires Contracting States to recognize an agreement in writing as an agreement to arbitrate. The requirement itself is easy to understand; there is no other method of proving a conclusive arbitral agreement. The UNCITRAL Model Law also does not require a specific reference to the arbitration clause, and a general reference is sufficient. The only requirement of Article 7(2) of the UNCITRAL Model Law is that the contract is in writing and the reference is such as to make that clause part of the contract: see Fouchard Galliard Goldman on International Commercial Arbitration.

The international experience differs across jurisdictions. For example, in *Psichikon Compania Naviera Panama v. SIER* (see footnote 176 of Fouchard Galliard Goldman on International Commercial Arbitration), the French Court of Appeal, owing to a lack of a clear reference, held that the arbitration clause had not been firmly accepted by the other parties. Similarly, the Italian Court of Cassation has underlined the necessity of establishing party consent to adjudicate disputes through arbitration. The Court held that parties had to have knowledge of the arbitration agreement through specific reference to it in the main agreement.

German courts have taken a view that consent may be construed to be implied from relevant international trade usages and conventions, especially when such contracts are widely and typically used in the industry in question, and where such parties have been previously active in the relevant business. A United States court also upheld an arbitration agreement incorporated through general reference to another agreement. The Court stated that parties had "tacitly" agreed to the general terms of the document to which they had referred. This was despite the fact that the plaintiff had never been in possession of those general terms. The Indian Supreme Court has also upheld a printed arbitration agreement annexed to a bill of lading.

In view of the above comparative analysis, it can be concluded that while jurisdictions such as the UAE and Italy place importance on "party consent" while deciding the validity of an arbitration agreement incorporated by reference, it is equally important to recognize practical realities such as the fact that parties involved in such construction agreements are usually active in the industry and are aware of the industry's general practices, as recognized by German and Indian courts.

Conclusion

According to the authors, excessive emphasis on the form by courts in the UAE is antithetical to the concept of party autonomy. Most construction contracts are entered into between sophisticated parties who are well aware of how the detailed suites of contracts work. The argument that a specific reference is required to demonstrate knowledge and, consequently, consent, seems out of sync with the commercial realities of the time. That being said, given the fact that debate over this issue can easily be resolved at the time of drafting, it is essential that commercial parties focus on the arbitration clause whilst negotiating their overall contractual agreements, ensuring that the

arbitration agreement is drafted in clear and unequivocal terms.

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