Landmark Judgment on the Extension of Arbitration Agreements to Non-Parties through Indirect Claims in Jordan

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The Economic Chamber of the Amman Court of First Instance issued a groundbreaking judgment addressing the topic of extending arbitration agreements to non-parties through indirect claims.

Case Background

The plaintiff filed a lawsuit against the defendant, demanding a sum exceeding $30 million. In the statement of claim, the plaintiff insisted that they were filing this lawsuit on behalf of Company S, pursuant to the provisions of indirect litigation as stated in Articles 366 and 367 of the Jordanian Civil Law.

Article 366: (1) Every creditor, even if their right is not due for performance, may pursue all the rights of their debtor, except for those related to their person or unattachable. (2) The creditor's use of the debtor's rights is only accepted if they prove that the debtor has not exercised these rights and that their neglect is likely to lead to their insolvency. The debtor must be included in the lawsuit.

Article 367: The creditor is considered a representative of their debtor in exercising their rights, and any benefit

resulting from the exercise of these rights enters the debtor’s assets and serves as a guarantee for all their creditors.

Parties Involved and Contractual Relationship

The plaintiff clarified that the defendant, Company P, had previously entered into a construction contract with Company S for the purpose of building a structure. In line with the contract and to fulfill its obligations, Bank A, at the request of Company S, issued two guarantees in favor of the defendant, Company P, as follows:

- A performance bond worth approximately $20 million.
- An advance payment guarantee worth approximately $11 million.

Despite Company S fulfilling its obligations and handing over the project to the defendant, the latter allegedly unjustly liquidated the aforementioned guarantees by requesting the issuing bank to do so, and subsequently appropriated the stated amount.

Plaintiff’s Demand

As a result, the plaintiff demanded the reimbursement of the guarantee amounts that the defendant company had seized for the benefit of Company S.

Arbitration Clause in the Construction Contract

The court noted that the construction contract connecting Company P and Company S included the latter’s obligation to issue an advance payment guarantee and a performance bond. The agreement also defined the scope of each party’s obligations and rights.

The agreement stipulated that any dispute or conflict not resolved within forty days after submitting the dispute notice, whether a dispute meeting was held or not, should be

referred to arbitration according to the provisions detailed in the contract (the “Provisions”). The arbitration would take place before a tribunal consisting of three arbitrators: one appointed by the employer, another by the contractor, and a third appointed by the appointed arbitrators in accordance with the Provisions. The arbitration venue would be in the country, and the arbitration language would be English. Both parties would waive any right to appeal before any court in any jurisdiction to the extent that such waiver could be properly made.

The arbitration rules were to be in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

Indirect Litigation and Plaintiff’s Position

The court highlighted in its judgment that the plaintiff did not file the lawsuit in their personal capacity, but rather relied on the rules of indirect litigation, in accordance with Articles 366 and 367 of the Civil Law. The plaintiff confirmed that the lawsuit aimed to return the claimed amounts to Company S’s general guarantee, and explicitly stated that they were filing the lawsuit on behalf of Company S.

The court pointed out that the Jordanian legislator regulated indirect litigation as a means to ensure that a creditor has the right to file a lawsuit on behalf of their negligent debtor before the latter’s debtor, thereby increasing the general guarantee and collecting the rights that the negligent debtor fails to exercise.

Plaintiff’s Role in Indirect Litigation

The court then concluded that, given the plaintiff’s position in the lawsuit, the requirements of direct litigation, according to the explicit text of Article 367 of the Civil Law, imply that the plaintiff in direct litigation only claims the rights of their debtor on their behalf.

The court continued that, since the plaintiff in direct litigation legally represents their debtor, it follows that the defendant (the debtor's debtor) has the right to invoke all legal defenses against the plaintiff that they possess against the debtor.

Legal Subrogation and Arbitration Clauses in Jordanian Courts

The court based its opinion on what was stated by Dr. Abdul Razzaq Al-Sanhouri:

"The effects of the indirect claim are all centered on the basic idea of the creditor representing the debtor, as previously mentioned, and the representation here is a legal one…"

(Dr. Abdul Razzaq Al-Sanhouri, Mediator in the Explanation of Civil Law, Volume 2, General Theory of Obligations: Evidence – Effects of Obligations, Revival of Arab Heritage House, Beirut, p. 269)

The court concluded that the concept of legal representation stipulated in Articles 108-115 of the Civil Law is required in the relationship between the representative and the debtor. The latter can assert before the representative all the conditions or qualities surrounding his obligation when facing the principal. Naturally, this applies to the arbitration clause as well.

The court cited Dr. Fathi Waly's as well in its reasoning:

"If there is a substitution in the obligation, the substitution includes the arbitration clause. Thus, if a third party fulfills the debt and replaces the creditor who has satisfied his claim against the debtor, this third party, whether by law or agreement between them and the creditor or debtor, is bound by the arbitration agreement between the creditor and the debtor. They replace the creditor in this agreement when they claim their right against the debtor,

replacing the creditor’s right.”

(Dr. Fathi Waly, Arbitration Law in Theory and Practice, First Edition 2007, Knowledge Foundation, Alexandria, pp. 167-168)

The court also quoted Dr. Waly as follows:

“Applying this, it has been ruled that the arbitration clause in the subcontract between the main contractor and the subcontractor regarding disputes related to the execution of the contract extends to any dispute concerning the claim for the work executed under the contract, including the subcontractor’s claim against the main contractor for what is due in his account to the employer.”

(Dr. Fathi Waly, Mediator in National and International Commercial Arbitration, Knowledge and Practice, Part One, Arab Renaissance House, Cairo, 2021, p. 292 and following)

And concluding reference to Dr. Waly the court cited:

“There is no problem if one of the parties in the two contracts claims against the other party in the other contract through an indirect claim, and the other contract includes an arbitration clause. In this case, the creditor is using their debtor’s right arising from a contract that includes an arbitration clause, and the creditor is bound by this clause, which limits their debtor’s right.”

(Dr. Fathi Waly, Mediator in National and International Commercial Arbitration, previous reference, p. 317)

The Court’s Response to Plaintiff’s Objections

The plaintiff raised objections regarding the arbitration clause, asserting that it should be in writing and agreed upon exclusively by the contracting parties. The court agreed with the plaintiff and highlighted the requirement of the arbitration clause being in writing, as decided by the legislator and the Court of Cassation in various instances.

The court confirmed that the arbitration clause under consideration was explicitly stated in the construction contract between Company S and Company P.

Furthermore, the court emphasized that in an indirect claim, such as the one at hand, the plaintiff represents its debtor, in this case, Company S. Consequently, the arbitration clause that governs this case is the one between Company S and the defendant, Company P. The court also verified the existence and validity of this clause.

In addition to reviewing research on extending arbitration clauses, the court referred to judicial decisions issued by the Court of Cassation that determined the extension of arbitration clauses in other cases.

Ultimately, the court dismissed the claim on the basis that jurisdiction lies with an arbitration tribunal subject to the arbitration agreement between Company S and Company P.

Significance of the Judicial Precedent

This case serves as a groundbreaking judicial precedent in Jordanian courts, marking the first instance where the effect of an arbitration clause in a contract is extended to parties other than the original signatories. This innovative approach allows for the activation of arbitration clauses for non-signatories to the arbitration agreement in specific cases, provided that strict rules are followed.

Ultimately, this Jordanian court case highlights the importance of understanding the potential implications of arbitration clauses in construction contracts and the possibility of extending their effects to non-signatory parties under certain circumstances.

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