

THE CURIOUS CASE OF ANNULMENT OF JURISDICTIONAL AWARD IN THE UAE: JURISDICTION, ADMISSIBILITY AND PRACTICAL CONSIDERATIONS

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The twilight zone between jurisdiction and admissibility remains a controversial issue which recently came back to spotlight after a decision by Dubai Court of Appeal annulling a preliminary jurisdiction award of an arbitral tribunal on the ground that the condition precedent to arbitration was not met. This article analyses the decision of the Dubai Court of Appeal, while highlighting practical considerations vis-à-vis Article 19 of the UAE's Federal Arbitration Law, which entitles parties to challenge arbitral tribunal's preliminary jurisdictional award, however, results in an automatic stay of arbitration. Further, the article outlines the myriad approaches to characterising preconditions to arbitration. Keeping various approaches in mind, the article highlights the tension between enforcing the contractual pre-conditions to arbitration and promoting arbitration by giving primacy to the arbitral tribunal's jurisdictional decisions.

Keywords: International Arbitration, UAE, FIDIC, Multi-tier Dispute Resolutions Clauses, Construction Arbitration, Preconditions to Arbitration

TABLE OF CONTENTS

I.	INTRODUCTION	36
II.	RELEVANT FACTS OF THE CASE AND THE DECISION	37
III.	POTENTIAL FOR ABUSE OF FAL ARTICLE 19(2) AND PRACTICAL CONSIDERATIONS.....	38
IV.	PRE-MATURITY: JURISDICTION OR ADMISSIBILITY?	39
V.	CONCLUSION	41

I. INTRODUCTION

The distinction between jurisdiction and admissibility has long remained controversial and has notably been called a “twilight zone”.¹ The distinction is critical because an arbitral award lacking jurisdiction is liable to be set aside, whereas the admissibility and merits of an arbitral award remain unreviewable.² It becomes even more critical in jurisdictions that have adopted Article 16(3) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law (“Model Law”), which enables the parties to challenge the

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¹*Methanex Corporation v United States of America*, Partial Award on Jurisdiction and Admissibility, 7 August 2002, para 139.

² See generally William Park, ‘Determining an Arbitrator's Jurisdiction’ (2008) 8 Nevada Law Journal 135.

preliminary positive jurisdictional decisions of the arbitral tribunal before the state courts such as Article 19(2) of the UAE's Federal Arbitration Law ("FAL").³ Article 16(3) of the Model Law as well as Article 19(2) of the FAL essentially provide the respondents with a remedy against the preliminary decision of the arbitral tribunal accepting jurisdiction. During this stage, the characterisation of the respondent's preliminary objection into jurisdiction or admissibility is a critical issue, which has been dealt with in detail in the current piece.

Article 19(2) of the FAL was recently subject to a decision by the Dubai Court of Appeal ("the Court").⁴ The Court annulled a preliminary jurisdiction award on the ground that the condition precedent to arbitration was not met. The decision has once again brought the twilight zone between jurisdiction and admissibility to the centre stage. Moreover, this decision has sparked debate on finding the balance between preserving the respondent's right to object to the arbitral jurisdiction and enforcing its obligation to do so promptly. This article addresses these issues and highlights strategic and practical considerations for the parties considering onshore UAE as a seat of arbitration.

II. RELEVANT FACTS OF THE CASE AND THE DECISION

The dispute arose out of a construction contract presumably based on the FIDIC Contract 1987 (4th Edition),⁵ which led to the commencement of the arbitration. The tribunal issued a jurisdictional award accepting the jurisdiction. The respondent in the arbitration challenged the award before the Dubai Court of Appeal under Article 19(2) of the FAL. The respondent argued that Clause 67 of the contract required the dispute to be submitted to the Engineer before moving on to arbitration, and since such a requirement was not satisfied, the tribunal's jurisdictional award must be annulled. The claimant argued that the respondent did not raise any jurisdictional objections either in the signed terms of reference ("TOR") or the statement of defence, and therefore waived its right to object to jurisdiction. Furthermore, the claimant argued that it had commenced a reference to the Engineer in order to satisfy the pre-condition.

The Court concluded that the reference to the Engineer was a contractual pre-condition and must be enforced as such. The Court found that the evidence submitted by the claimant to the effect that it had commenced reference to the Engineer is insufficient, which means that the dispute is pre-mature. Therefore, the Court annulled the jurisdictional award of the tribunal.

³ UAE Federal Arbitration Law, art 19 (2).

⁴ Dubai Court of Appeal Case 32/2019 <[https://www.dc.gov.ae/PublicServices/VerdictPreview.aspx?OpenedCaseMainType=0&OpenedLitigationStage=-](https://www.dc.gov.ae/PublicServices/VerdictPreview.aspx?OpenedCaseMainType=0&OpenedLitigationStage=-1&CaseYear=2019&CaseSerialNumber=32&CaseSubtypeCode=393&Keyword=&DecisionNumber=8&lang=&OpenedPageNumber=0)

<https://www.dropbox.com/s/711e1ff369hh7rz/Unofficial%20translation%20of%20the%20%28Dubai%20Court%20of%20Appeal%29%2032%20for%202019.pdf?dl=0>> accessed 17 April 2021 Note: Since the piece is based on a judgment from a civil law jurisdiction, particularly from Dubai, the official English translation of the decision is not available. The unofficial translation has been prepared by one of the authors for purposes of this article. Furthermore, it is not possible to pin cite a particular part of the judgment because unlike common law judgments, the judgments of Dubai Court of Appeal are structured differently and are relatively shorter, containing only a few paragraphs.

⁵ FIDIC contracts are sample construction contracts containing standard provisions drafted and published by the Fédération Internationale Des Ingénieurs-Conseils founded in 1915. FIDIC contract are also known as standard form contracts (SFC). Different editions of FIDIC contracts have been released over the years. In the current context, the 4th Edition is relevant.

III. POTENTIAL FOR ABUSE OF FAL ARTICLE 19(2) AND PRACTICAL CONSIDERATIONS

At the outset, it is worth mentioning that the arbitration was administered under the 2007 Rules of Dubai International Arbitration Centre (“DIAC”). Pursuant to Article 6.4 of the DIAC Rules, generally, “the tribunal *should* rule on a plea of jurisdiction as a preliminary question.”⁶ The tribunal may also deal with it in the final award. The word ‘plea’ would imply that the jurisdictional objection is essential for the tribunal to determine jurisdiction as a preliminary question. However, it is a well-recognised principle that as a consent-based actor, the arbitral tribunal can and must rule on jurisdiction *proprio motu*.⁷ Furthermore, it has been suggested that Article 16(1) of the Model Law [equivalent to Article 19(1) of the FAL] empowers the tribunal to rule on jurisdiction *sua sponte*.⁸ Therefore, a DIAC tribunal seated in the UAE is not expressly barred from bifurcating the proceedings into jurisdiction and liability *proprio motu* under the DIAC Rules.

Given that the tribunal issued an award on jurisdiction in the current case, it appears that the proceedings were bifurcated, *proprio motu* or otherwise. The claimant argued that the respondent did not raise any jurisdictional objections either in the signed TOR or its statement of defence. This presents a policy-based consideration for the Courts – whether the jurisdictional objection before the tribunal must be a prerequisite or at least a critical element for an Article 19(2) application to be successful, particularly when the tribunal issues a jurisdictional award *proprio motu*?

As stated above, Article 19(2) of the FAL provides parties with a right to challenge the tribunal’s preliminary positive jurisdictional decision. On the other hand, Article 25 of the FAL (akin to Article 4 of the Model Law) imposes an obligation upon the parties to object within seven days of becoming aware of the non-compliance of the arbitration agreement, failure to comply with which would lead to a waiver of the right to object.⁹ A harmonious reading of Article 25 and Article 19(2) reveals an interesting distinction. On the one hand, the duty to raise an objection under Article 25 operates for seven days from becoming aware of the non-compliance with the arbitration agreement leading to a waiver of the right to object. On the other hand, the right conferred upon the party under Article 19(2) is triggered only after the tribunal has issued a jurisdictional decision.

If one is to consider the claimant’s submission that the respondent signed the TOR without any jurisdictional objection, then there is an argument to be made that the respondent’s application under Article 19(2) was liable to be dismissed on the ground that the respondent had waived its right to object to jurisdiction pursuant to Article 25.

Separately, Article 19(2) of the FAL mirrors Article 16(3) of the Model Law, except the filing of an application under FAL Article 19(2) results in an automatic stay of arbitration.¹⁰

⁶ Dubai International Arbitration Centre Arbitration Rules 2007, art 6.4.

⁷ Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration* (Kluwer Law International 2017) 564.

⁸ United Nations General Assembly, *Report of UNCITRAL on work of its eighteenth session* (3-21 June 1985) 30 Fortieth Session Supplement No. 17 (A/40/17), <[https://undocs.org/en/A/40/17\(SUPP\)](https://undocs.org/en/A/40/17(SUPP))> accessed 17 April 2021

⁹ Article 25 of the Federal Arbitration Law - A party who knows that any provision of this Law from which the Parties may derogate or any requirement under the Arbitration Agreement has not been complied with and yet does not state its objection to such non-compliance within the time limit agreed upon, or within seven days of becoming aware of the non-compliance in the absence of such agreement, shall be deemed to have waived its right to object.

¹⁰ Article 19(2) of the Federal Arbitration Law - If the Arbitral Tribunal rules as a preliminary question that it has jurisdiction, a party may, within fifteen days after receiving notice of that ruling, request the Court to decide that

While the provision entitles each party to request the arbitral tribunal to continue the proceeding, Article 19(3) states that the party requesting such continuation must bear the arbitration costs should the Court find that the tribunal lacks jurisdiction. Article 19(2) also states that the Court must decide the case in 30 days.

In this case, it took far longer than 30 days for the Court to decide the case. The Dubai Courts website states that the case was registered on 5 September 2019 and was decided on 5 February 2020,¹¹ which means it took 153 days (approximately five months) to decide this case. Hence, in practice, the respondent has the benefit of using the automatic stay under Article 19(2) as a dilatory tool. Therefore, the utility of automatic stay deserves reconsideration.

IV. PRE-MATURITY: JURISDICTION OR ADMISSIBILITY?

In the current case, the Court ruled that the reference to the ‘Engineer’ under clause 67 of the contract was a condition precedent for filing the request for arbitration, and since this condition was not satisfied, such request was pre-mature. Consequently, the Court annulled the preliminary jurisdictional award. The permissible level of scrutiny for the Court under Article 19(2) of the FAL is not clear from the language of the provision. While it is not precisely clear from Article 16(3) Model Law jurisprudence whether the Court is required to take a deferential view towards the tribunal’s ruling, the more accepted practice is *de novo* review with some degree of deference.¹² Therefore, the Court would independently determine whether the tribunal has jurisdiction, thus the application in this case under FAL Article 19(2) must be dismissed.

On the other hand, the task of the arbitral tribunal in determining its jurisdiction pursuant to its *kompetenz-kompetenz* powers remains limited to determining the formal and substantive validity of arbitration agreement under the *lex arbitri* and whether the dispute falls within the scope of that agreement.¹³ In this case, the arbitration agreement’s validity or its scope was not at stake. The primary ground was that reference to ‘Engineer’ was a condition precedent to arbitration, which was not satisfied.

While it is clear that the tribunal must raise jurisdiction *proprio motu*, it is unclear whether it must do so with admissibility. Although FAL Article 19(2) is silent on it, the scholarly opinion suggests that the arbitral tribunals cannot raise admissibility *proprio motu*.¹⁴ This is particularly because admissibility is about the appropriateness of a particular claim as opposed to jurisdiction which is about the power of the tribunal to deal with a particular claim. Therefore, arguably, it was improper for the tribunal to admit the arbitration request when the

matter. The Court shall then decide the request with thirty days of being filed with the Court and its decision shall be subject to no appeal; while such a request is pending, the arbitral proceedings shall be stayed unless the Arbitral Tribunal decides to continue the arbitral proceedings at the request of a party.

¹¹ Snapshot from the Dubai Courts website <<https://www.dropbox.com/s/stec21krnu0nooe/Dubai%20Court%20of%20Appeal%2032%20of%202019.png?dl=0>> accessed 17 April 2021.

¹² Michael Polkinghorne et al, ‘Article 16 - Competence of Arbitral Tribunal to Rule on Its Own Jurisdiction’ in Ilias Bantekas and ors. (eds), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (Cambridge University Press 2020) 312; See also *Insignia Technology Co Ltd v. Alstom Technology Ltd* [2008] SGHC 134, para 21 <<https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/2008-sghc-134.pdf>> accessed 17 April 2021.

¹³ Abdul Azeem Al Maghraby, ‘Different Defenses in Arbitral Disputes;(1999) 1 Journal of Arab Arbitration 121, 123.

¹⁴ Michael Hwang and Si Cheng Lim, ‘Chapter 16: The Chimera of Admissibility in International Arbitration’, in Neil Kaplan and Michael J. Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Kluwer Law International 2018) 266.

pre-condition was not satisfied. The arbitral tribunal could have either stayed the matter or dismissed it without prejudice. However, the tribunal was well within its jurisdiction to entertain the case because prematurity is an admissibility issue and not a jurisdictional issue. A simple test propounded by Professor Jan Paulsson to distinguish between the issues of jurisdiction and admissibility is that when an objection takes aim at the tribunal rather than the claim, it is jurisdictional. Whereas, when an objection takes aim at the claim, it is an admissibility objection.¹⁵

The Court itself acknowledged that the dispute was pre-mature. The Court recognised that the dispute existed, albeit in a pre-mature form. The finding of prematurity was directed towards the suitability of the dispute and not the tribunal's adjudicative power to decide that dispute. Hence, it is an issue of admissibility and not reviewable by the Court under Article 19(2) of the FAL.

This distinction between jurisdiction and admissibility has also been recognised by the scholars¹⁶ and courts in other MENA jurisdictions, notably by the Egyptian Court of Cassation.¹⁷ Additionally, the interpretation by some arbitral tribunals supports the characterisation of treating non-reference to Engineer or the dispute adjudication boards before arbitration under the FIDIC as an admissibility issue.¹⁸ However, this is not the settled position, and certain tribunals have also treated it as a jurisdictional requirement.¹⁹ In other words, some tribunals have ruled that non-compliance of pre-arbitral steps would affect their jurisdiction. Therefore, the treatment of non-compliance of multi-tier dispute resolution clauses such as the one under the FIDIC as the issue of admissibility is not universal.

It is worth mentioning that the current judgment is based on the 2007 Dubai Cassation Court judgment, which enforced the reference to 'Engineer' under the FIDIC (4th Edition) as a condition precedent to arbitration pursuant to the principle of *pacta sunt servanda*, one of the most significant principles enshrined in the UAE Civil Code.²⁰ However, recently, the UAE has sought to modernise its onshore arbitration framework to make it more internationally consistent.²¹ To that end, there is an argument to be made whether the Court could have exercised a deferential approach towards the jurisdictional issue.

The above legal position can be contrasted with the recent ruling of the English High Court,²² where it was ruled that the compliance with pre-conditions to arbitration is a matter of admissibility, not jurisdiction. In fact, the High Court's reasoning was similar to the argument

¹⁵ Jan Paulsson, 'Jurisdiction and Admissibility', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (2005) 616; Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 148.

¹⁶ Fat-hyWali, *Almabsot fi SharhQanun Al Kad'a Al Madani* (treatise in the Law of Civil Judiciary), vol 2 (Dar AlnahdaAlrabia 2017) 99.

¹⁷ Egyptian Court of Cassation, Challenge No. 1274 for 48JY <<https://www.eastlaws.com/data/ahkam/details/8034/27941/0>> accessed 17 April 2021.

¹⁸ ICC Arbitration Case 14431 (Interim Award), (2015) 1 ICC Dispute Resolution Bulletin 35. <https://library.iccwbo.org/content/dr/AWARDS/AW_1170.htm> accessed 17 April 2021.

¹⁹ ICC Arbitration Case 19581 (Final Award), (2015) 1 ICC Dispute Resolution Bulletin 147. <https://library.iccwbo.org/content/dr/AWARDS/AW_1176.htm> accessed 17 April 2021.

²⁰ Dubai Court of Cassation Case 140/2007 <https://www.lexismiddleeast.com/case/Dubai/DCC_2007_140_2007/> accessed 17 April 2021.

²¹ Malak Nasreddine, 'The UNCITRAL Model Arbitration Law and the UAE Federal Arbitration Law: Points of Convergence and Divergence' (*Kluwer Arbitration Blog*, 22 November 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/11/22/the-uncitral-model-arbitration-law-and-the-uae/>> accessed 17 April 2021

²² *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm).

made above by the authors that substantive jurisdiction of the arbitral tribunal exists independently of the pre-conditions to arbitration, which fall into the admissibility category.²³

Nevertheless, from an onshore UAE legal perspective, there are two conflicting objectives, which require balancing. The first is enforcing the contract law requirement by holding the multi-tier dispute resolution clauses to the contractual standards. The second is promoting and supporting arbitration by exercising a deferential approach towards the rulings of the arbitral tribunals. Both of these objectives are not mutually exclusive, and this case is a clear example of the interplay between them.

Interestingly, the decision of the Court of Appeal was appealed before the Dubai Court of Cassation.²⁴ However, the Court of Cassation rejected the appeal on the ground that Article 19(2) of the FAL explicitly states that “decision shall be subject to no appeal”.

Nevertheless, it remains to be seen whether the approach of Dubai Court of Appeal would change over the time particularly in light of the UAE’s aim to modernise its onshore arbitration landscape.

V. CONCLUSION

The characterisation of prematurity as jurisdiction or admissibility remains open. This case indeed provides food for thought. The international practice suggests that pre-condition to arbitration, at least in commercial arbitrations, should not vitiate the arbitral tribunal’s jurisdiction and must generally be treated as admissibility issues. It remains to be seen whether the onshore UAE judiciary will adopt this international practice.

Meanwhile, the decision of the Dubai Court of Appeal raises concerns as to the practical implications of Article 19(2) of the FAL, such as the time of the jurisdictional objection and potential misuse of the automatic stay. Nevertheless, the decision is certainly an important reminder for the parties to understand their dispute resolution clause and to act accordingly.

²³ *ibid* para 18.

²⁴ Dubai Cassation Court Case number 339/2020
<https://www.lexismiddleeast.com/case/UnitedArabEmirates/DCC_2020_339_2020> accessed 26 August 2021.