

Kluwer Arbitration Blog

Referral of a Dispute to the Engineer: A Question of Admissibility as per the Dubai Court of Cassation

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In a [judgment](#) issued by the Dubai Court of Cassation (“COC”) on 8 June 2023 (Dubai Court of Cassation No. 1514/2022 Commercial), the COC confirmed that the condition precedent of referring the dispute to the engineer prior to filing arbitral proceedings is an issue pertaining to admissibility, not jurisdiction. The same judgment also provided insight on two other points: the awarding of legal costs by a tribunal seated in the United Arab Emirates (“UAE”) and the consequences of parties not paying the advance on arbitration costs. This blog post provides an overview.

Conditions Precedent

The respondent filed for the annulment of an award rendered in an arbitration governed by the Dubai International Arbitration Centre (“DIAC”) Rules raising three grounds, all of which were rejected by the COC.

According to the respondent, the dispute had not been referred to the engineer in line with Clause 67 of the contract concluded between the parties.

The COC dismissed the argument explaining that “preconditions to arbitration” such as referral of the dispute to the engineer are “questions of admissibility” not “questions of jurisdiction.” The COC even quoted the two terms in English, perhaps in order to emphasize the distinction. As such, the non-fulfillment of any such condition does not deprive the tribunal of its jurisdiction or confer jurisdiction to the courts, but simply postpones the hearing of the dispute in arbitration until the required conditions have been met. The COC further explained that as a result the arbitral tribunal can decide whether a certain claim has become admissible at a certain point in time and can therefore be heard. In exercising its discretion, the tribunal is not subject to the supervision of the courts except to the extent necessary to ensure that due process and public policy considerations have been met.

In this specific case, the dispute revolved around the non-payment of amounts which had been subject to interim payment certificates certified by the engineer. The COC therefore concluded that the precondition at Clause 67 was moot: if the engineer had already certified the payment, it made no sense to resubmit the issue to him if the dispute was limited to the non-payment of the certified

amounts.

In other words, if the engineer had himself confirmed the contractor's entitlement to the interim payments, there can be no expectation that the same question be referred to the engineer for determination. Furthermore, compliance with Clause 67 was established by the fact that the claimant had sent more than a notice to the respondent in order to enter into amicable settlements in line with Clause 67(1). The respondent had not replied to these notices and the arbitral proceedings were filed after the period of 56 days required for settlement had lapsed.

The fact that the COC has upheld the condition precedent is not new. It has **consistently** done so and decisions on this point are **abundant**.

The significance of this judgment lies in its determination of the nature of the conditions precedent. The COC confirms through this case that conditions precedent relate to admissibility and not jurisdiction, which is a point not previously covered in COC judgments. The clarification made by the COC on this point is extremely useful particularly that the lower court had treated this question as a jurisdictional issue.

The Court of Appeal ("COA"), to which the application for the nullification of the award had been filed, **dismissed** the respondent's argument that the condition precedent had not been complied with. However, the COC found that the COA's reasoning was flawed as it had held that the issue of jurisdiction was already *res judicata* as a result of an earlier Order by the Dubai Courts which had found that the arbitral tribunal had exclusive jurisdiction over the dispute. In other words, the COA treated the issue of non-compliance with the conditions precedent as a matter of jurisdiction which had been dealt with in a prior decision and dismissed the challenge accordingly, when it should have considered the issue of admissibility separately from the issue of jurisdiction.

The COC's analysis and approach is commendable as it clarifies to the lower courts the difference between admissibility and jurisdiction and it is in line with **international practice**. What is also important is that treating the referral of the dispute to the engineer as a question of admissibility eliminates the courts' supervisory powers, which confirms the UAE's desire and efforts to become an arbitration-friendly jurisdiction.

Although the COC's judgment dealt only with the referral of the dispute to the engineer, it is very likely that the COC will treat other forms of conditions precedent in the same manner given that the same logic applies.

It is worth noting in this context that when the court declares jurisdiction over the dispute and rejects the application of the arbitration clause, the conditions precedent are **considered** to be no longer applicable.

Non-Payment of the Advance on Costs

Another ground of challenge raised by the respondent related to the advance on costs. The respondent argued that these were not paid and hence the award should be nullified because the arbitration clause is no longer enforceable. The COC dismissed the challenge as the advance on costs were in fact paid by the claimant.

The COC went on to explain that even if the advance on costs had not been paid, the arbitration clause remains unaffected. According to the COC, Article 54(4) of the Federal Arbitration Law No. 6/2018 maintains the enforceability of an arbitration agreement even if the arbitral award is set aside. A fortiori, non-payment of the advance on costs cannot render the arbitration clause inapplicable. In addition, there are specific grounds for the nullification of an award and non-payment of the advance on costs is not amongst them.

The position set out on this point represents a complete reversal of the [prior position](#) of the COC where it had consistently concluded that non-payment of the advance on costs renders the arbitration clause inoperable. This is of course only dicta but it gives us an insight into the shift that may be taking place in the position of the COC on this issue and potentially what to expect in future decisions on the question of non-payment of the advance on costs.

Awarding of Legal Costs

The third ground of challenge related to the legal costs which had been awarded by the tribunal. The respondent argued that legal costs could not be awarded in the absence of a legal provision or an agreement between the parties and that awarding the costs in this case had been done on the basis of a procedural order issued by the tribunal. This argument is based on the text of the Federal Arbitration Law No. 6/2018 and the DIAC Rules 2007, both of which do not expressly grant an arbitral tribunal the power to award attorney fees.

The COC rejected this ground of challenge explaining that the purpose behind a procedural order is to determine procedural disputes between the parties or identify the rules that complement the procedural aspects. But there is nothing to prevent a procedural order from reflecting points agreed between the parties and doing so does not change the nature of the parties' agreement. As the parties may grant the arbitral tribunal the power to award legal costs, an agreement to grant such powers may be recorded by the arbitral tribunal in a procedural order. The power of the tribunal is based on the agreement of the parties and not the decision of the tribunal. The said procedural order demonstrates that the parties during a meeting agreed that the tribunal will have the power to determine the legal costs as part of the final award and accordingly the challenge on this basis is rejected.

The COC's position on legal costs is in line with prior decisions, which confirm that legal costs can be awarded upon the agreement of the parties. There have been [anomalies](#) on this point but these have been rare. The novelty in this case is that the agreement of the parties has been established through a procedural order.

Final Observations

The confirmation that the referral to the engineer is a question of admissibility is a welcome development. This judgment, similar to other judgments issued in recent years, confirms UAE's commitment to developing a rich body of court decisions in the field of arbitration. We now find decisions which deal with various issues that arise in arbitration and that provide clarity and

guidance on points that are not covered by the law. Given how things are progressing, it is likely that other decisions would be issued in the future drawing the distinction between questions of admissibility and jurisdiction, explaining the difference between the two and the consequences of such distinction.


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