

**Reference to the
Arbitration clause in
a FIDIC contract
does not bind
parties to the
Arbitration itself:
UAE Court of
Cassation
Landmark
Judgement**



In a most recent landmark decision, the Dubai Court of Cassation has set a precedent and overturned the Court of Appeals' decision in the Judgment No 1308/2020 as decided on 03rd March 2021. The Court determined that incorporation of the FIDIC Red Book, which contains the General Conditions of Contract for Construction of Building and Engineering Works ("FIDIC Red Book"), by reference into a contract does not automatically bind the parties to the arbitration clause as contained in the FIDIC Red Book. Further, the highest Court of UAE clarifies the applicability of Article 7(2) of the Federal Law No. (6) of 2018 on Arbitration (the "Arbitration Law") in the matters involving the reference of any model contract having an Arbitration clause as a part of a written contract between the parties.

Facts of the case

The dispute between the parties in the present case concerned the construction of a villa.

The dispute involved various other construction-related issues such as variation, site discharge, and termination for convenience. The dispute concerned a sum of about AED 20 million.

The parties had agreed that the contract would be governed by the FIDIC Red Book General Conditions of Contract (FIDIC Red Book). The Red Book contains contract terms for construction work where the Employer is responsible for the design.

Clause 67 of the FIDIC Red Book provides for the settlement of a dispute with the help of Arbitration. It states that if neither party agrees with the engineer's findings, the issue will be submitted to a Dispute Adjudication Board for resolution (DAB). The DAB is composed of one or three individuals chosen jointly by the parties. If neither party accepts the DAB's judgement, the case will go to international Arbitration. The Employer in the present case filed a suit against the contractor before the Dubai Court of First Instance. The Court determined that the Dubai Courts had jurisdiction over the issue and decided in the Employer's favour.

Further, an appeal was filed before the Dubai Court of Appeal wherein the Court overturned the judgment passed by the Dubai Court of First Instance. The Court of Appeal determined

that, because of the arbitration clause contained in the FIDIC Red Book general terms of the contract, the Dubai court had no jurisdiction to exercise over the case.

The Court of Appeal has given the reference of Article 7(2) of the UAE Arbitration Law. The said Article validates the reference of any model agreement or other documents, having an arbitration clause in the written contract, and the reference is such that the clause becomes part of the contract.

Finally, the Employer filed an appeal with the Dubai Courts of Cassation against the decision of the Dubai Court of Appeal.

The issue before the Court.

The main issue raised before the Dubai of Cassation was whether Dubai courts could exercise jurisdiction over the matters which involved the reference to any model contract that includes an arbitration provision as a part of the parties' written contract?

Landmark Ruling by Court of Cassation

The Dubai Court of Cassation has upheld the decision of the Court of First Instance. The Court of Cassation ruled that although the parties, in this case, consented to be bound by the general conditions mentioned under FIDIC Red Book, they disagreed with being bound by the Arbitration clause mentioned therein. It was because neither party's contract included an arbitration clause expressly, nor did it refer to the arbitration clause in the Conditions of FIDIC Red Book.

The Court further reviewed the applicability of Article 7(2) of UAE Arbitration Law and determined that the reference to the FIDIC Red Book Conditions was general. Since there was no explicit reference to the arbitration provision, the arbitration clause was declared unenforceable. Thus, the Dubai Courts were competent to hear the issue.

Concluding Remarks

It is a most welcome judgement for the parties which refers to the model contract as the governing law of their contract in the UAE. If the parties want to arbitrate any issues that exist or may arise out of the agreement, they must expressly state so in the contract. The mere reference to the FIDIC Red Book does not indicate that the parties want to arbitrate their dispute. Contracting parties must exercise caution when including arbitration provisions by reference.

While drafting a contract, referring to a model agreement with an arbitration provision, such as the FIDIC Red Book, may not accurately reflect the parties' intentions. Consequently, there is a possibility that the courts will not uphold an arbitration clause included by reference. It is preferable to avoid referring to other agreements or documents that include arbitration clauses as a means for resolving the dispute.

Please get in touch with us if you want to learn more about the judgment. The purpose of this article is to provide a general overview of the subject. Regarding your situation, you can seek expert guidance.

HHS lawyers and legal consultants specialized in dealing with cases relating to Arbitration. Our Arbitration experts can help you in drafting the Arbitration Agreement. If you wish to draft an Arbitration Agreement without any error, don't hesitate to contact us.