

Kluwer Arbitration Blog

The Ruling of the Dubai Court of Cassation in Case No. 1514 of 2022: Three Key Procedural Takeaways

Gordon Blanke (Blanke Arbitration LLC) · Tuesday, September 19th, 2023

In a recent ruling of 8 June 2023 in [Case No. 1514 of 2022](#), the Dubai Court of Cassation has taken a fresh look at a number of procedural questions that frequently arise in UAE-seated arbitrations under the [2018 UAE Federal Arbitration Law \(“FAL”\)](#). There are three particular issues stemming from this recent ruling of the Dubai Court of Cassation that this post discusses in detail.

Consequences of Non-Compliance with Pre-Arbitral Conditions Precedent

The first one of these issues concerns a party’s compliance with pre-arbitral conditions precedent that require completion before a dispute can be escalated to arbitration. A typical set of conditions precedent is contained in the dispute resolution mechanism under clause 67 of the FIDIC Conditions 1987, 4th edition, which are often adopted in contracts for construction projects across the MENA region.

Traditionally, the UAE Courts have qualified the issue of compliance with pre-arbitral conditions precedent as one of jurisdiction, whereby, non-compliance results in a premature referral to arbitration or in the premature constitution of the arbitral tribunal (for example Dubai Court of Cassation Case No. 140 of 2007 dated 7 October 2007; Dubai Court of Cassation Case No. 53 of 2011 dated 7 December 2011 and Dubai Court of Appeal Case No. 32 of 2019 dated 5 February 2020, affirmed by [Dubai Court of Cassation \(Commercial\) Case No. 339 of 2020 dated 19 July 2020](#)). As a natural corollary, a tribunal in a UAE-seated arbitration would be required to decline jurisdiction where conditions precedent have not been satisfied, prompting a fresh course of compliance with the conditions precedent, followed by a re-filing of the request for arbitration and the constitution of a new tribunal. This stands in marked contrast to the international approach, such as, for example, the approach codified in the [Chartered Institute of Arbitrators’ International Arbitration Practice Guideline on Jurisdictional Challenges](#), where Article 3 provides that compliance with pre-arbitral conditions precedent qualifies as a matter of admissibility, empowering the tribunal to suspend the proceedings to allow compliance with the conditions precedent *after* commencement of the arbitration.

Strictly speaking, the international approach jeopardises the qualification of the FIDIC pre-arbitral conditions as conditions *precedent*, allowing compliance with pre-arbitral contractual provisions after the commencement of the arbitration, hence turning them into conditions *subsequent*.

Constituting ordinary contractual provisions under UAE law, conditions precedent must be complied with in order to comply with the *pacta sent servanda* principle under UAE law. As a result, the UAE Courts have consistently ruled that such conditions, to the extent that they are governed by UAE law, must be strictly applied.

The admissibility approach advocates a less strict application of *pacta sunt servanda* and allows compliance after the event, i.e., after filing for arbitration. In marked contrast to the previous approach of the UAE Courts, the recent Dubai Court of Cassation ruling advocates precisely this and states in relevant part as follows:

The preconditions to arbitration – such as presenting the dispute to the consulting engineer before resorting to arbitration – are not considered questions of jurisdiction, [...]. [...] it is a matter of whether the substantive claims raised in the arbitration case can be heard at that time or a legal impediment prevents it, for example, by raising it prematurely under questions of admissibility. The sign of this is that the non-fulfilment of any of the preconditions for arbitration does not return the authority to adjudicate the dispute to the courts of the State again but would – to the maximum extent – postpone the hearing of the case through arbitration until the preconditions agreed upon by the two parties are met, so the arbitration remains the authority that has jurisdiction to adjudicate the dispute. The result of this distinction is that issues related to the possibility of hearing substantive requests at any time are subject to the discretionary power of the arbitral tribunal, and the State’s judiciary does not extend its oversight over them except in the narrowest limits to ensure that there is no breach of the right of defense or violation of the public order of the State,[...].

Importantly, the Dubai Court of Cassation’s comments on admissibility were *obiter* as it found in favour of *de facto* compliance on the facts of the case in any event. As such, the court’s ruling on this point does not form part of the UAE Courts’ body of established jurisprudence (*jurisprudence constante*) and will unlikely persuade lower courts (and future courts of cassation for that matter) to follow suit. In any event and for the avoidance of doubt, there is nothing fundamentally wrong with the courts’ existing approach (as long as it is consistently applied, which it has) as it does not undermine the parties’ choice of arbitration as a binding dispute resolution forum in principle.

Consequences of Parties’ Failure to Pay Advance on Costs

The second issue that features in the recent Dubai Court of Cassation’s ruling was the Court’s clarification – in derogation from previous rulings of the Dubai Court of Cassation (for example in Dubai Court of Cassation Case No. 210 of 2016 dated 21 December 2016 and Dubai Court of Cassation Case No. 403 of 2016 dated 11 January 2017) – that the parties’ failure to make payment of the Dubai International Arbitration Centre (“DIAC”) advance on costs does not qualify as a waiver of the obligation to arbitrate as it does not constitute a ground for nullification under Article 53 of the FAL. In this recent decision, the Court adopted the view that non-payment does not invalidate the arbitration agreement and as such cannot trigger the general jurisdiction of the UAE Courts. In the Dubai Court of Cassation’s own words:

The failure to pay the fees due to the arbitration centre – assuming it happened –

does not lead at all to the lapse of the arbitration agreement. As the non-payment of fees has no effect whatsoever on the existence or validity of the arbitration agreement, so if the invalidity of the arbitration award does not necessarily lead to the forfeiture of the arbitration agreement in accordance with Article 54(4) of Federal Law No. 6 of 2018 regarding arbitration, then it a fortiori does not lead to a failure to pay arbitration fees to forfeit the arbitration agreement or the expiry of its purpose. This is until failure to pay the arbitration fees is not considered one of the cases specified by Article 53 of the Arbitration Law exclusively to request annulment of the arbitral award.

That said, to the extent that both parties refuse to make payment of their share of the advance on costs (and one party does not substitute the non-paying other party), it is arguable that both parties have consciously and willingly foregone one key component of the arbitration agreement, that is to finance the arbitration process, thus revoking the obligation to arbitrate and allowing the parties to default to the general jurisdiction of the courts. In this sense, it remains uncertain whether future decisions by the UAE Courts of Cassation would follow suit. In any event, the claimant did make full payment of the advance on costs in this Dubai Court of Cassation ruling and accordingly, the Dubai Court of Cassation's dictum on the subject is *obiter*.

Tribunal's Power to Award Costs

The third and final issue was that the Dubai Court of Cassation helpfully confirmed the limited legal effect of procedural orders in a cost context; a tribunal is only able to record the parties' agreement to confer the power on the tribunal to award costs (including legal costs) but it cannot make an order for (legal) costs in the absence of the parties' agreement. This confirms that the tribunal's power to award legal or party costs remains strictly subject to party agreement. For the avoidance of doubt, the instant case concerned the tribunal's powers under the 2007 Dubai International Arbitration Centre (DIAC) Rules of Arbitration, which are understood to be limited in scope to the award of arbitration costs, i.e., DIAC costs and the tribunal's fees and expenses, only. In contrast, Article 36.1 of the latest version of the 2022 DIAC Rules expressly confers upon the tribunal the power to award party costs, as commented on in a previous blog post [here](#).

In the round, this decision by the Dubai Court of Cassation is an interesting ruling that seeks to internationalise the practice of arbitration in the UAE on a number of important points of arbitral procedure. Whether or not these will be followed by future courts will have to be seen. In the meantime, out of an abundance of caution, to be safe rather than sorry, arbitration practitioners and parties alike are advised to follow the approach of old, which – so far at least – has stood the test of time.

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The graphic features a black background with white text and a circular icon. The icon depicts a magnifying glass over a group of stylized human figures, representing a search or investigation process. The text is arranged in a clean, modern layout with horizontal lines above the main heading.

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