

# Kluwer Arbitration Blog

## Bahrain Court of Cassation Extends Arbitration Agreement to Non-Signatories

Aseel Zimmo (The First Link) · Tuesday, August 20th, 2024

The recent decision by the Bahrain Court of Cassation (“COC”) in Case No. 31 of 2023, issued on 8 January 2024 (“COC Judgment”), marks a significant development in the application of arbitration clauses to non-signatories for Bahrain-seated arbitrations. The case centred on the interpretation of an arbitration clause in a sub-subcontract (“Sub-Subcontract”) and its applicability to the dispute between the main contractor (“Main Contractor”) and the sub-subcontractor (“Sub-Subcontractor”). This ensued after the Main Contractor’s agreement to assume liability alongside the subcontractor (“Subcontractor”) towards the Sub-Subcontractor, as stipulated in the Sub-Subcontract.

In its decision, the COC employed the doctrine of a chain of contracts to ascertain the interconnectedness of the contractual arrangements and extended the arbitration agreement to a non-signatory party, namely the Main Contractor. The COC held that a reference to a contract containing an arbitration clause is sufficient to establish a valid arbitration agreement among the parties, and satisfied the requirement of Article 7 of the [Bahrain Legislative Decree No. 9 of 2015 Concerning Arbitration](#) (“BAL”), which mandates that an arbitration agreement is to be in writing, and can be incorporated by reference to any document that contains an arbitration clause.

### Background of the COC Judgment

The dispute stemmed from an agreement between an employer and the Main Contractor for the provision of services in an electricity generating station. Some of the Main Contractor’s obligations were subcontracted to the Subcontractor, which, in turn, were subcontracted to the Sub-Subcontractor. Upon the cessation of services by the Sub-Subcontractor due to non-payment by the Subcontractor, the Main Contractor agreed to pay any outstanding dues to the Sub-Subcontractor on behalf of the Subcontractor. This agreement was set out in a letter dated 15 May 2018 (“15 May Letter”) issued by the Main Contractor to the Sub-Subcontractor. The Main Contractor also issued a purchase order to Sub-Subcontractor and confirmed that it would pay it on behalf of the Subcontractor in exchange for performance of works under the Sub-Subcontract.

Subsequently, the Main Contractor failed to make the payment to the Sub-Subcontractor leading to the Sub-Subcontractor filing a claim before the Bahrain Court of First Instance (“CFI”) against the Main Contractor and the Subcontractor for the recovery of the unpaid sums. In response, both the

Main Contractor and the Subcontractor challenged the jurisdiction of the CFI on the basis of the existence of an arbitration agreement in the Sub-Subcontract.

The CFI rejected the jurisdictional challenge and ordered the Main Contractor and the Subcontractor jointly to pay the Sub-Subcontractor BHD 47,978.881 in its judgment of 23 August 2022 (“CFI Judgment”). The CFI relied on the 15 May 2018 Letter in deciding that there was no express reference to an arbitration agreement. The CFI Judgment was upheld by the Bahrain Court of Appeal (“COA”) on 31 January 2023 (“COA Judgment”).

### **The COC Judgment**

The Main Contractor and the Subcontractor challenged the COA Judgment before the COC. In the COC Judgment, the COC referred to the doctrine of a chain of contracts which applies when a group of contracts share the same subject matter, and their purpose is to ensure the delivery of one commercial transaction. The COC found that a chain of contracts existed in this case. As the 15 May Letter referred to the Sub-Subcontract, it became a part of a chain of contracts along with the main contract and the subsequent subcontracts according to it. This reference, the COC held, was sufficient for the purposes of Article 7 of the BAL, which requires arbitration agreements to be in writing. Accordingly, the COC allowed the appeal and held that the Bahraini courts have no jurisdiction to hear the dispute due to the existence of an arbitration agreement.

The COC further held that pursuant to the 15 May Letter, the Main Contractor assumed obligations to pay the Sub-Subcontractor on behalf of the Subcontractor under the Sub-Subcontract, and that it does not amount to a novation, as the original obligation of the Subcontractor continues concurrently. To reach this conclusion, the COC applied [Article 351\(b\) of Law No. 19 of 2001](#) (“Civil Code”).<sup>1)</sup> The COC applied Article 351(b) of the Civil Code and held that the 15 May Letter constituted a delegation of the Subcontractor’s obligations to the Main Contractor, which, in the absence of an express agreement, does not qualify as a novation, and therefore, the Main Contractor’s obligations were concurrent with those of the Subcontractor. Accordingly, absent any explicit novation provisions, the original obligations of the Subcontractor persisted concurrently with any new obligations assumed by the Main Contractor, creating a tripartite agreement between the Main Contractor, the Subcontractor, and the Sub-Subcontractor.

The COC further held that the Sub-Subcontractor’s performance of its obligations under the Sub-Subcontract based on the 15 May Letter meant that the Sub-Subcontractor accepted the delegation and the inclusion of the Main Contractor to the Sub-Subcontract. The Main Contractor made payments to the Sub-Subcontractor in accordance with the provisions outlined in the Sub-Subcontract. The Sub-Subcontractor issued its invoices to the Subcontractor, who approved them wholly or partially and sent them to the Main Contractor for payment in accordance with the procedure outlined in the Sub-Subcontract.

According to the COC, the Sub-Subcontractor’s fulfilment of its obligations subsequent to the 15 May Letter signified its acknowledgment of the Main Contractor’s inclusion in the Sub-Subcontract. Since the Sub-Subcontract included an arbitration agreement, the COC was of the view that all the three parties were bound by it.

The COC Judgment was subsequently relied on by the COC in another decision (Case No. 19 of

2023, issued on 6 May 2024) concerning a dispute between the same Main Contractor and the Subcontractor and another sub-subcontractor on the project. In this decision, the COC adopted the same chain of contracts principle to extend the arbitration agreement to the Main Contractor and another sub-subcontractor working on the project.

### **The Arbitration Agreement Under the BAL**

Article 7 of the BAL provides that an arbitration agreement is an agreement between parties to refer their disputes to arbitration, which must be in writing. Further, Article 7 stipulates that an arbitration agreement could be a clause in an underlying contract or contained in a separate agreement. The arbitration agreement can also be incorporated by reference to a contract that contains an arbitration clause, provided that the manner in which the reference is made renders the arbitration clause part of the contract.

The COC recognised that while the 15 May Letter did not create a new contract between the Main Contractor and the Sub-Subcontractor; it extended and shared the Subcontractor's rights and obligations with the Main Contractor, which also included the arbitration agreement between the Subcontractor and the Sub-Subcontractor. Accordingly, the COC was of the view that the Main Contractor was bound by the arbitration agreement in the Sub-Subcontract on the basis that the 15 May Letter referred to the Sub-Subcontract. Based on this reasoning, the arbitration agreement was held to be incorporated by reference, thereby, complying with the requirements of Article 7 of the BAL.

### **Conclusion**

It is noteworthy that the Main Contractor, a non-signatory to the Sub-Subcontract, was seeking that the dispute be referred to arbitration. It would be interesting to consider the COC's view if it was the Main Contractor that was resisting arbitration. Based on the COC's analysis of the law and the facts, the answer should be the same.

Where the parties expressly consented to the contractual obligations in the Sub-Subcontract, as in the COC Judgment, there are grounds to infer that the parties had expressly consented to the arbitration agreement as well.

It remains to be seen how the COC will apply the concept of chain contracts in divergent scenarios, particularly in instances involving novation or delegation by conduct rather than in writing, even if there is no explicit reference to arbitration, as in the 15 May Letter.

The issue of binding non-signatories to an arbitration agreement has been discussed and grappled with by many courts in the region and the world. Traditionally, the Bahraini courts have started with the premise that arbitration is an exception to the default position of litigation before the courts and that only signatories to an arbitration clause can be parties to an arbitration, based on the principle of privity of contracts and the requirement that arbitration clauses be in writing (Bahraini Court of Cassation judgments Nos. 587/2009, 204/2021, 205/2021, 206/2021, 208/2021 and 27/2022). Many judgments were decided on these two principles, where courts did not bind any party to an arbitration except if it had explicitly consented in writing.

The COC Judgment represents a departure from the traditional understanding of the principle that an arbitration agreement is confined to the parties that have signed the arbitration agreement. Traditionally, Bahraini courts have taken the position that an arbitration agreement binds only the parties explicitly named within the agreement and cannot be expansively extended to other parties that the Bahraini courts consider as unrelated to the contract. Consequently, disputes involving both signatories and non-signatories were considered as falling outside the scope of the arbitration agreement. On this premise, Bahraini courts have previously held that non-signatory parties to the arbitration agreement were subject to the jurisdiction of the courts.

However, the COC Judgment represents an inclination to broaden the scope of arbitration agreements to encompass parties not directly part of the original agreement containing the arbitration clause, but are intricately linked to the same commercial transaction. The COC Judgment elucidates the parameters dictating the extension of arbitration agreements to non-signatories within a chain of interrelated contracts. It underscores the principle that while explicit reference to arbitration clauses is preferred, such reference need not be explicit to warrant their incorporation into ancillary contracts.

The COC's interpretation of consent is in line with the suggestion made by Lim and Uson in another [post](#) that:

“[w]e think it is more accurate to refer to a modern approach to consent that is more focussed on facts and more aligned with commercial practice, economic reality and trade usages.”

In comparative jurisdictions, the Dubai Court of Cassation, in a judgment of 30 March 2023, held that an arbitration agreement was valid and enforceable against the assignee; even though the assignment agreement did not make specific reference to the arbitration clause, it was held that the arbitration clause had been assigned to the assignee (Case No.1603/ 2022 (Commercial)). In the past, the Dubai courts were of the view that to incorporate the arbitration agreement by reference, a specific reference to the arbitration clause was needed and an implicit reference to arbitration was not enough (Case No. Appeal 153 of 2011 (Real Estate) issued on 19 February 2012). In the COC Judgment, it was held that the general reference to the Sub-Subcontract, which included an arbitration agreement, would suffice. It is possible that, in the future, the Dubai courts may end up following an approach similar to the COC Judgment.

The COC Judgment serves to bolster the use of arbitration as the preferred mechanism for dispute resolution in Bahrain. It also underscores Bahraini judiciary's commitment to apply internationally recognised legal doctrines such as the doctrine of a chain of contracts and the requirements of written consent in line with the commercial practice, economic reality and trade usages.

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### References

Article 351(b) states that novation is not assumed in a case of delegation; in the absence of an agreement providing for novation, the original obligation continues concurrently with the new obligation.

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