DUBAI COURT OF CASSATION FINDS THAT THE INTERESTS OF JUSTICE CAN OVERRIDE AN AGREEMENT TO ARBITRATE IN CIRCUMSTANCES WHERE A DEPENDENT CONTRACT DOES NOT ALSO PROVIDE FOR ARBITRATION

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SUMMARY

A recent judgment from the Dubai Court of Cassation indicates that the interests of justice may require disputes arising out of separate but related contracts (not all of which contain arbitration agreements) to be determined together by a court, thereby rendering non-binding an otherwise valid and enforceable arbitration agreement.

The Dubai Court of Cassation in Case No. 290/2021 held that disputes arising out of multiple contracts (only one of which contained an arbitration agreement) relating to the same transaction were so closely connected that it was in the interests of justice, and to avoid inconsistent judgments, that the disputes should be determined in one forum. As the arbitration agreement was not binding on all of the parties, it was not possible for the whole dispute to be determined by arbitration. The Court held that the Dubai Court of First Instance was therefore the appropriate forum to resolve the entire dispute. Accordingly, notwithstanding the existence of a valid arbitration agreement in one of the contracts, the Court held that the arbitration agreement was not binding in respect of this dispute.

BACKGROUND FACTS

A developer (Developer) engaged a consultant (Consultant) to provide engineering, design and supervisory services in respect of the work of a contractor (Contractor). The contract between the Developer and the Consultant contained an arbitration clause, but the contract between the Developer and the Contractor did not.

The Developer filed a claim in the Dubai Court of First Instance against the Contractor and the Consultant jointly and severally seeking damages for harm suffered as a result of the Consultant having certified the Contractor's work as being complete, when it was in fact not complete.

The Court of First Instance accepted the case against the Contractor but dismissed the case against the Consultant on the basis of lack of jurisdiction due to the arbitration agreement in the contract between the Developer and the Consultant.

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The Developer appealed the decision to the Court of Appeal, which overturned the judgment, rejected the jurisdictional challenge and remitted the case back to the Court of First Instance to consider the case against the Consultant.

The Dubai Court of Appeal stated that, because the agreement between the Developer and the Consultant included providing design and supervision of enabling work that was carried out by the Contractor, it was necessary to determine whether the Contractor was at fault before it could determine whether the Consultant had breached its obligations. Therefore, in the interests of justice and to avoid contradictory judgments, the Court held that the disputes should be adjudicated in one forum. As the arbitration agreement in the contract between the Developer and the Consultant was not binding on the Contractor, the claims could not all be determined by arbitration. It was held therefore that the forum with jurisdiction was the Court.

The effect of this determination was that the Consultant was obliged to have its dispute determined by the Court and its otherwise valid and enforceable arbitration agreement with the Developer was not binding in these circumstances.

The Consultant appealed the judgment to the Dubai Court of Cassation and argued that the contract between the Consultant and the Developer was separate to the contract between the Developer and the Contractor and that there was no connection between the obligations of the Consultant and the obligations of the Contractor.

The Court of Cassation upheld the judgment of the Court of Appeal. The Court of Cassation agreed with the Court of Appeal's finding that, where the disputes related to a transaction that was the subject of multiple contracts and they were so closely connected that they should not be divided and determined separately, in the interests of justice and to avoid inconsistent judgments, the disputes should be adjudicated by one forum. As the arbitration agreement was only binding on the signatories to the contract containing the arbitration clause, it was not possible for the whole dispute to be determined by arbitration. Instead, the forum with jurisdiction was the court with original competence.

In reaching its conclusion, the Court of Cassation confirmed that under UAE law an agreement to resolve disputes by arbitration is generally still considered an exceptional agreement, and so arbitration agreements are to be construed narrowly and strictly. Moreover, as arbitration agreements are based on the parties' consent, they cannot bind third parties who have not consented.

COMMENT

It is worth noting that the Dubai Court of Cassation's decision in this case turned on a specific set of facts, where the Court considered that one defendant's liability was dependent upon first establishing the fault of the other defendant. In these circumstances, the Court held that the claims should be heard together notwithstanding that they arose out of separate contracts. As the arbitration agreement between the Developer and the Consultant could not bind the Contractor, the Court held that the forum with jurisdiction was the court of original competency.

This decision highlights the importance of drafting construction contracts in light of the terms of any other dependent contracts. If parties wish for disputes to be resolved by arbitration, care should be taken to ensure that all dependent contracts contain compatible arbitration agreements, and, if appropriate, to include language which expressly reflects the parties' intention that related disputes shall be heard together in a single arbitration proceeding, or in concurrent arbitration proceedings with the same arbitral tribunal.

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