

Navigating Borders

Myriam Simon, Partner, Al Aidarous shares lessons learnt from Cross-Border Practice and a past Inhouse role.

As a French national my legal education was rooted in the French civil law tradition, which closely aligns with the UAE legal system. I have a Bachelor's and Master's Degree in Private Law, a Master's in International Law, and a Degree in Criminology and Penal Codes, all from Toulouse University in France. I practice in a range of areas, including civil, commercial, corporate, and real estate law and work on complex disputes, on a whole host of subjects including high-value real estate disputes, high-profile cryptocurrency ownership disputes, and intricate VAT evasion cases. I relocated to Australia for personal reasons, and joined an in-house legal team at a prominent company which had a diverse industry portfolio. It was a significant shift, especially as I also had to adjust to Australia's common law system and the intricate cultural differences there, which play a part in negotiations.

While working as an in-house counsel, I learnt to balance legal advice with commercial interests, and the need for practical and actionable solutions over abstract legal opinions. My work covered the legal regimes in various Australian states, Hong Kong and Singapore, and I gained cross-border experience in areas including real estate, the food and beverage sector, and intellectual property rights. This experience also allowed me to see legal matters from a corporate perspective, where concise and actionable advice often takes priority. There are many challenges, when working on cross-border matters including navigating different legal systems, cultural differences, language barriers, translation issues, data security concerns and time zone differences. Successfully managing these requires meticulous planning and clear communication. I also believe it is crucial to acknowledge your limitations, and that partnering with local experts is essential in ensuring the smooth running of cross-border transactions and business operations.

Since moving to the UAE, a number of my cases have involved the hospitality and leisure sectors. In the UAE these are dynamic sectors, and intellectual property rights, particularly those involving branding and trademarks, have particular importance due to the intense competition in these sectors here. The large number of new restaurants opening in the UAE shows how vibrant the market is, but investors need to conduct thorough market research and strategic



placement as some of these businesses close within a year. In the past I have assisted clients who opened and closed restaurants in less than two years. In Dubai, ever-changing trends can lead to venues becoming old fashioned far quicker than in other countries. Then with international hotel franchises which I also do a lot of work, the crux of the dispute often revolves around hotel management. These disputes often arise when an operator appointed by the franchisor is initially accepted by the franchisee and then contested. There can also be situations where franchisees decide to assume management, leading to disputes. Branding issues also surface when franchisors are dissatisfied with the management, and fear they could tarnish their name and reputation. In my experience, when venturing into a new business venture, in the UAE or any foreign country, it is important to seek proper professional advice and ensure the business model accurately aligns with licensing activities, and that shareholder agreements are crystal clear to avoid future disputes.

Contracts with third parties must also meticulously follow the law, avoiding any infringement of public order and ensuring valid implementation. Market newcomers can be tempted to cut costs by relying on informal advice, but this can be very costly in the long run as even with proper legal structures and agreements in place, businesses can encounter issues, and these risks increase if you do not have a solid foundational structure.

It is also essential, to understand the importance of cultural sensitivity, local customs and traditions, which can be the key to establishing and cultivating the strong partnerships which are vital for a successful business in the UAE.



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PRE-CONDITIONS TO ARBITRATION

Following on from a recent Dubai Court of Cassation (DCC) case, DCC Case No 1514/2022 (Commercial), non-compliance with conditions precedent in order to invoke arbitration is no longer considered a jurisdiction issue. It is instead now an issue of inadmissibility, as Hashem AlAidarous of Al Aidarous explains.

In a judgment handed down by the Dubai Court of Cassation (DCC Case No. 1514/2022 (Commercial)) on 8 June 2023 it was ruled that non-compliance with conditions precedent as a means to invoke arbitration was no longer considered to be an issue of jurisdiction, but rather was deemed to be an issue of inadmissibility.

CONTEXT OF THE CASE

Until recently, the UAE Courts, including the Dubai Courts, have constantly considered that non-compliance with the conditions precedent for invoking arbitration (for example, a non-referral of a dispute to an engineer as per Clause 67 of the FIDIC Conditions), was an issue of jurisdiction of the tribunal, where the Court would review the arbitral award afresh in order to decide whether the agreed conditions precedent had been met.

In other words, the Dubai Court of Cassation considered that this issue fell under the Court's wide power to scrutinise the jurisdiction of the tribunal and was not simply an issue of admissibility which would be determined by the arbitral tribunal.

This was important as if the Court found that the conditions precedent were not met, it would then set aside the arbitral award as it was considered to have been issued by an arbitral tribunal which did not have jurisdiction to hear the case in the first place.

However, with this recent Dubai Court of Cassation ruling, the Court no longer considers this as an issue of jurisdiction, but it is instead treated as an issue of admissibility.

THE COURT'S REASONING

In arriving at this ruling, the Dubai Court of Cassation offered the following reasoning:

"The preconditions to arbitration – such as presenting the dispute to the consulting engineer before resorting to arbitration – are not considered as questions of jurisdiction,it is a matter of whether the substantive claims raised in the arbitration case can be heard at that time

THIS RULING SIMPLY DEALS WITH THE COURT'S POWER AT THE POST AWARD STAGE."

or whether a legal impediment prevents it, for example, by raising it prematurely, under questions of admissibility."

"The sign of this [in support of this view] 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...[Clarification added]"

THE IMPACT

This ruling does not suggest that the preconditions are no longer adhered to by the parties or the arbitral tribunal, but simply, that the arbitral tribunal is granted vast power to determine whether or not those conditions have been met.

As a result, the Court (in an action for recognition or setting aside of an arbitral award) will narrowly exercise its power, and its scrutiny will be confined to ensuring that the arbitral award has not denied a party the right of defence, which means that the arbitral tribunal has adequately addressed any such plea of inadmissibility for non-compliance with the conditions



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precedent and the arbitral award, in arriving at its conclusion, is not in breach of public order. However, in order to avoid any confusion, it should be noted that this ruling has no impact on the arbitral proceedings.

This ruling simply deals with the Court's power at the post-award stage.

This is because the arbitral tribunal should continue to address any pleas of inadmissibility, and if the arbitral tribunal has found that the required pre-conditions have not been met, it will simply declare the claim to either be inadmissible or to have been prematurely filed.

SUSPENSION OF PROCEEDINGS

However, the question which remains to be answered following on from this case is whether an arbitral tribunal in a Dubai seated arbitration can suspend the proceedings if it finds that conditions have not been met whether this is on its own initiative or at a request by one of the parties, allowing the parties to fulfill the conditions precedent, and then resume the arbitral proceedings?

This Dubai Court of Cassation ruling does not provide any guidance on this particular question. However, it may help to consider the approach taken by the State Court when dealing with certain conditions precedent before filing an action imposed by the law, in looking for guidance on how to approach this.

For example, in labour cases in the UAE, a litigant party first must refer their dispute to the labour department for conciliation and if such efforts are unsuccessful, only then will the labour department refer the case to the Court for consideration.

However, if a litigant party has filed a case with the court before taking this required step of referring their case to the labour department for conciliation as is imposed by the Labour Law, the Court would then automatically declare the case inadmissible and may not grant the claimant a chance to fulfill this requirement belatedly.

As a result, I personally believe, following this logic that the arbitral tribunal may not enjoy greater power than those of the State Court.

So by analogy, the answer to this question - can an arbitral tribunal in a Dubai seated arbitration suspend the proceedings if it finds that conditions have not been met whether on its own initiative or at a request of one of the parties allowing the parties to fulfill the conditions precedent, and then resume the arbitral proceedings - is no.

However, it should be noted that this is not certain and it is yet to be seen how the Dubai Courts will deal with this issue.

This article represents the views of the author and it should be noted it may not necessarily represent the view of ALAIDAROUS Advocates and Legal Consultants.