

Kluwer Arbitration Blog

Conflicting Dispute Resolution Clauses in Related Contracts in the UAE: Which Forum?

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The purpose of a dispute resolution clause is to provide for a process and a forum through which disputes can be resolved efficiently. However, dispute resolution clauses are too often ignored and relegated to the end of contractual negotiations or considered boilerplate provisions without regards to the overall context. Issues may arise from the parties' chosen dispute resolution forum where parties conclude multiple related contracts with conflicting dispute resolution clauses. Efficiency considerations play in favour of having mutual claims arising out of the same fact pattern heard in a single forum although such disputes arise under separate agreements. This is particularly relevant in the context of construction disputes, which frequently involve multiple related contracts and various stakeholders who are not always signatories to the same agreements.

This post reports on a recent decision of the [Dubai Court of Cassation dated 21 April 2021 in Case No. 209/2021](#), which involved claims under two distinct contracts relating to the same transaction but only one of which contained an arbitration agreement. As the arbitration agreement was not binding on all parties, the Dubai Court of Cassation held that the local courts were the proper forum to resolve the parties' dispute "*in the interests of justice*" and to "*avoid contradictory judgments*".

The Background Facts

In this case, a real-estate developer entered into (i) a construction contract for the performance of enabling works for the construction of a tower (the "**construction contract**") and (ii) a separate agreement with a consultant for the provision of engineering, design and supervisory services over the enabling works to be performed by the contractor (the "**consultancy contract**"). The consultancy contract contained an arbitration clause while the construction contract did not.

Following completion of the enabling works, the real-estate developer hired another contractor for the erection works of the tower, but the new contractor faced issues in completing its own works because of inadequate enabling works. Upon the developer's request, a panel of court appointed experts confirmed that both the first contractor and the consultant defaulted on their respective obligations and were jointly liable to pay damages to the developer.

The Judgments

Relying on the experts' opinion, the developer commenced proceedings before the onshore Dubai court against both the contractor and the consultant jointly, seeking damages for the harm suffered as a result of the consultant having mistakenly certified the enabling works as complete when in fact they were not.

The Dubai Court of First Instance (“**Court of First Instance**”) accepted the claim against the contractor but dismissed the case against the consultant for lack of jurisdiction based on the existence of a valid arbitration agreement in the consultancy contract, as was raised by the consultant. This decision is in line with the provisions of Article 8 of the 2018 [UAE Federal Arbitration Law](#), which provides that:

“[t]he Court before which the dispute is brought in a matter covered by an Arbitration Agreement, shall declare the inadmissibility of the action, if the defendant has raised such plea before any claim or defence on the substance of the case, and unless the Court finds that the Arbitration Agreement is null and void or incapable of being performed”.

Nevertheless, upon appeal by the developer, the Court of Appeal overturned the Court of First Instance decision and rejected the jurisdictional challenge raised by the consultant. In reaching its decision, the Court of Appeal stated that:

- (i) A finding of liability on part of the consultant was dependant on a finding of liability on part of the contractor. In other words, to determine whether the consultant was in breach of its obligations under the consultancy contract, it was necessary first to establish a breach by the contractor of its own obligations under the construction contract.
- (ii) In the interests of justice and to avoid contradictory decisions, all related issues, should be determined in one forum.
- (iii) Given that the arbitration agreement in the consultancy contract was not binding upon the contractor, the claims could not all be determined by arbitration, and the proper forum with jurisdiction was the local court.

Upon further appeal by the consultant, the Court of Cassation upheld the Court of Appeal's decision and agreed with the reasoning of the lower court that where disputes related to a transaction that was the subject of multiple but closely related contracts, these disputes should not be divided and determined separately. In circumstances where it was not possible for the whole dispute to be determined by arbitration, the forum with jurisdiction must be the court with original competence. The Court of Cassation also noted, in line with previous decisions, that arbitration under UAE law remains an exceptional means of dispute resolution, and arbitration agreements are to be construed narrowly and cannot bind third parties who have not consented to arbitrate, as have been commented on in some previous posts [here](#).

Commentary

The Dubai Court of Cassation disregarded an express choice of dispute resolution forum in favour of its own jurisdiction. This decision illustrates that a party may find itself having to litigate before the local courts despite having signed a contract with a valid and otherwise binding arbitration clause if the “*interests of justice*” so require. However, the decision is fact specific and should be understood in the light of all the circumstances of the case. In this case, the consultancy contract included the arbitration agreement whilst the construction contract, which was arguably the main underlying agreement, did not. The Court of Cassation may possibly have ruled differently if it was the construction contract that contained the arbitration agreement rather than the consultancy contract or if the issue in dispute was a different one, i.e. if the resolution of the parties’ dispute did not depend on a finding of liability under the construction contract.

This decision is interesting as it highlights the importance of ensuring consistency in the choice of dispute resolution in the context of multiple and distinct but related contracts.

If multiple parties to a construction project wish for all their potential disputes to be determined by arbitration, they should ensure that all related contracts contain compatible arbitration agreements allowing for joinder of additional parties and consolidation of arbitrations. Otherwise, they run the risk of having to litigate before the local courts. In this context, it is noteworthy that, unless contracts are entered into on a back-to-back basis, not all parties will necessarily be aware of the contractual terms entered into by others in relation to the same project and/or one party may not be in a strong negotiating position and therefore not able to impose its preferred choice of dispute resolution forum. It will not always be possible to ensure consistency in the choice of dispute resolution forum across all distinct but related contracts at the outset of a particular project. Once a dispute arises, it remains open to the parties to agree to submit their dispute (or a particular aspect of it) to arbitration by signing a separate submission agreement. Submission agreements that allow parties without pre-existing arbitration clauses to choose to submit a particular dispute to arbitration may possibly remedy the absence of a pre-existing arbitration agreement. In practice, parties may sign a submission agreement while engaged in negotiations for resolution of their disputes or even where a dispute is already being litigated before the courts. In the context of multiple contracts, parties should carefully consider how the submission agreement aligns or conflicts with all concerned agreements to ensure it achieves the desired relationship between all contracts. When negotiating and drafting a submission agreement, parties will have to consider (as with any arbitration clause) whether the arbitration should be administered by an institution or conducted ad hoc, which arbitrations rules are to apply, what the seat of the arbitration and number of arbitrators should be. Once a dispute has arisen, parties have the benefit of understanding the precise issues and amounts in dispute, which will allow them to better tailor the process to best suits their needs.

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