

Kluwer Arbitration Blog

Exercising Jurisdiction in Spite of an Arbitration Clause: UAE Courts' Practice

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The United Arab Emirates (“UAE”) has taken strides in increasingly accepting arbitration as the parties’ chosen dispute resolution mechanism. It is now well established that UAE courts would respect the parties’ agreement on arbitration and uphold valid arbitration clauses. In fact, Article 8(1) of the [Federal Law on Arbitration, No. 6 \(2018\)](#) (“UAE Arbitration Law”) requires the court to dismiss a claim brought before it when the parties have concluded an arbitration agreement and the defendant invokes the arbitration agreement prior to raising any substantive claim or defense.

In spite of all the progress made, UAE courts still disregard the parties’ choice of arbitration in one specific scenario: they appear to exercise jurisdiction over a defendant who has a valid arbitration agreement with a claimant when court proceedings are filed against a number of defendants, which include one or more parties that are not part of the arbitration agreement. The Blog recently published a [post](#) focused on a recent case arising from such practice, *Dubai Court of Cassation No. 209/2021 (dated 21 April 2021)*. This post will examine a different case where the same practice was implemented by the Dubai Courts and highlight the prevalence of this practice by referencing other similar cases.

Case Summary

In a recent case brought before the Dubai Courts, a developer (“Developer”) had concluded a consultancy agreement (“Agreement”) with an engineering consultancy firm (“Engineer”) which contained an arbitration clause. The project subject matter of the Agreement was a hotel. Few years after the completion of the hotel, a fire erupted causing huge losses to the Developer. The latter’s losses were paid by its insurer (“Insurer”), who filed proceedings to recuperate the amounts paid to the Developer.

The Insurer filed proceedings against the three engineers and the three contractors who were involved in the initial construction of the building and in further works to the building. In total, there were six main defendants (there were a number of joined parties as well) and the claim amount exceeded AED one billion.

The Engineer invoked the arbitration clause in the Agreement and challenged the court’s jurisdiction on the argument that the arbitration clause is binding upon the Insurer.¹⁾ Some of the

other defendants invoked the arbitration clauses in their contracts with the Developer as well. The Court of First Instance (“CFI”) issued a preliminary decision rejecting the plea to dismiss the case on the basis of the arbitration clauses. The CFI concluded that the arbitration clause in the Agreement is invalid.²⁾ It then explained that there was no need to examine the arbitration defenses raised by the other defendants as the existence of arbitration clauses in their contracts do not prevent the Dubai Courts from hearing the case as a whole *vis-à-vis* all the defendants.

While the Engineer appealed the decision of the CFI to the Court of Appeal (“COA”), the other parties did not do so. The COA **upheld** the decision of the CFI explaining that when proceedings are filed against more than one party to hold them jointly liable in a dispute that may not be divided, the courts would have jurisdiction in the circumstance where only some of the parties have concluded arbitration agreements while the others have not.

Thereafter, the Engineer challenged the decision of the COA before the Court of Cassation (“COC”) on the basis that the Insurer filed the proceedings against the Engineer and the other defendants on different legal grounds and that the proceedings contain claims which are based on separate contractual relations. Therefore, the proceedings can be divided. The COC dismissed the challenge and upheld the decision of the COA. It adopted the same reasoning and added that the proceedings were filed on the basis of provisions in the Civil Transactions Law no. 5/1985 (“CTL”) which impose joint liability on contractors and the engineers.³⁾ It explained that the proceedings against the Engineer and the other defendants are premised on them designing, executing and supervising the works. As such, they are jointly liable for the compensation due. This renders the claims linked in a manner that requires that they all be heard by the same forum to ensure the proper administration of justice. In this respect, the COC stated that the courts have “*original jurisdiction*” and that arbitration is the exception.⁴⁾ Consequently, the court determined, in *Dubai Court of Cassation No. 1270/2020 (Commercial)* that it has jurisdiction over the entire dispute.

Similar Decisions

The reasoning adopted in the above decisions is very common. In *Dubai Court of Cassation No. 1112/2018 (Commercial)*, the court explained that arbitration is an exceptional route. Hence, when a case is filed against a number of defendants and some of them are not bound by an arbitration clause, the proper administration of justice requires that the proceedings not be divided and the dispute should be heard by the court, which has the “*original*” jurisdiction.

The same logic appears in *Dubai Court of Cassation No. 153/2019 (Commercial)* where the court nullified an award on the basis that it was issued against a number of defendants, of which only one had signed the arbitration clause. Although the award creditor argued that partial nullification could have been granted, i.e. nullifying the award against the non-signatories, the court nullified the entire award.

These court decisions collectively show that the Courts will not exercise jurisdiction over a defendant who has concluded an arbitration agreement even where other defendants have not concluded an arbitration agreement in one instance: when it becomes clear to the courts that the

defendant who has not concluded the arbitration agreement does not have capacity in the proceedings. In other words, that defendant should not have been a party to the proceedings in the first place. (See *Dubai Court of Cassation No. 300/2019 (Real Estate)*).

Analysis

The Dubai courts' approach raises concerns. Some decisions mention that the proper administration of justice necessitates the dispute not to be divided. Other decisions state that the case cannot be divided. Either way, the courts do not provide an explanation as to why a certain dispute cannot be divided or why the proper administration of justice requires that the dispute not be divided. The only common thread is that this scenario usually arises in construction disputes where several parties have participated in the project and the relationships are memorialized in several disparate contracts that are not mutually consistent.

The fact that the Dubai Court of Cassation explained in *Case No. 1270/2020 (Commercial)* that the reason for not dividing the case is the joint liability of the parties based on provisions of the CTL does not provide much consolation for a variety of reasons:

- First, this is a rare occasion where the court has relied on a specific provision of the law to justify its decision. In all other decisions, general statements are made about the need not to divide the dispute or the need for proper administration of justice.
- Second, in relying on the provisions of the CTL, the court did not verify whether these provisions were indeed relevant. It accepted at face value the Insurer's assertions that these provisions are applicable.
- Third, in many such disputes, it will be possible to apportion liability if detailed examination of the facts takes place but the courts seem to be trying to avoid such exercise.

Moreover, this approach is a violation of Article 8(1) and a violation of the freedom of contract principle. The UAE legal system upholds the principle that a contract is the law of the parties. As a result, whatever agreement concluded by the parties cannot, in principle, be amended by the courts or by law. The law may only interfere with the agreement of the parties when there is a need to protect public interest.⁵⁾

The decisions reviewed in this post do not comply with this principle because interfering with the parties' agreement can only be done through the law, i.e. legislation, and not through court decisions. Further, the public interest that is being protected is not clearly identified in the reviewed decisions. One could argue that the public interest is the proper administration of the law but this is not always expressly set out in the decisions. More importantly, the UAE courts should provide detailed reasoning when they decide to exercise jurisdiction over a party that has concluded an arbitration agreement and aim to avoid exercising jurisdiction over parties who have concluded valid arbitration clauses. This requires the courts to very closely examine the facts of the dispute rather than make general sweeping conclusions.

The author of this Blog post has been involved in the case discussed as party counsel.

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References

- ?1 This argument is based on the assignment of right from the Developer to the Insurer, which would lead to the assignment of the arbitration clause.
- ?2 It was held invalid because of the doubt around the signatory's powers to bind the Developer to arbitration.
- ?3 See [Article 880 of the UAE Federal Civil Transactions Law](#).
- ?4 This sentence reflects the courts' view that courts are the default forum for hearing disputes and that as such arbitration is a deviation from that route.
- ?5 See *Dubai Court of Cassation 142/2014 Civil, Dubai Court of Cassation 105/2011 and 106 /2011 (Real Estate)*.

This entry was posted on Tuesday, November 16th, 2021 at 8:47 am and is filed under [Arbitration Agreements, Dubai, Jurisdiction, UAE, UAE Federal Arbitration Law](#)

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