

**The Effect of Pre-Arbitration Procedural Requirements on
Admissibility and Jurisdiction Under UAE Law**

تأثير الإجراءات السابقة للتحكيم على قبول الدعاوى والاختصاص وفقاً
لقانون دولة الإمارات العربية المتحدة

by

SHADY SHERIF ATEEM

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of the requirements for the degree of
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DECLARATION

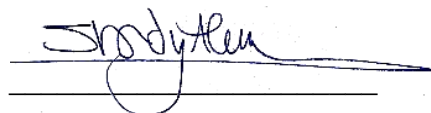
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ABSTRACT

This dissertation examines the frequency of pre-arbitration procedural mechanisms used in construction contracts in the UAE and their influence on the effectiveness of the arbitration process. Although these methods are designed to improve efficiency, they frequently result in more conflicts, resulting in a complicated legal environment that lacks a definitive structure under UAE law. Legal practitioners and courts have utilised various approaches to interpret these clauses, leading to ambiguity. This research examines a recent significant judgement from the Dubai Court of Cassation which focuses on differentiating between admissibility and jurisdiction, in line with established international practises. This study proposes implementing contractual modifications to enhance the clarity of drafting, ensuring that parties strictly adhere to procedural requirements, and introducing legal provisions to regulate admissibility and jurisdiction. Furthermore, it is important to take into account the rules of institutional arbitration and the authority given to tribunals to suspend proceedings. Potential areas for further research involve investigating the relevant legislation regarding pre-arbitration prerequisites and analysing how they compare to laws governing the validity of arbitration agreements. The paper proposes further examination of the persistence of pre-arbitration circumstances after the termination of a contract, specifically focusing on the distinctiveness of the arbitration agreement. In essence, improving and simplifying pre-arbitration procedures can promote peaceful resolution of conflicts in accordance with international and UAE court practises

Keywords: admissibility, jurisdiction, condition precedent, construction, disputes

خلاصة

يدرس هذا البحث الإجراءات السابقة للتحكيم في عقود التشييد في الإمارات العربية المتحدة وأثرها على كفاءة عملية التحكيم، وعلى الرغم من عزم هذه الآليات على تعزيز فعاليتها، فإنها كثيراً ما تؤدي إلى منازعات إضافية، مما يخلق مشهداً قانونياً معقداً يفتقر إلى إطار واضح في ظل قانون دولة الإمارات العربية المتحدة. وقد استخدم الممارسون القانونيون والمحكمون والمحاكم أساليب متنوعة لتفسير هذه الأحكام، مما أدى إلى المزيد من الغموض. ويتناول هذا البحث، تحليل لحكم بارز صادر مؤخراً عن محكمة النقض في دبي، بين قبول الدعاوى والاختصاص القضائي، بما يتماشى مع الممارسات الدولية. وتوصي الدراسة بإجراء تغييرات تعاقدية من أجل صياغة أوضح، وتقيد الأطراف التزاماً صارماً بالمتطلبات الإجرائية، وإدخال أحكام قانونية تنظم المقبولية والولاية القضائية. وبالإضافة إلى ذلك، يُنظر في قواعد التحكيم المؤسسية وتمكين المحاكم من النظر في أمر وقف الإجراءات. وتشمل سبل البحث المقبلة استكشاف القوانين المنطبقة على متطلبات التحكيم المسبق ومقارنتها بقوانين صحة اتفاقات التحكيم. وتقترح الدراسة أيضاً التحقيق في بقاء شروط ما بعد إنهاء العقد قبل التحكيم، مع تناول قابلية اتفاق التحكيم للفصل. وفي نهاية المطاف، فإن توضيح وتبسيط الإجراءات السابقة للتحكيم يمكن أن ييسر تسوية المنازعات بالوسائل السلمية بما يتماشى مع النهج المتبعة في المحاكم الدولية ومحاكم الإمارات العربية المتحدة

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LIST OF ABBREVIATIONS

ADGM	Abu Dhabi Global Markets
DAB	Dispute Adjudicating Board
DIAC	Dubai International Arbitration Centre
DIAC Rules 2007	Rules Dubai International Arbitration Centre Rules 2007
DIAC Rules 2022	Rules Dubai International Arbitration Centre Rules 2022
DIFC	Dubai International Financial Centre
DIFC Arbitration Law	DIFC Law No 1 of 2008 as Amended
DIFC-LCIA Rules	Dubai International Financial Centre – London Court of International Arbitration Rules
Engineer	The consultant engineers as defined in the FIDIC contracts
FIDIC	Fédération Internationale des Ingénieurs-Conseils
FIDIC 1987	FIDIC Conditions of Contract for Works of Civil Engineering Construction - Fourth Edition 1987
FIDIC 1999	FIDIC Conditions of Contract for Construction - Red Book - 1999
FIDIC 2017	FIDIC Conditions of Contract for Construction - Red Book - 2017
ICC	International Chamber of Commerce
UAE	United Arab Emirates
UAE Arbitration Law	Federal Law No. 6 of 2018 as amended, UAE Arbitration Law
UAE Civil Code	Federal Law No. 5 of 1985, UAE Civil Transactions Law
UNCETRAL Rules	UNCITRAL Arbitration Rules 2021

Chapter 1 : Introduction

1.1 Background of the Study

Construction contracts in the UAE typically include some defined procedures for initiating and escalating claims by either of the contracting parties. It is also a common feature in these contracts to outline various steps for resolving disputes before invoking the eventual dispute resolution process, typically arbitration or litigation. These dispute resolution steps are commonly known as "*multi-tier dispute resolution mechanisms*" or "*pre-arbitration procedural requirements*".¹ Moreover, when the opposing party in the dispute is the government or a governmental related entity, there are further procedural prerequisites under the UAE law which shall be fulfilled before initiating arbitration proceedings.² These requirements collectively establishes pre-arbitration steps that must be satisfied before commencement of arbitration to avoid legal and procedural complexities.

On the other hand, the construction business in the UAE is a dynamic market that attracts specialists from all over the world, each with their own distinct experiences inspired by the regulatory frameworks and practices of their own nations. In this ever-changing environment, construction claims and disputes regularly arise. However, these practices typically occur inside a framework that may not perfectly line with the laws,

¹ Perhaps the FIDIC forms of construction contracts, as amended, or bespoke construction contracts based on the FIDIC forms, are the most commonly used in the UAE. Example of the FIDIC standard multi-tier dispute resolution mechanisms can be seen, in Clause 67 of FIDIC 1987, Clause 20 of FIDIC 1999, and Clause 21 of FIDIC 2017. Pursuant to clause 67 of the FIDIC 1987, all disputes must initially be referred to the Engineer for a decision. This decision is considered as legally binding for both parties and may also become final unless the dissatisfied party chooses to escalate the dispute to be resolved through arbitration. In such scenario, a procedure of reaching an amicable settlement must be also satisfied. FIDIC 1999 and FIDIC 2017 replaced the Engineer's decision process with an independent DAB. The DAB can be either permanent or ad-hoc panel appointed only in the case disputes arises between the parties, amicable settlement procedure is maintained in these two forms and shall be satisfied before any dispute is taken to arbitration.

² See for example, Dubai law no. (3) of 1996 as amended by law no. (10) of 2005 which requires referral of disputes against Dubai government and other government entities to Dubai Legal Affairs Department for mandatory amicable settlement process prior to commencing arbitration.

rules, and procedures of the UAE and its local courts. Hence, seemingly uncomplicated claims can rapidly transform into complex disputes, primarily stemming from noncompliance with procedural aspects.

Common pre-arbitration requirements in the UAE include the obligation for parties to attempt amicable resolution, good faith negotiations, settlement meetings between executives from both sides, seek a decision from the consulting engineer or architect, consider mediation, utilize dispute adjudication boards, and explore conciliation. The inclusion of such provisions in construction contracts is typically intended to achieve flexibility, expediency, and cost-effectiveness in resolving disputes, while also avoiding formal actions, with an overarching goal of preserving positive and healthy business relationships.

Nevertheless, in practice, the inclusion of multi-tier dispute resolution mechanisms often results in an outcome which is contrary to the parties' original intent. The presence of several pre-arbitration procedural requirements, especially when they are poorly drafted, leads to confusion and uncertainties. This confusion then gives rise to additional arguments regarding validity and enforcement thereof and the perception of UAE courts and arbitral tribunals to the extent of the parties' adherence to these pre-arbitration requirements. It is common that contracting parties frequently depart from these contractual terms. As a result, conflicts that escalate into legal conflicts, whether through arbitration or litigation, frequently deal with a range of pertinent concerns.

Consequently, several questions will arise, including: (1) the validity, operability, and enforceability of these provisions, (2) the mandatory nature of complying with these provisions, (3) the necessary actions to satisfactorily adhere to these provisions, (4) the consequences of not complying with these provisions, (5) the impact of pre-arbitration

procedural requirements on the jurisdiction and admissibility of the parties' claims,³ (6) the authority of the forum to examine and decide on arguments related to these provisions, and (7) the court's supportive and supervisory role in relation to the arbitral proceedings and reviewing arbitral awards involving these provisions.

A further level of intricacy emerges when individuals, throughout the course of ongoing arbitration or litigation processes, submit counterclaims or when claimants add new claims that were not initially brought up before the start of arbitral or legal proceedings. In such situations, a crucial query arises should the respondents have followed pre-arbitration procedures prior to pursuing their counterclaims, and whether such newly submitted claims be admissible in the ongoing proceedings.

The contrasting perspectives held by UAE courts and arbitral tribunals on these various legal questions, despite being governed by the same underlying laws, often lead to inconsistent judicial decisions and arbitral awards, which is both intriguing and perplexing. The lack of clear and satisfactory analysis provided in the judgments and arbitral awards adds to such ambiguity and hinders the ability to predict future outcomes when addressing conflicts involving pre-arbitration procedural procedures. Such confusion often hinders the commencing of arbitration proceedings or the enforceability of arbitral awards, which undermines the timely resolution of disputes and results in wasted time and expenses. This goes against the fundamental goals of the multi-tiered dispute resolution mechanisms and ultimately undermines the original intentions of the parties

³ In the field of international arbitration, the expression "jurisdiction" typically refers to the authority of the arbitral tribunal, or judicial authority, to make decisions in a particular case. This involves an assessment of whether the tribunal has the jurisdiction to make a competent decision on the disputed matters. Issues pertaining to jurisdiction comprise investigations into the enforceability of the arbitration agreement, the scope of the arbitration clause, and the development of a legal connection between the parties concerned. The term "admissibility" refers to the acceptability of a claim or certain pieces of evidence. Admissibility considerations arise after the tribunal has confirmed its jurisdiction and typically include examining the relevance, reliability, or legal permissibility of certain claims or evidence. The definitions of these two terms may differ across different jurisdictions, or alternative names may be used to define the same concepts.

involved. The divergence in understanding and implementation can have a substantial effect on the results of conflicts, the manner in which they are settled, and the ability to enforce arbitration decisions, thus generating an intricate and unpredictable legal atmosphere within the construction sector.

This thesis aims to thoroughly examine the relationship between pre-arbitration procedural requirements, admissibility, and jurisdiction in the UAE. It specifically focuses on the potential repercussions of not adhering to these contractual provisions. This research provides a comprehensive understanding of construction dispute resolution in the UAE by examining the current legal framework, comparing it to worldwide practices, and analysing actual case examples. The goal is to illuminate the complex and frequently controversial nature of this field. By doing this, it aims to enhance comprehension of current matters and offer valuable perspectives for players involved in this crucial area of the UAE's economy.

1.2 Research Problem

The legal system in the UAE lacks defined provisions for addressing pre-arbitration procedural requirements and differentiating between questions of admissibility and jurisdiction in the context of resolving construction disputes. This is particularly evident when determining the authority of the forum responsible for deciding these matters and the national court supportive and supervisory role in relation to arbitration proceedings. The absence of clear legal guidelines resulted in varied outcomes when resolving construction disputes causing delays, additional costs, and introduces an unpredictable legal landscape within the construction sector.

Introducing new claims and counterclaims during ongoing arbitration proceedings, which is very common in construction disputes, creates an additional level of complexity

whereas it remains unclear whether the party filing new claims or counterclaims should have followed the pre-arbitration processes beforehand.

It is further complicated and ambiguous as to the competent forum who should finally decide arguments related to non-compliance with pre-arbitration procedural requirements causing hindrances to appointment of arbitral tribunals and the possibility of nullifying arbitral awards. Hence, stakeholders in the UAE construction industry encounter difficulties in parleying these complex legal matters, which have a direct impact on the efficiency of resolving disputes in this crucial sector of the UAE's economy. The ultimate goal of this research is to offer clarity and practical insights to stakeholders in the construction industry, and ultimately enhance the effectiveness and fairness of resolving construction disputes in the UAE.

1.3 Research Questions

This study aims to tackle the following pivotal questions:

1. Do pre-arbitration procedural requirements hold legal validity, and can they be enforced under the UAE legal framework?
2. In the context of UAE legal practice, how should arguments related to non-compliance with pre-arbitration requirements be classified: as jurisdictional or admissibility matters?
3. Within the framework of legal practice in the UAE, which legal forum has the power to settle disputes related to failure to comply with pre-arbitration requirements?

4. What are the possible consequences that could result from not following the pre-arbitration rules in the UAE legal system?

The research questions will direct the investigation into the interaction between pre-arbitration procedural requirements concerning admissibility and jurisdiction in the UAE. This will provide a helpful understanding of the intricacies and possible inconsistencies in the interpretation and implementation of these aspects within the legal framework.

1.4 Research Aim and Objectives

This thesis aims to analyse the complex correlation between pre-arbitration procedural requirements in the context of admissibility and jurisdiction in the UAE. The focus is on comprehending the repercussions and significance of failing to comply with contractual provisions. The research contributes to the enhancement of dispute resolution practices in the construction industry within the UAE with the following particular objectives:

1. to examine the existing legal framework and contractual provisions that regulate the pre-arbitration procedural requirements under the UAE laws.
2. to evaluate the consequences of not complying with pre-arbitration conditions on the admissibility and jurisdiction of construction disputes in the UAE.
3. to analyse the manner in which courts and arbitral tribunals in the UAE understand and implement legal concepts concerning pre-arbitration procedural requirements, admissibility, and jurisdiction with the aim is to uncover any discrepancies in their viewpoints.

4. to offer guidance and analysis to key individuals in the UAE construction sector, such as contractors, owners, developers, academics, legal professionals, arbitrators, and judges on effectively managing the difficulties related to pre-arbitration procedural obligations in order to improve overall efficiency and effectiveness of construction dispute resolution.

5. to enhance the current knowledge in the field of construction law and dispute resolution in the UAE by providing a thorough comprehension of the intricacies related to pre-arbitration procedural requirements and their impact on admissibility and jurisdiction in construction disputes.

1.5 Research Methodology

The research methods are structured in the following manner:

Literature Review: The research will begin by conducting a comprehensive examination of pertinent literature, encompassing both domestic and foreign scholarly publications, books, articles, legal provisions, and case law in the UAE and internationally. This aims to establish a fundamental comprehension of the legal structure, contractual norms, common practices, and significant matters related to pre-arbitration procedural requirements in the UAE.

Comparative Studies: The research will primarily focus on conducting comparative case studies on commonly employed pre-arbitration procedural requirements in UAE construction contracts and their international counterparts. It will analyse how these concepts were handled by national courts and arbitral tribunals in the UAE and in different jurisdictions worldwide. The case studies will examine the practical implementation of pre-arbitration procedural prerequisites and the manner in which UAE courts have resolved conflicts resulting from them. The research will also entail

scrutinizing pertinent papers produced by local and international authorities in the field, offering valuable perspectives on the legal and practical aspects of the subject matter.

Data Analysis: The collected data will be examined to detect trends, patterns, and inconsistencies in how various stakeholders approach and interpret pre-arbitration procedural requirements and associated legal issues. This analysis will be crucial in formulating conclusions and providing recommendations.

Ethical Considerations: The study will rigorously comply with ethical guidelines, guaranteeing the confidentiality and anonymity of survey respondents and interviewers. Explicit consent will be acquired from all participants, and data will be treated with utmost confidentiality and security.

1.6 Significance of the Research

This finding holds considerable significance that stretches across multiple crucial parameters:

Legal Empowerment: The research enhances the understanding of industry players on their legal obligations and rights in the UAE when disputes arise by providing clear explanations of pre-arbitration procedural requirements.

Improvement of Dispute Resolution landscape: The findings have the potential to improve the efficiency and fairness of resolving construction disputes, which might lead to a reduction in the time and costs associated with these conflicts.

Consistency of Legal Practice: Ensuring legal consistency is crucial for instilling trust in the legal system by promoting uniformity in the interpretation and implementation of laws across UAE courts and arbitral tribunals.

Promote Best Practices: This research offers valuable insights into the most effective global strategies for construction professionals, assisting them in effectively managing pre-arbitration procedural obligations and contractual adherence.

Legal knowledge: Legal practitioners can get advantages from the research findings, enhancing their capacity to manage construction conflicts and enriching legal education programs.

Research Impact: This study enhances the existing knowledge in construction law and conflict settlement, hence enabling further scholarly investigations in this domain.

Economic Consequence: The research's impact lies in its ability to promote economic growth and investor confidence in the UAE construction market by facilitating efficient and consistent dispute resolution.

To summarize, this research has important consequences for many stakeholders in the UAE. It seeks to improve the efficiency of resolving construction disputes and promote a fairer legal environment.

1.7 Structure of the Dissertation

The research consists of five chapters as summarized below:

Chapter one provides an overview of the research by providing a general background. This chapter shall identify the research problem, the questions of research, research methodology, and the significance of the research.

Chapter two provides literature review, court judgements and arbitral awards, industry practice, shortcomings as well as the author's findings, opinion, and recommendations pertaining to the validity and effect of pre-arbitration procedural requirements in the UAE.

Chapter three further provides literature review, court judgements and arbitral awards, industry practice, as well as the author's findings, opinion, as to the possible characterization of arguments of non-compliance with pre-arbitration requirements in UAE legal practice and whether it would be considered as a question of admissibility or jurisdiction.

Chapter four will provide literature review, judgements and awards, industry practice, shortcomings as well as the author's findings and recommendations pertaining to the competent forums to decide jurisdiction and admissibility arguments related to pre-arbitration procedural requirements in the UAE legal landscape as well as the potential ramifications of non-compliance with pre-arbitration requirements in UAE construction dispute resolution.

Chapter five draws together all the research findings, analyses, and provides a conclusion, as well as the author's propositions.

Chapter 2 : Examining The Validity and Effect of Pre-Arbitration Procedural Requirements Under UAE Law

This chapter examines the validity of pre-arbitration procedural requirements in the UAE and its effect on subsequent arbitral and legal proceedings.⁴ The author categorized the often-employed pre-arbitration requirements which are commonly seen in construction in the UAE construction contracts into two groups based on their nature and how they are perceived by the UAE courts. The first category encompasses good-faith negotiations, mediation, conciliation, and amicable settlement discussions. These dispute resolution machineries are typically included in construction contracts in a general manner, without particular details regarding the conduct thereof. The second category comprises the Engineer decision (such as clause 67.1 of the FIDIC 1987) and DAB (such as clause 20.2 of the FIDIC 1999). In contrast to the first category, drafting of these two forms is usually presented in a comprehensive manner, including a clear approach and details. The author then turns to examining other pre-arbitration procedural requirements which are stipulated under the UAE laws when the counterparty in a dispute is the government or a governmental entity.

This chapter will further analyse the mandatory character of the often-employed pre-arbitration procedural requirements in the UAE and determine whether the UAE courts

⁴ UAE is a federation of seven emirates and operates under a civil law system (the UAE onshore legal system). Dubai and Abu Dhabi, two of the seven emirates, have established financial free zones that encompass distinct territories within each emirate with separate legal systems to encourage foreign investments by offering a different legal structure that is mostly based on international model laws and the common law legal system. The Dubai International Financial Centre (DIFC) is the designated financial free zone in Dubai. The financial free zone in Abu Dhabi is officially called the Abu Dhabi Global Markets, abbreviated as ADGM. Both the DIFC and the ADGM have separate and independent courts. Each court has authority over legal disputes within its own free zone. These two courts operate autonomously and are distinct from the UAE onshore courts that have authority outside these free zones. Parties may opt-in ADGM or DIFC jurisdictions as the seat of their arbitrations, regardless of the law governing their agreement and regardless of whether they have any nexus to either of those jurisdictions.

and arbitral tribunals consider them to be criteria that must be fulfilled before arbitration can proceed, or circumstances that may be fulfilled after arbitration has taken place.

2.1 Amicable Settlement, Negotiations, Conciliation, and Mediation

Agreements aimed at negotiating (mediating, conciliating, or facilitating amicable discussions) for the settlement of disputes prior to commencing arbitral proceedings have been commonly regarded as invalid and unenforceable by courts across various jurisdictions, encompassing both common law and civil law systems. This is mostly due to concerns surrounding the uncertainty of its terms. Most national courts will recognize the validity of negotiation agreements only when there is a fairly specified arrangement of the conditions thereof that can serve as a standard for assessing the parties' negotiation efforts.⁵

According to the highest court in the United Kingdom, the House of Lords, an obligation to negotiate in good faith is impractical since it is fundamentally contradictory to the standing of a negotiating party, where the uncertainty exists. The House of Lords stated that "*[...] while negotiations are in existence, either party is entitled to withdraw from these negotiations, at any time and for any reason*". The House of Lords then concluded that there is no duty to negotiate until there is a 'good reason' to withdraw. As a result, a basic agreement to negotiate has no legal standing.⁶

In a similar decision, an American court agreed with this broad viewpoint, ruling that a 'promise to negotiate in good faith' is unenforceable since it is "*even more vague than an agreement to agree*". The court went on to say that such an agreement is

⁵ Gary Born and Marija Šcekic, "Practicing Virtue: Inside International Arbitration", Chapter 14, (Oxford University Press, 2015), 231

⁶ *Walford v Miles* [1992] 2 AC 128, 138 (House of Lords).

"*amorphous and nebulous*" since it contains multiple aspects that are indeterminate and ambiguous, making it difficult to detect the parties' intent without resorting to assumption.⁷

More generally, courts in various jurisdictions have accepted the validity of agreements to negotiate (mediate, conciliate, or reach an amicable settlement) when there is a sufficiently defined and exact set of substantive and procedural criteria against which the parties' negotiation efforts can be analysed and measured. For instance, national courts are more likely to enforce clauses that include provisions that provides a defined negotiation duration, a specified number of negotiation sessions, designated negotiation participants, or the involvement of a designated institution or individuals (particularly in case of mediation or conciliation), than open-ended or unstructured obligations to negotiate or mediate.

The varying criteria that different jurisdictions employ on the validity and enforceability of such settlement clauses exacerbates the uncertainty surrounding these pre-arbitration conditions in international settings, disputes about the applicable legislation adds to the overall confusion.⁸ Negotiation agreements and similar settlement provisions are typically seen by courts and arbitral tribunals to be more of aspirational to motivate the parties to settle their disputes, expressing a shared intention to obtain a mutually acceptable result, rather than a commitment to any precise objective. These undertakings mean that they are only legitimate and enforceable under limited conditions that do not infringe on the parties' general freedom of contract, commercial autonomy, and access to justice.⁹

Looking at the local practice, The UAE Arbitration Law contains no specific requirements regulating any pre-arbitration procedural requirements generally.

⁷ *Candid Prod Inc v Int'l Skating Union* (n 5) 1337.

⁸ See the author suggestion in chapter five below, further research is required to address the question of which law applies to the pre-arbitration procedural requirements.

⁹ Gary Born and Marija Šcekic, "Practicing Virtue: Inside International Arbitration", Chapter 14, (Oxford University Press, 2015), 233

Nonetheless, UAE courts and arbitral tribunals adopt an approach which is aligned to the international scheme discussed above. Onshore courts in the UAE often uphold contractual clauses, including arbitration prerequisites to the extent that such agreements are clear and provide measurable provisions.

If an agreement contains a broad or ambiguous provision requiring the parties to negotiate or seek negotiations or amicable resolution (including mediation and conciliation) of a dispute before resorting to arbitration, provided that this agreement does not offer guidance on the process for reaching an amicable settlement, and there is no specific criterion that can definitively determine whether such efforts have been made to reach an amicable resolution, in such cases, if one party advances immediately to arbitration, the court considers that such action indicates that settlement attempts is deemed to be failed. In many instances, as depicted hereinafter, UAE courts ruled that, where an agreement states that the parties should try to reach an amicable settlement before resorting to arbitration but failed to define particular procedures to be taken, the court is unable to establish whether a genuine attempt at settlement was made by the parties prior refereeing such dispute to arbitration.

A dispute occurred under the sale and purchase agreement where the claimant purchased eleven units and ten parking spaces from the respondent in a residential development project. The claimant successfully pursued a claim in arbitration pursuant to DIAC Rules 2007 and then sought ratification of the arbitral award before the Dubai Court of First Instance. The award was then ratified by the Court of First Instance on 28 May 2014. The respondent filed an appeal with the Court of Appeal, claiming that the arbitral decision shall be nullified because the claimant did not seek an amicable resolution of the matter before resorting to arbitration, as required pursuant to the sale and purchase

agreement. Based on this rationale, the Court of Appeal reversed the lower court's judgement and refused to ratify the arbitral award on 24 December 2014.

The Claimant filed an appeal before Dubai Cassation Court to uphold the First Instance Court's decision in favour of ratifying and enforcing the arbitral award. Dubai Court of Cassation overturned the Court of Appeal's ruling and upheld the First Instance Court's judgement, upholding the arbitral award's ratification. In reaching its decision, the court explained that "*[...] the sale and purchase agreement failed to provide any guidance on the nature of the amicable settlement and lacks essential details for the Court of First Instance to ascertain whether such a settlement attempt was made [...] Furthermore, the arbitration proceeded without the respondent raising the issue before the arbitral tribunal, specifically pointing out that the claimant had directly initiated arbitration without first attempting to reach an amicable settlement and without using best efforts to resolve any disputes, as required by the sale and purchase agreement. This failure indicates to the court that the parties were unable to reach an amicable resolution. The Court of Appeal ignored this viewpoint, rendering its ruling defective and hence hereby reversed.*"¹⁰

Similarly, in a dispute related to a joint venture contract, Abu Dhabi Court of Cassation confirmed that the parties may agree on any pre-arbitration procedural requirements as they may wish as long as it does not contradict with the UAE public order and morale standards, and thus, the parties are entitled to satisfy such pre-agreed conditions before resorting to arbitration in application of '*Pacta Sunt Servanda*' principle. Nevertheless, the court found that in the case at hand the parties did not identify the method by which they may fulfil the amicable settlement requirement indicated in their contract. The court suggested that this may mean that what has been included in this

¹⁰ Hassan Arab, "Important Judgment on Contractual Preconditions to Arbitration in the UAE", (ALTamimi & Co, 2016)

agreement is just to motivate both parties to try to settle their dispute amicably before resorting to arbitration and without seeking the help of a third party. Based on the foregoing grounds, the court dismissed a plea to set aside the arbitral award on the basis that no amicable settlement process was made before resorting to arbitration.¹¹

More recently, in an arbitration seated in the UAE, an arbitral tribunal found, by majority of its members, that it does not have jurisdiction to decide the dispute on the basis that the claimant did not satisfy pre-arbitration procedural requirements.¹² However, Dubai Court of Appeal disagreed with the arbitral tribunal and nullified the award whereas the court found, among other issues, that the claimant proceeded to arbitration after giving notice of its intent to proceed to arbitration to the respondent, which means, in the eyes of the court, that negotiations has failed to lead to an amicable settlement of the dispute and that the claimant was entitled to commence arbitration.¹³

In contrast, as confirmed in Abu Dhabi Court of Cassation judgement mentioned above, among many other court judgements, if the parties' agreement contains detailed settlement provision, the UAE onshore courts will uphold such provisions by applying the '*Pacta sunt servanda*' principle. For example, Dubai Court of Cassation refused to recognize and enforce an arbitral award on the basis of noncompliance with specific preconditions to arbitration. The court explained that the claimant has failed to satisfy the pre-arbitration requirements.¹⁴

In the above-mentioned case, Dubai Court of First Instance dismissed the respondent's motion to nullify the award. Dubai Court of Appeal affirmed the decision of the Court of First Instance. Nevertheless, when the Appeal Court decision was contested

¹¹ Abu Dhabi Court of Cassation 173/2014 (164)

¹² DIAC case no. 135/2018

¹³ Dubai Court of Appeal 19/2020 Annulment of Arbitral Awards

¹⁴ Dubai Commercial Cassation No. 188/2012

by the respondent, Dubai Court of Cassation reversed the decision citing that the lower court neglected to appropriately examine the respondent's arguments. The Court of Cassation determined that the Court of Appeal should have examined the arbitration case file and attached it to the case file in order to verify that the claimant had initiated the proceedings only after fulfilling the agreed pre-arbitration prerequisites. The case was sent back to the Court of Appeal for further review. Upon submitting the arbitration file together with a translated version thereof, the Court of Appeal reversed the ruling made by the Court of First Instance. The court rejected the claimant's attempt to enforce the arbitration award because the claimant did not satisfy the agreed pre-arbitration conditions, specifically, those preconditions which obliged the parties' executive directors to meet and endeavour to reach an amicable settlement before resorting to arbitration. The respondent's plea to set aside the award was then upheld. The claimant lodged an appeal before the Court of Cassation; however, the claimant appeal was rejected.

Dubai Court of Cassation explained its ruling that the contract is considered as the governing authority for the parties, the parties have the freedom to incorporate any provisions they see fit in their agreement, as long as these provisions do not go against public policy or moral standards. The court noted that the parties' arbitration agreement may establish prerequisites that must be fulfilled before they can commence the arbitral proceedings and that the responsibility for demonstrating the satisfaction of these prerequisites rests with the party seeking to commence arbitration. The court further clarified that determination of whether a pre-arbitration clause has been fulfilled is a factual matter that is within the trial court's discretion.¹⁵

As for UAE offshore seated arbitrations, proceedings that take place in the DIFC are governed by the procedural guidelines outlined in DIFC Arbitration Law. Similar to the

¹⁵ Hassan Arab, "Recent Rulings on Arbitration by the Dubai Courts", (AlTamimi & Co, 2013)

onshore regime, the DIFC Arbitration Law does not include provisions regulating settlement attempts or other alternative dispute resolution methods prior to initiating arbitration.

However, the DIFC Courts Rules (RDC) may offer direction on how to handle pre-action protocols before DIFC Courts in accordance with RDC 27.1 which advocates for the utilization of alternative dispute resolution methods, including but not limited to mediation and conciliation. Although it is not obligatory, parties involved in a possible litigation in the DIFC are encouraged to consider using alternative dispute resolution methods before initiating actions in the DIFC Courts, as recommended by RDC 27.1. Furthermore, it might be anticipated that the parties involved in a potential arbitration may likewise undertake similar actions. While there is a scarcity of legal precedents on this matter, it can be anticipated that arbitral tribunals in DIFC seated arbitration will uphold preconditions to arbitration, provided that these preconditions are necessary and form an integral component of a legally valid and enforceable agreement.

Arbitrations that take place in the ADGM are governed by the procedural guidelines outlined in the ADGM Arbitration Regulations. These do not include rules mandating parties to engage in settlement attempts or other kinds of alternative dispute resolution prior to initiating arbitration. The ADGM, which is a relatively new jurisdiction, is still in the process of building its legal framework, and it seems that the matter of enforcing pre-action procedures has not been addressed yet. English common law is directly applicable in the ADGM by the Application of English Law Regulations 2015. Thus, it is reasonable to anticipate that the English method of pre-action provisions would be utilized in the ADGM courts, particularly regarding matters of substantive jurisdiction or admissibility. Judges in ADGM litigations usually refers to precedence of the English Law and therefore it is reasonable to assume that ADGM courts will adopt the same

approach as the English court when deciding matters pertaining pre-arbitration procedural requirements.

Finally, it is worth noting that the latest version of DIAC¹⁶ arbitration rules, DIAC Rules 2022, encompasses provisions addressing conciliation proceedings, which are considered as exceptional procedures. However, it is important to note that DIAC Rules 2022 do not mandate the parties to participate in conciliation prior to the commencement of arbitration. The agreement and consent of the parties is the determining factor in this regard.

2.2 Engineer's Decision and Dispute Adjudication Boards

In line with the above analysis, prerequisites to engage in a specific pre-arbitration dispute resolution process (such as mediation conducted by a designated institution or individual, expert determination, or an engineer's assessment) are generally more likely to be considered valid and enforceable compared to a broad requirement to negotiate or settle amicably.

Construction contracts based on FIDIC 1987, FIDIC 1999, or FIDIC 2017, if there are established Engineer decision or DAB procedures, a respondent would likely find it easy to argue that arbitration is premature if these requirements are not satisfied, as a result, arbitral tribunal would arguably lack jurisdiction or claims would be found prematurely referred to arbitration. It is quite probable that courts in the UAE, as well as other jurisdictions, will be reluctant to enforce an arbitral award issued in such circumstances.¹⁷

¹⁶ DIAC is the leading arbitration institution in the UAE.

¹⁷ Taner Dedezade, "Can a party ignore FIDIC's DAB process and refer its dispute directly to arbitration?" (Howard Kennedy, 2014).

Clause 67 of FIDIC 1987 is one example for detailed multi-tier dispute resolution mechanism as it expressly stipulates that before a claim is referred to arbitration certain conditions shall be met and complied with, which are: (i) to refer the dispute to the Engineer (sub-clause 67.1), and (ii) if the Engineer does not give its decision within 84 days as of the date of referring the dispute to him, or if a party give a notice of dissatisfaction to the Engineer decision if issued, (iii) 56 days' notice to commence arbitration must be given, and (iv) the parties shall endeavour to resolve such dispute amicably (sub-clause 67.2), only thereafter, the dissatisfied party may commence arbitration (sub-clause 67.3).

Two relevant judgments issued by Dubai Courts clarified the unwavering position of the local courts that in construction contracts adopting FIDIC 1987, where it was agreed that definitive preconditions to commence arbitration, such as those in clause 67, such conditions must be met before referring any dispute to arbitration by either party. Otherwise, the court determined that arbitration shall not commence.¹⁸

In these two judgements, Dubai Court of Cassation confirmed that arbitration shall not commence unless either party seeks the Engineer's decision as stipulated for under Clause 67 of FIDIC 1987 before advancing to arbitration. The Court of Cassation specifically stated that:

“....as for the request for appointing an arbitrator on behalf of the appellee, pursuant to the provisions of Article 67 of the agreement entered by the litigants, is rejected on grounds that the appellant did not resort to the consulting engineer to settle the dispute arising between both litigants, since both parties agreed in that clause to refer the dispute according to a written request to the engineer to settle the same and that he shall settle the dispute within 90 days, otherwise, upon lapse of this period without resolving the dispute, the parties shall be entitled to refer to arbitration. The appellant sent a

¹⁸ Dubai Court of Cassation 140/2007 Civil Appeal and 53/2011 Commercial Appeal.

written request to the consulting engineer on September 28, 2009, in which it specified the subject of the dispute, which is releasing the payment certificate [...] before resorting to arbitration, so that if any of these conditions were not met, the request to refer the dispute to arbitration shall be inadmissible in application of the pacta sunt servanda principle, and the burden of proving that those conditions were actually met before resorting to arbitration falls on the contracting party seeking to initiate the arbitration. If both parties agree that the dispute should be referred to the consulting engineer to decide thereon before initiating arbitration procedures, then it is not permissible for either party to resort to arbitration before referring the dispute to the consulting engineer ...”

Dubai Court of First Instance reiterated the same position and nullified and arbitral award issued under DIAC Rules 2007 on the bases that the dispute was not referred to the Engineer prior to commencement of arbitration and accordingly determined that the arbitration proceedings are considered illegitimate whereas the preconditions for initiating arbitration were not met.¹⁹

Similarly, Dubai Court of Appeal upheld the agreement to submit a dispute to DAB as a mandatory condition before proceeding to arbitration. Under those circumstances, the court dismissed a request to appoint an arbitrator prior to the parties fully satisfying the contractual DAB procedure.²⁰

In a recent case, Dubai Court of Appeal upheld the strict application of the condition precedent included in the multi-tier dispute resolution mechanism of FIDIC 1987. The court decided against the tribunal’s award issued under DIAC Rules 2007 in DIAC case no. 43/2018 and determined that the claimant had initiated arbitration prematurely whereas it started the arbitral process before fulfilling the pre-arbitral requirements outlined in FIDIC 1987. These requirements include, specifically, referring to

¹⁹ Dubai Court of First Instance 757/2016 Commercial Case

²⁰ Dubai Court of Appeal Case 795/2018 Commercial Appeal

the dispute between the parties to the engineer for resolution as stated in Clause 67.1 of FIDIC 1987. The courts further affirmed that it will not entertain a delayed dispute referral to the engineer, such as after the initiation of arbitral procedures and stated that:

*“If the two parties agreed that the dispute shall be referred to the consultant engineer in construction contracts in order to discuss the same prior to arbitration, then no such party shall have the right to refer the dispute to arbitration prior to referring the dispute to the engineer as aforesaid unless otherwise agreed by the two parties ...”.*²¹

The above-mentioned cases demonstrates that Dubai courts has consistently upheld that parties shall comply with the agreed pre-arbitration procedural requirement when the terms of their agreement are clear, specific, and measurable, such as those included in the FIDIC forms of contract, requiring the parties to obtain Engineer’s or DAB decision, as the case may be, prior to commencing arbitration.²²

2.3 Pre-Arbitration Requirements Under the UAE Law

As stated above, there are no specific requirements regulating pre-arbitration procedural requirements under the UAE laws, however, in case of disputes against the government or governmental authorities, there are specific pre-arbitration requirements mandated under specific laws, governmental procedures, and decrees.

One prominent example here is the legal requirements of initiating proceedings against the government of Dubai or any of its relevant authorities, whereas these disputes are subject to law no. (3) of 1996 as amended by law no. (10) of 2005. Article 3 (d) of the aforementioned law stipulates that disputes against the government shall be submitted to the Legal Affairs Department of Dubai government (LAD) enclosing full details of such

²¹ Dubai Court of Appeal 32/2019 Annulment of Arbitral Awards

²² Gordon Blanke, “Article 19 of the UAE Federal Arbitration Law: a first test” (Thomson Reuters, 2020)

dispute, LAD will then transmit this claim or dispute to the respective authority/entity against which the dispute is registered to review within one week of receipt thereof. Article 3(d) also stipulates that, should two months lapse without reaching amicable settlement of such dispute, the claimant could refer the dispute to the relevant court.

LAD offers useful clarification to the above-mentioned law that “...*the Government of Dubai Legal Affairs Department, under its establishing Law No. (32) of 2008, is tasked with receiving complaints and claims made against the Government and Government entities in the Emirate of Dubai, and seeking amicable settlement, through a specialized team of legal counsel, in accordance with the procedures set out in Law No. (3) of 1996 Concerning Government Claims*”.²³

The wording of Article 3(d) of the above-mentioned law is unclear as to whether this law also applies to disputes that will be referred to arbitration when an arbitration agreement is in place. However, LAD offers further clarification that confirms that “...*potential arbitration claims against any entity affiliated with the Government of Dubai be submitted to the Legal Affairs Department for amicable settlement prior to initiating arbitration procedures*” and that “*The claimant has the right to request the issuance of a certificate to initiate arbitration proceedings after the lapse of the two-month mediation period ...*”.²⁴

In reading of the above law and clarifications offered by LAD, it is clear that Article 3(d) imposes further pre-arbitration requirements beyond what could be mentioned in an arbitration agreement between a party in contract with a Dubai government entity. A

²³The Government of Dubai Legal Affairs Department, “FAQ”, <[https://legal.dubai.gov.ae/en/Services/Pages/ServicesDesc.aspx?ServiceID=10#:~:text=\(3\)%20of%201996%20Concerning%20Government,App%20or%20the%20Department's%20website](https://legal.dubai.gov.ae/en/Services/Pages/ServicesDesc.aspx?ServiceID=10#:~:text=(3)%20of%201996%20Concerning%20Government,App%20or%20the%20Department's%20website)> accessed on 18 November 2023

²⁴ The Government of Dubai Legal Affairs Department, “FAQ”, <<https://legal.dubai.gov.ae/en/AboutDepartment/Pages/faq.aspx#>> accessed on 18 November 2023

party filing a dispute against the Government of Dubai or any of its affiliated authorities has to; (1) notify LAD with its claim, (2) engage in amicable settlement discussions for a period of at least two months, and (3) obtain a certificate from LAD to initiate arbitration proceedings, prior advancing a case in arbitration. The foregoing, by itself, forms another set of pre-conditions that could prevail over similar, or even contradictory, requirements of the arbitration agreement under the contract.

It is to be noted that the wording of the law does not specify the scope of application of the law on arbitration, however it could be reasonably assumed that non-compliance with such requirements when initiating arbitration against a governmental authority in Dubai, for an arbitration seated in Dubai, would potentially result in inability to commence arbitration or, if arbitration proceeds, annulment of arbitral award for premature referral to arbitration or lack of jurisdiction. In all cases, a party pursuing a claim against a governmental authority in the Emirate of Dubai would be advised to secure its legal position to safeguard the legal proceedings and subsequently the arbitral award.

It is pertinent to mention that the DIFC courts have rules that require specific pre-action protocols to be followed in certain situations. As an illustration, according to RDC 41.19, it is required that a person who wants to start legal action against the government must give notice of their intention to do so at least 15 days before actually starting the legal procedures. In the case of *Limsa v Lordon A Trading Platform of Dubai Multi Commodities Centre & Ors* [2020] DIFC ARB 008, the claimant's inability to adhere to pre-action protocols, including the one outlined in RDC 41.19, led the judge to determine that the claimant must cover the defendants' costs. It is unclear whether the same rule could apply to arbitrations seated in the DIFC.

2.4 Binding Nature of Pre-Arbitration Procedural Requirements

If we assume that the pre-arbitration procedural requirements stated in the contract are legally binding, they give rise to difficulties regarding their interpretation. Several authorities have examined whether these conditions are obligatory or non-obligatory (i.e., merely aspirational).

As mentioned earlier in this research, national courts and arbitral tribunals have typically been reluctant to consider compliance with contractual pre-arbitration requirements for negotiation or mediation of disputes as a compulsory obligation, unless there is explicit language to this effect. However, when the parties' intention is evident, courts and arbitral tribunals consider these criteria to be obligatory, this might have major consequences. Failure to adhere to mandatory pre-arbitration procedures can result in accusations of breach of contract and may prevent the non-compliant party from initiating arbitration or presenting their claims in such proceedings.

In fact, non-compliance with mandatory pre-arbitration procedural requirements can jeopardize the validity of arbitral awards, leading to its annulment or non-recognition. The same approach can be used to the need to explore other methods for resolving disputes (such as going through local legal processes), but these requirements are more likely to be considered obligatory.

As discussed later in this chapter, many international arbitral tribunals have established in a significant number of rulings that breaches of pre-arbitration procedural requirements, such as disregarding waiting or 'cooling-off' periods or failing to negotiate dispute resolutions, do not constitute a breach of obligatory pre-arbitration requirements. According to one tribunal, clauses that requires attempts to achieve amicable settlement before starting arbitration are mainly an expression of intention to motivate settlements,

such provisions should not be used to force parties into unproductive negotiations or to delay the resolution of disputes.²⁵

The usual justification for these decisions is that pre-arbitration procedures are largely aspirational, and that a non-compliant party with such procedures shall not result in any meaningful harm to the other party. As a result, this analysis undermines the reliability and legal binding nature of agreements to negotiate. These decisions are also influenced by a hesitation to prevent parties from participating in legal proceedings and seeking remedies for valid claims, especially when the non-compliance with pre-arbitration procedures is unlikely to fully resolve the dispute or offer similar relief.

Likewise, some arbitral rulings determine that it is generally not necessary to fulfil negotiation, mediation, conciliation, or other similar procedural conditions stated in an arbitration agreement before starting arbitration proceedings. These decisions primarily occur in relation to provisions that include 'cooling-off periods', which mandate the giving of notice and engaging in negotiations for a specific duration. In the words of one tribunal:

*“In the Tribunal’s view [...] properly construed, this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for an amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. Non-compliance with the six-month period, therefore, does not prevent this Arbitral Tribunal from proceeding”.*²⁶

The same rationale is reflected in Article 13 of the UNCITRAL Model Law on International Commercial Conciliation, which provides: *“Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time*

²⁵ See for example, ICC Case No 10256, Interim Award (12 August 2000) in Figueres (n 2) 87 and ICC Case No 11490, Final Award (2012) XXXVII YB Comm Arb 32

²⁶ Biwater Gauff v Tanzania (n 25) para 343

*or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not in itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings”.*²⁷

Conversely, if dispute resolution clauses clearly state that negotiations or other procedural steps are obligatory and must be followed in order to proceed with arbitration, certain arbitral tribunals and national courts have enforced such language. For instance, one arbitral tribunal determined that a Request for Arbitration was premature and subsequently dismissed the arbitration due to the claimant's failure to fulfil pre-arbitral dispute settlement requirements.²⁸

Both English and Swiss courts have recently addressed the matters discussed in the preceding paragraphs. In both cases, the courts affirmed the crucial role of the Dispute Adjudication Board (DAB) in the FIDIC dispute resolution process and emphasized that referring to the DAB is mandatory. Significantly, the Swiss courts acknowledged that a party cannot frustrate this as a justification to obstruct the DAB process and subsequently claim that an arbitration referral is invalid due to noncompliance with this process. This action would be contrary to the principles of good faith, which are typically upheld in the UAE as well.²⁹

For instance, the Dubai Court of Cassation has determined that the failure to adhere to pre-arbitration regulations could serve as a basis for rejecting a motion to advance the

²⁷ UNCITRAL Model Law on International Commercial Conciliation (2002), Art 13.

²⁸ ICC Case No 6276 (n 4), see also ICC Case No 9812, Final Award (2009) 20(2) ICC Ct Bull 69, 73.

²⁹ Peterborough City Council v Enterprise Managed Services Limited [2014] EWHC 3193 (TCC) and Swiss Federal Supreme Court Case dated 7 July 2014 (4A_124/2014)

matter to arbitration. The court reiterated that the burden to demonstrating adherence to arbitration prerequisites lies with the party wishing to commence arbitration proceedings.

The court stated:

“[...] it is established in this court that according to the general principles of contracts; the parties to it may stipulate any condition that they find appropriate as far as it is not against public policy. The parties may agree conditions precedent that must be followed before recourse to arbitration. If the condition precedent is not satisfied the request for arbitration should be invalid”.³⁰

As discussed above, the UAE courts have frequently invalidated arbitral awards when the claimant has not satisfied pre-arbitration formalities. This is specifically true where the language of the dispute resolution clause explicitly states that the pre-arbitration procedural requirements are mandatory conditions that must be met before proceeding with arbitration.

It has been consistently established in the UAE courts that parties are allowed to include any clause in their agreement that they consider suitable, as long as it does not go against public policy or moral standards. This includes the inclusion of a clause that sets preconditions for arbitration. This position has been consistently supported by the Dubai Court of Cassation in various cases referred above where the court noted that:

“It is established in the precedents of this court in accordance with the general rules of contracts that the arbitration is a contract concluded between two parties who may insert any condition [...] so that they may lay down prerequisites that must be met before resorting to arbitration. If any of these conditions was not met, the application for arbitration shall be dismissed in accordance with the rule which says that the contract is the law of the contracting parties”³¹

³⁰ Dubai Court of Cassation 124/2008 Commercial Appeal

³¹ Ibid

The same principle was adopted by the Abu Dhabi Court of Cassation in which the court noted:

“[I]t is established subject to obligatory rules in contracts that arbitration, as a contract between its parties, may include any provision the contractors consider appropriate without prejudice to public order or ethics. This allows the parties to put pre-conditions before seeking arbitration where if any of such provisions is not performed, seeking arbitration shall not be accepted subject to the rule “Pacta sunt servanda (agreements must be kept).”³²

It must be noted that the mandatory nature of any agreed multi-tier dispute resolution mechanism is contingent upon whether the ultimate dispute resolution forum is agreed to be national courts or arbitration. Whereas any attempt to limit access to the UAE national courts is likely to be unenforceable due to public policy reasons. Therefore, the Courts adopt the view that parties are allowed to establish preconditions that must be met before arbitration proceedings can begin, however, this may not be applicable in case of litigation. In one ruling, Dubai Court of Cassation stated:

“If the parties agree to follow certain specific procedures in order to resolve amicably any difference that may arise between them concerning the execution of certain work, that does not prevent them from having recourse to the courts directly on grounds that the court has a general jurisdiction to determine disputes”.³³

Due to such various approaches, it is challenging to establish precise criteria for determining whether a pre-arbitration procedural requirement will be considered obligatory or optional by a tribunal or national courts. Some experts proposed that any uncertainties regarding the obligatory nature of contractual negotiating provisions should be resolved in

³² Abu Dhabi Court of Cassation Case No. 173/2014 (164) as well as Case No. 140/2007

³³ Dubai Court of Cassation Case Number 14 of 2008

support of their aspirational and non-binding nature. A pre-arbitration negotiating provision should only be considered required and binding on parties to refrain from initiating or continuing arbitral proceedings if the language used is clear and unambiguous. This study would offer significantly higher certainty compared to other existing methods, while aligning more accurately with the true goals and purposes of the parties involved.³⁴

2.5 Conditions Precedent vs. Conditions Subsequent

As previously mentioned, multi-tier dispute resolution clauses are typically valid in the UAE. However, if mandatory preconditions to arbitration are not met before starting the arbitration process, a respondent may successfully argue that the claim is not acceptable or that the appointed tribunal does not have the authority to decide the dispute. In such circumstances, national courts may nullify awards if a claimant fails to meet the required preconditions. This proposition essentially views mandated pre-arbitration procedural procedures as a ‘condition precedent’ that must be fulfilled before arbitration can begin.

It is worth noting in this context that Article 25 of the UAE Arbitration Law states that if a party fails to raise an objection to its opponent's failure to meet a procedural requirement in the arbitration agreement within the agreed time limit, or within seven days of becoming aware of the non-compliance if no time limit was agreed upon, it automatically waives its right to object.³⁵

However, practical consideration may force a party to the dispute seek to commence arbitration prior to full compliance with what is deemed to be a condition

³⁴ Gary Born and Marija Šcekic, “Practicing Virtue: Inside International Arbitration”, Chapter 14, (Oxford University Press, 2015), page 239.

³⁵ Antonia Birt and Amr Omran “Arbitration Guide - IBA Arbitration Committee - United Arab Emirates - Updated December 2019” (IBA, 2019), 8

precedent to commence arbitration. One valid example is when a party is seeking to apply for interim relief whereas according to the UAE civil procedural law a party having secured an interim relief in its favour is required to file a substantive lawsuit within eight days from the date when the order for temporary relief was enforced. Pursuant to the UAE Arbitration Law, a notice or request for arbitration fulfils the criterion of a substantive lawsuit, eliminating the need to file a second lawsuit in court.³⁶ Practically, the petitioner must be prepared to prove to the court that the notice of arbitration was sent within eight days of the order for interim relief being authorized. In such case, a party may not be in a position to wait until the preconditions are fully satisfied and shall commence the arbitral proceedings within these eight days.³⁷

Another practical example is when a party is advancing a new claim or a counterclaim after the commencement of arbitral proceedings (this situation will be discussed in further details hereinafter), in such case, it will not be practically possible to satisfy such ‘condition precedent’ in this scenario, a tribunal in an arbitration seated in the UAE would be obligated to reject jurisdiction or dismiss these new claims (or counterclaims). This would require the parties to fulfil the conditions precedent, and then submit a new request for arbitration and establish a new tribunal which is inefficient and comes with additional time and cost.

The recent international approach, exemplified by the Chartered Institute of Arbitrators' International Arbitration Practice Guideline on Jurisdictional Challenges, according to Article 3 of this guideline, arbitral tribunals are empowered to stay the proceedings in order to ensure compliance with these conditions after the arbitration has

³⁶ Chatura Randeniya, “Interim relief prior to starting arbitrations under the Federal Arbitration Law: A note on recent experiences”, (Afridi & Angell, 2020).

³⁷ Article 27(2) of the UAE Arbitration Law states “*Notice of the request for arbitration shall be deemed to be tantamount to filing an action for the purpose of levying precautionary attachment*”.

begun, which in effect, converting the agreed ‘condition precedent’ into ‘condition subsequent’. In a strict sense, the international approach compromises the pre-arbitral conditions in the FIDIC like contracts by enabling compliance with contractual provisions to be met after arbitration commences.

Although Dubai Courts have traditionally declined to adopt this modern international approach (see for example, Dubai Court of Appeal’s findings in appeal 32/2019 Annulment of Arbitral Awards mentioned above, where the court have specifically stated that it will not entertain a delayed dispute referral to the Engineer).³⁸ However, in a very recent case, Dubai Court of Cassation commented on a decision taken by one tribunal stating that:

*“[...] for example, by raising [a claim] prematurely is a question of admissibility. The effect of this is that any nonfulfillment 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.”*³⁹

With this latest approach, Dubai Courts seems to be influenced with the modern international approach and receptive to the idea of accepting that the ‘conditions precedent’ to be satisfied to a future date after commencement of the arbitral proceedings, which is in effect, turning the ‘condition precedent’ to a ‘conditions subsequent’. This is, in the author’s view, a welcomed move towards more efficient dispute resolution approach.

³⁸ Confirmed by Dubai Court of Cassation 339 of 2020 Commercial Appeal

³⁹ Dubai Court of Cassation 1514/2022 Commercial Appeal

2.6 Inoperability of Pre-Arbitration Procedural Requirements

Turing now to examine a situation where agreed pre-arbitration procedural requirements are rendered inoperable or, in other words, impossible to fulfil especially in cases when a dispute arise after termination of the construction contract or long after completion of the contract where the Engineer is not available or it is impossible to constitute DAB, what would be the possible consequences in such a case?

The UAE civil code has demonstrated that a condition holding a contingent right is no longer valid whenever it becomes impossible to perform which would result in the contingent right being effective immediately. Article 423 of the UAE Civil code states; “*A conditional (lit: suspended) disposition is one which is dependent on a not yet existing Condition or on a future event, and whose effect is suspended until such Condition is satisfied.*”

Article 424 of the UAE Civil Code further states: “*In order for the suspension to be valid, the Condition must be an event which has not taken place, but which could take place and is not impossible.*”

The survival of the right has been confirmed by the Dubai Court of Cassation as follows;⁴⁰

“...it is understood from Articles from 420 to 427 of the Civil transactions Code that the right contingent to a condition is an existing and binding right. The condition is an occasional matter added to it after its completion and the achievement of its elements. The condition does not contribute to the formation of the right itself. It is rather added to it after its formation. An obligation is conditional on the matter of its existence, or its disappearance is a consequence of an unfulfilled future matter. This

⁴⁰ Dubai Court of Cassation, Civil Appel No. 471 of 2018, dated 7 February 2019 and Cassation of Rights No. 450/2003/398 of 2003, dated 14 March 2019

suspicion of the occurrence of the matter is the core of the condition and the crux of it. If the matter is certain to fall, then it is not a condition, and if an obligation is conditional on a matter that is not possible, permitted a forbidden, forbids a permissible, or contrary to public order or morals, then the condition is null and void. As for the obligation itself, it is not forfeited and implemented immediately...”

Therefore, it could be argued that claims that were not brought forward for Engineer’s decision in context of Clause 67 of FIDIC 1987 for example shall not affect a party’s entitlement to advance its claims to arbitration as there could be an impossibility of fulfilment of pre-arbitration procedural requirements, i.e. it is impossible to refer the claim for the Engineer’s decision after the completion of the project and the Engineer is unreachable or ceasing of having any authority under the contract.

The FIDIC DAB process (or similar adjudication procedure) may also become difficult or impossible to implement when a dispute arises for a variety of reasons, for example, if the parties are unable to agree on the adjudicator/DAB members, or when there are disagreements as to the adjudicator/DAB members’ remuneration, or if one party is simply intransigent and refuses to sign the agreement appointing the adjudicator/DAB (known in FIDIC terminology as the “DAA”).

The refusal of one party to sign the Dispute Adjudication Agreement (DAA) can pose significant difficulties, particularly considering the content of clause 20 of the FIDIC 1999 Forms. However, sub-clause 20.8 possibly grants an unwilling party an "escape" clause and a direct path to arbitration.

In *Al Waddan Hotel Ltd v Man Enterprise Sal (Offshore)* [2014] EWHC 4796 (TCC), the English court was examining a similar situation when considering whether the Contractor ("MAN") had the right to bring a dispute to arbitration before the contractual time period expired, even though the Engineer was supposed to make a decision on the

dispute before arbitration could take place. However, both parties were aware that the Engineer would not make a decision within that time period, or possibly at all, due to the Employer's ("AWH") default. The contract in question refers to the FIDIC 1987. The clause of importance is sub-clause 67.1, which stipulates that in the event of a disagreement between the involved parties, it must initially be brought to the attention of the Engineer. The Engineer is then required to provide a decision within a period of 84 days. The court determined that it was firmly established under the FIDIC form that the process outlined in article 67.1 must be completed before arbitration can take place.

In this case, when MAN referred a dispute to the Engineer in line with sub-clause 67.1, it became clear that the Engineer's decision would not be provided because AWH terminated the Engineer's contract and did not take any action to find a replacement. Afterwards, MAN submitted the case to arbitration before the expiry of the 84 days period allowed for the Engineer Decision. AWH challenged this action on the grounds that, notwithstanding the absence of an Engineer's decision, MAN was still obligated to wait until the 84 days period, within which the Engineer was required to make a decision, had expired.

The court dismissed AWH's argument and determined that the case could be directly sent to arbitration, even though the requirement precedent had not been fulfilled. The court arrived at this result by examining the extensive and well-established legal concepts of cooperation and prevention of performance, as referenced in *Mackay v Dick* [1881] 6 AC 25. In a previous case, *Stirling v Maitland* (1864) 5 B & S 840, the court made the following statement:

"... if a party enters into an arrangement which can only take effect by the continuance of a certain existing set of circumstances, there is an implied engagement on his part that he shall do nothing of his own

motion to put an end to that state of circumstances, under which alone the arrangement can be operative”.

Judge Raeside QC determined that these concepts were sufficiently established to be easily inferred into contracts governed by common law. In this instance, the court referred to the recent decision of Attorney General of Belize v Belize Telecom [2009] 1 WLR 1988. Lord Hoffman, in that case, made the following statement: “*There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?*”

By applying these concepts, the court determined that the condition precedent in sub-clause 67.1 might be overridden by either the "refusal approach" or the "hindrance avoidance approach", or both. The refusal approach is grounded in a series of established precedents dating back to the Victorian era. These precedents state that if an impartial decision-maker, appointed by the parties, declines to fulfil their delegated role, the parties have the right to approach the court to seek the relief or remedy that they would have otherwise obtained from the appointed decision-maker.⁴¹

It is reasonable to assume that this approach could be equally applied in the UAE, whereas Article (70) of the UAE Law of Civil Transactions provides for similar principle, it states: “*No person may resile from what it has (conclusively) performed.*”

المادة 70 : من سعى في نقض ما تم من جهته فسعيه مردود عليه

Consequently, when the Engineer explicitly and unequivocally declared that it would not fulfil its role in making decisions, the parties had the option to either consider the contractual obligation as no longer applicable or to seek the services of a different

⁴¹ Jeremy Glover, “Implied terms of cooperation and non-prevention of performance - a party cannot take advantage of its own wrongdoing” Fenwick Elliott, 2015)

Engineer. Since AWH had not made any effort to hire another Engineer, the court concluded that both parties were no longer obligated to seek the Engineer's decision.

The "hindrance avoidance" approach is founded on the enduring principle, often referenced from the speech of Blackburn J in the Victorian case of *Roberts v Bury Improvement Commissioners* (1870) L.R. 5 C.P.310. In this case, the Judge stated that no individual can benefit from the failure to fulfil a condition if they themselves have obstructed its fulfilment.

The court further acknowledged that AWH had a contractual obligation to not only hire the Engineer but also to guarantee that the Engineer executed their contractual duties. Consequently, AWH had a responsibility to uphold the Engineer's retainer or designate a different Engineer when there was a failure to perform.

AWH violated this responsibility by terminating the Engineer's contract and neglecting to hire a replacement Engineer, therefore hindering the fulfilment of this requirement. Consequently, AWH did not have the right to depend on the provision that required the Engineer's ruling before the matter could be sent to arbitration. Consequently, MAN was not obligated by the condition that came before and had the right to bring the dispute to arbitration.

2.7 Applicability of Pre-Arbitration Procedural Requirements After Commencement of Arbitration

The question now is whether preconditions for commencing arbitration in the UAE equally apply to new claims, or counterclaims, that arise both before and after the initiation of arbitration, or are there discernible differences in their treatment?

Article 21 of the UNCITRAL Arbitration Rules states:

“In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.”

It could be argued from the above provision that the UNCITRAL Arbitration Rules expressly stipulated the obligation for a defending party to establish the tribunal’s jurisdiction over such party’s counterclaims, even if such claims are by way of set-off. Accordingly, a respondent advancing a counterclaim could be obligated by the Rules to establish and demonstrate the tribunal’s jurisdiction over their counterclaims, even if by way of set-off.

However, it could be debated that given that a tribunal’s jurisdiction has been already established by virtue of being properly appointed to look into the same claims under the same contract and the same arbitration agreement, there shall be no need to re-establish jurisdiction that already exists. However, there remains the other element of admissibility and whether such counterclaims are admissible in context of relevant pre-conditions of dispute resolution mechanism. In such case, it could be possible for a tribunal, should the tribunal take a narrow view on the compliance with such pre-conditions, to allow a party to go and comply with such preconditions for admissibility, which, interestingly, Dubai Court of Cassation opened the door for. However, there remains a concern of absence of legal grounds under UAE Arbitration Law for such action.

There has also been judicial support for the view that parties may even be completely justified in dispensing with certain pre-conditions that require mere amicable settlement negotiations. It was established by Dubai Court of Cassation that:

“...it is established that the agreement of contracting parties to follow certain procedures for amicable resolution of a conflict between them

*regarding the execution of a certain work does not prevent resorting to court directly, given that the court has the general jurisdiction to settle disputes, and considering that the direct resort of one party to court is proof of failure to reach amicable resolution or settlement...*⁴²

In an arbitration under the ICC arbitration rules; the respondent asserted that the claimant had prematurely commenced arbitration proceedings because the claimant made no initial efforts to resolve their dispute amicably (despite this being required in the parties' agreement). The parties had exchanged a series of letters, wherein they both asserting their respective positions on the dispute. The latest of the claimant's letters proposed that the parties converge for a meeting, to which the respondent did not respond. In determining that the arbitration proceedings were not prematurely initiated, the arbitral tribunal said the following:

*"...the arbitrators are of the opinion that a clause calling for attempts to settle a dispute amicably are primarily expression of intention and must be viewed in the light of the circumstances. They should not be applied to oblige parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute. Accordingly, the arbitrators have determined that there was no obligation on the claimant to carry out further efforts to find an amicable solution, and that the commencement of these arbitration proceedings was neither premature nor improper ..."*⁴³

In dealing with the matter of admissibility of a counterclaim for delays pursuant to Clause 67.1 of the contract, which responded to a claimant's claim of the same nature on project's delays, the tribunal considered that the 'dispute' occurs when "*...the parties have incompatible or irreconcilable claims and when a dispute arises*" accordingly, it need not be for the other party to refer its own counterclaim concerning same dispute to the

⁴² Dubai Court of Cassation 14/2008 Commercial Appeal

⁴³ Manufacturer v Manufacturer, Final Award, ICC Case No. 8445, 1994, Albert Jan Van Den Berg (ed), Yearbook Commercial Arbitration 2001 – Volume XXVI, Yearbook Commercial Arbitration.

Engineer separately. This is particularly the case when the parties hold opposing views on liability for delay, since the determination of one party's claim will naturally lead to the determination of the other party's claim.⁴⁴

The tribunal in the above-mentioned case drew a distinction between those facts of the case, in which the claimant had notified the Engineer with its dispute and the respondent had notified the claimant with levying of delay damages for delay, and the facts in the previously mentioned decisions of Dubai Court of Cassation [Dubai Court of Cassation 140/2007 Civil Appeal and Dubai Court of Cassation 53/2011 Commercial Appeal], in which neither party had referred the dispute relating to a specific point to the Engineer prior to the commencement of arbitration proceedings and, as a result, the Court found that the claimant had failed to fulfil the pre-arbitral requirements. However, in this case, when the claimant referred the dispute containing its entitlements to the Engineer, which necessarily included the issue of delay the tribunal found those cases not to be of relevance to the issue in hand. The tribunal, accordingly, dismissed the claimant's plea against the respondent, whether for lack of jurisdiction or inadmissibility, for non-compliance with the pre-conditions of raising the counterclaim under Clause 67.1 of the contract.

2.8 Conclusion

Although UAE legislation presently does not regulate pre-arbitration procedural requirements, except for particular pre-arbitration procedural requirements in disputes against the government or a government related entity, the 'onshore' and 'offshore' legal systems allow contracting parties to mutually stipulate that settlement negotiations,

⁴⁴ ICC Case no.24026/HTG/MDY, 217

mediation, or other alternative dispute resolution methods must precede arbitration proceedings. If the parties mutually consent to a prerequisite prior to commencement of arbitration, the courts in the UAE often uphold this agreement and require the parties to adhere to the prescribed procedure before proceeding with arbitration. Nevertheless, it cannot be assumed as an absolute norm that local courts will always see every pre-arbitral procedure as a necessary requirement for arbitration, or at the very least, mandatory.

In summary, it is essential to adhere to any prerequisites that involve well-defined procedures that must be completed prior to the initiation of arbitration; failure to do so will result in the arbitration being deemed premature. In cases where a broad clause exists, which simply motivates an endeavour to achieve an amicable resolution without identifying a specific approach or procedure, the act of one-party initiating arbitration serves as evidence that previous attempts at settlement have been unsuccessful. The responsibility lies with the party who is advancing a dispute before the tribunal to proof that such requirements were fulfilled. If this party fails to do so, they will not be able to address the issue throughout the enforcement process.

Chapter 3 : Characterizing The Arguments Related to Non-Compliance with Pre-Arbitration Requirements Under UAE Law

3.1 Introduction

The categorization of pre-arbitration procedural requirements is a recurring topic that pertains to their legality and impact. Specifically, concerns regarding characterization pertain to whether these requirements are related to admissibility or jurisdictional aspects. Arbitral tribunals, courts, and other authorities have made conflicting conclusions in cases that involve the same concerns. These results are both analytically perplexing and frequently create ambiguity regarding the legal ramifications of violating pre-arbitration procedural requirements.

Disagreements about pre-arbitration procedural requirements often revolve around matters of characterization. Claims of non-compliance with procedural requirements can be categorized as 'jurisdictional' challenges, which argue that the arbitration agreement is not activated until pre-arbitration procedural requirements are met, or that the parties' consent to arbitration is contingent upon fulfilling certain pre-arbitration steps. It can also be classified as 'admissibility' defences, which assert that the arbitration agreement is in place and grants jurisdiction to the arbitrators, but substantive claims cannot be made until specific requirements are fulfilled. Lastly, they can be seen as 'procedural' requirements, which pertain to the procedural conduct of the dispute resolution mechanism and do not impact the parties' substantive rights to be heard and will be considered as a mere breach of contract if not fulfilled.

The characterization of pre-arbitration procedural requirements in contracts differs across various legal systems, but it can have significant implications in some jurisdictions.

For instance, certain experts propose that failure to comply with pre-arbitration procedural requirements should be classified as a matter of 'admissibility' rather than 'jurisdiction.' This approach would restrict the potential for interim judicial decisions and the annulment or non-recognition of arbitral awards based on jurisdictional grounds. On the one hand, a 'jurisdictional' requirement must potentially be fulfilled only by circumstances that exist at, or prior to the start of an arbitration. On the other hand, an 'admissibility' requirement can usually be fulfilled later, by circumstances that arise after the arbitration has begun.⁴⁵

There is disagreement among arbitral decisions and other authorities about how to accurately characterize arguments related to pre-arbitration procedural procedures. Certain authorities argue that these requirements pertain to matters of 'admissibility' rather than 'jurisdiction'. Some experts argue that pre-arbitration procedural requirements are considered 'jurisdictional', meaning that failure to comply with these requirements prevents the proper beginning of arbitration.⁴⁶ A third authority has refused to classify pre-arbitration procedural requirements as admissibility, jurisdiction, or procedural issues. Instead, they consider these requirements as mandatory and must be followed. They also adopt practical approaches to addressing violations of these requirements. This chapter examines the differences between 'Jurisdictional' and 'Admissibility' in the context of pre-arbitration criteria in the UAE.

⁴⁵ See Paulsson (n 59) 617 “*Decisions of tribunals which do not respect jurisdictional limits may be invalidated by a controlling authority. But if parties have consented to the jurisdiction of a given tribunal, its determinations as to the admissibility of claims should be final. Mistakenly classifying issues of admissibility as jurisdictional may therefore result in an unjustified extension of the scope for challenging awards*”.

⁴⁶ Gary Born and Marija Šcekic, “Practicing Virtue: Inside International Arbitration”, Chapter 14, (Oxford University Press, 2015), 245

3.2 Distinction between 'Jurisdiction', 'Admissibility' and 'Arbitrability'

The focus on this study is the characterization of arguments related to non-compliance arbitrability, in particular, to analyse the courts and tribunals practice as to whether such arguments are classified as a question of 'jurisdiction' or 'admissibility'. However, whereas these two notions are sometimes confused with the concept of 'arbitrability', it suffices to start by drawing clear distinction between each of these three different concepts.

'Arbitrability' is perhaps the easiest of the three concepts to define (as far as English law is concerned). What is meant by and should be understood as a dispute which is arbitrable?

The New York Convention⁴⁷ provides for the recognition of an international arbitration agreement, which concerns "*a subject matter capable of settlement by arbitration*"⁴⁸ and the UNICITRAL model law is similarly limited to disputes that are capable of settlement by arbitration. However, even with the concept of arbitrability there are difficulties. US case law frequently conflates arbitrability issues with jurisdiction issues. There's considerable scope for debate as to what issues may or may not be arbitrable. Matters which are non-arbitrable are those which must be resolved exclusively by the domestic courts of the state.

It's widely recognized that non-arbitrable matters, which are not capable of settlement by arbitration include criminal law, family law, corporate liquidations and the grant of patents and trademarks. There are grey areas, for example, questions of the illegality of a contract are regularly determined by arbitral tribunals, even though a

⁴⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

⁴⁸ Article II.1 of New York Convention

consequence of the illegality may be the commission of a criminal offence issues concerning unfair prejudice to a minority shareholder are generally considered to be arbitrable.

Although the two concepts of arbitrability and jurisdiction have sometimes been confused, they are separate and distinct concepts. Jurisdiction matters extend beyond issues of arbitrability. The parties to a dispute cannot give a tribunal the power to determine matters which are not arbitrable, as opposed to where the parties consent to refer to arbitration a matter.

Put as simply as possible, the concept of jurisdiction in the arbitration context refers to the authority of an arbitration tribunal to determine a case. Whereas admissibility refers to the appropriateness of a tribunal exercising its jurisdiction. The distinction between those two concepts has been the subject of extensive academic writings, but of less analysis in the English and UAE case law.

Section 30 of the English Arbitration Act 1996, which is concerned with the competence of a tribunal to rule on its own jurisdiction, identifies three areas where the issue of the tribunal's substantive jurisdiction comes into play: (1) Whether there's a valid arbitration agreement, (2) Whether the tribunal is properly constituted, and (3) of what matters have been submitted to arbitration in accordance with the arbitration agreement (most frequently). Those three issues are the only ones that can be relied on in a challenge under section 67 of the 1996 Act: to any award of a tribunal as to its substantive jurisdiction.

In *Sierra Leone v SL Mining*⁴⁹ the court equated arbitrability with the question whether there was another forum in which the claim in question should be decided. By

⁴⁹ *The Republic of Sierra Leone v SL Mining Limited* [2021] EWHC 286 (Comm)

contrast admissibility is concerned with whether a claim that could be determined by arbitration should be so determined.

3.3 Latest Approach in the International Scheme

United Kingdom

Sierra Leone v SL Mining was concerning a large-scale mining license, granted by the republic of Sierra Leone, in favour of SL Mining Limited, regarding the suspension and the subsequent cancellation of that license by the Sierra Leone government. The license contained an arbitration agreement for disputes to be determined by a panel of three arbitrators, acting in accordance with ICC Rules.

This arbitration agreement provided for a conditioned precedent to the bringing of an arbitration proceeding: (a) service of the written notice, (b) good faith negotiations, and (c) the expiry of three months following that notice without agreement being reached.

SL Mining, however, initiated arbitration just six weeks after serving a notice of dispute, bypassing the agreed three-month waiting period.

Following that request, the tribunal was duly formed, where the Sierra Leone government challenged the jurisdiction of the tribunal on the basis that no arbitration could be commenced until the expiry of three months, and since the arbitration had been commenced prematurely, the arbitrators lacked jurisdiction to decide the dispute between the parties.

The tribunal rejected that submission and by its partial final award they declared that they had jurisdiction in respect of SL Mining's claims. The government challenged the partial final award in the high court under section 67 of the Arbitration Act, which enables

a party to apply to court to challenge an award of a tribunal “*as to its substantive jurisdiction*”.

The term substantive jurisdiction in relation to a tribunal is defined by a combination of sections 82.1 and section 30. 1 of the Arbitration Act. As to encompass a ruling by the tribunal:

1. as to whether there is a valid arbitration agreement,
2. whether the tribunal is properly constituted, and
3. what matters have submitted to arbitration in accordance with the arbitration agreement (which the government focused on - not entitled to refer a dispute to arbitration before the expiry of the three-month period.

SL Mining submitted that the failure to wait for the expiry of the three-month period was a matter of admissibility, not a matter of the substantive jurisdiction of the tribunal and since section 67 challenge deals only with the absence of substantive jurisdiction, and that was not the case here, the application must fail.

The judge (Sir Michael) noted that the distinction between jurisdiction and admissibility, referring to a series of three English court decisions. *PAO Tatneft v Ukraine*⁵⁰ in 2018, where the judge (Mr Justice Butchered) said “*Issues of jurisdiction go to the existence or otherwise of a tribunal’s power to judge the merits of a dispute. Issues of admissibility go to whether the tribunal will exercise that power in relation to the claims submitted to it*”.

The government relied on two English first instance court decisions: *Emirates Trading Agency*; the prime export 2015 case and *Tang the Grant Thornton*; a 2013 case, with similar temporal condition precedents and where the court accepted that the challenge

⁵⁰ *PAO Tatneft -v- Ukraine* [2018] EWHC 1797 (Comm)

was available under section 67 (substantive jurisdiction). The Judge then did not follow those decisions, as in each case the availability of a challenge under section 67 was assumed, i.e., it was not argued before the court, and because the case is preceded in time. The question was mainly whether a challenge that a claim was premature is one going to substantive jurisdiction or to admissibility.

The Judge analysed the views of academic commentators: Paulsson "*Jurisdiction and Admissibility in Global Reflections on International Law, Commerce, and Dispute Resolution*"⁵¹ which reached the following conclusion: "*If the reason for such an outcome would be that the claim could not be brought to the particular forum seized; the issue is ordinarily one of jurisdiction and subject to further recourse. If, however, the reason would be that the claim should not be heard at all or at least not yet, the issue is ordinarily one of admissibility, and the tribunal's decision is final.*" And "Once it is established that the parties have consented to the jurisdiction of a particular tribunal, there's a powerful policy reason to recognize its authority to dispose conclusively of other threshold issues - those are matters of admissibility, alleged impediments to the consideration of the merits of the dispute, which do not put into question the investiture of the tribunal as such."

If there's a question about the terms of an arbitration agreement, like where a particular dispute should be resolved, it is a matter of substantive jurisdiction, and the tribunal's decision can be challenged under Section 67. However, if there is no question about the forum, and the only issue is prematurity, the challenge goes to admissibility and isn't subject to challenge under Section 67.

⁵¹ Jan Paulsson, "Jurisdiction and Admissibility - Global Reflections on International Law, Commerce, and Dispute Resolution" (ICC Publishing, 2005)

Merkin and Flannery on Arbitration in 1996 drew this same distinction.⁵² If the issue concerns whether the claim has been brought too late or too early, it's more likely to go to the question of admissibility than jurisdiction. This was approved in two decisions of the Singapore Court of Appeal in the 2020 cases *BBA v BAZ*⁵³ and *BTN v BTP*.⁵⁴

Sir Michael's ultimate conclusion was that while international authorities strongly support challenges like the present one not going to jurisdiction, the matter in English law boils down to whether prematurity falls within Section 30(1)(c) of the Arbitration Act 1996. He disagreed with the government's argument that the precise wording of the clause matters significantly and stressed that the focus should be on what matters have been submitted. Drawing from Paulson's views and the Singapore Court of Appeal, the judge asserted that the challenge here is not about arbitrability or alternative forums but rather about whether the claim was presented too early, a matter best left to arbitrators.

Furthermore, Sir Michael dismissed the Section 67 challenge. He also drew further support from *Fiona Trust* case⁵⁵ and the observations of Lord Hoffman for the view that arbitrators are in the best position to decide whether the conditions precedent have been satisfied. Therefore, for that reason amongst others, he dismissed the Section 67 challenge.

As a side note, he highlighted how English courts handle substantive claims issued before them when the contract mandates a dispute resolution process, indicating a tendency to adjourn or stay proceedings rather than striking out the claim.

FIDIC Contracts

One area where conditions precedent to arbitration are often found is construction contracts, and that applies both to the FIDIC 1999 Forms of Contract and to the 2017

⁵² Robert Merkin, Louis Flannery QC, *Merkin and Flannery on Arbitration in 1996*; 6th edition 2020

⁵³ *BBA v BAZ* [2020] SGCA 53

⁵⁴ *BTN and another v BTP and another* [2020] SGCA 105

⁵⁵ *Fiona Trust v Privalov* [2015] EWHC 527 (Comm)

forms, and they contain conditions precedent to the commencement of arbitration that include mandatory time bar clauses. Non-compliance with these clauses is dependent on the location of the arbitration seat.

For example, in a case from 2015 with a Paris seated arbitration, found that a failure to comply with the dispute resolution provisions of the contract gave rise to an issue of admissibility, not to one of jurisdiction. It referred to the existence of some disagreement on the subject of jurisdiction versus admissibility, where under French law this type of challenge was one of admissibility.

Interestingly, the tribunal also held that there was no evidence the party's consent to arbitration was conditional on the pre-arbitral procedures being undertaken, and it, therefore, didn't affect the jurisdiction or authority of the arbitral tribunal.

If you ask whether the party's choice of arbitration as opposed to another form of dispute resolution was conditional on a time bar clause being complied with, then, the answer is no.

The case may be that the parties would choose arbitration over litigation even if the conditions precedent aren't complied with. From there one can say the parties have impliedly chosen arbitration to decide on the consequences of non-compliance with time bar clauses, and in that case, the arbitrators have jurisdiction, but the claim they are dealing with might be premature.

However, it's not so much an issue of whether the party's consent to arbitration per se was conditional, but whether their consent to arbitration at that time was conditional. If it was, and the parties haven't waived that condition precedent, then can the arbitrators hold that they nonetheless have jurisdiction at that time?

This contradicts with London-seated tribunals, which been more inclined to find that non-compliance with a condition precedent prevents the tribunal from having jurisdiction. (Note: these decisions predate the Sierra Leone case, so might have been determined differently if they'd been decided in 2021). But they include failures to submit a dispute to an engineer in accordance with the FIDIC contract or to refer it to the dispute adjudication board.

Singapore

Singapore has recognized this distinction between admissibility and jurisdiction for longer than the English courts (preceding the 2018-2020 cases). In the Sierra Leone case, the court relied in part on the BBA case and the BTN case, in support of the conclusion that alleged prematurity was a matter of admissibility, not one of jurisdiction.

BBA Case⁵⁶

The English court in the Sierra Leone case quoted part of this case and in turn approving the position in an earlier Singapore decision, *Whispering Diamond Mines*. In this decision the concept of jurisdiction was defined to refer to the tribunal's power to hear a case, whereas admissibility refers to whether it's appropriate for the tribunal to hear it. The decision also described jurisdiction as a concept that deals with the existence of adjudicative power, admissibility as a concept dealing with the exercise of that power.

The decision suggested that the suitability of a claim is similar to the concept of arbitrability. The Singapore Court of Appeal proposed a simplified test, contrasting the tribunal versus the claim and that idea of the suitability of the claim is, close to the idea of arbitrability, which explains why the Singapore Court of Appeal opted a straightforward

⁵⁶ BBA v BAZ [2020] SGCA 53

test, the tribunal versus claim. This test aims to determine whether objections are directed at the tribunal or the specific claim.

Is the argument that the claim shouldn't be arbitrated due to a defect in or omission to consent to arbitration? Or is the argument that the claim itself is defective and it shouldn't be raised at all?

And the rationale behind this test according to the Singapore Court of Appeal, is that arbitration is a consensual process. If an objection targets the tribunal, it will mean that lack of no consent to that forum, hence the objection is jurisdictional. But on the other hand, if it targets the claim, then it doesn't necessarily follow there's no consent to arbitration per se, it rather is an argument that the particular claim shouldn't be heard or at least not yet.

In BBA case, the Singapore Court found that an objection that the claim was time-barred was an objection that targeted the claim. The court acknowledged that the parties could alter this by including an express provision in the arbitration clause, that the tribunal shall have no jurisdiction to hear time-barred claims.

BTN Case ⁵⁷

The arbitrators determined an arbitration not on substantive grounds but said the appellant “*wrongly applying raised due to Carter principles*” and held that the parties were bound by an earlier decision of the Malaysian Industrial Court. The appellant put its case that the tribunal had barred itself from dealing with the substantive issues. And hence, it argued that there was it had jurisdiction. The court held that it was a matter that targets the claim, not the tribunal, and so gives rise to an objection of admissibility.

⁵⁷ BTN and another v BTP and another [2020] SGCA 105

Both these decisions approved the Paulsson approach, including a quotation that the “tribunal's decisions on objections regarding preconditions to arbitration are matters of *admissibility*”. Paulsson also states that time limits (Singapore cases), conciliation provisions before arbitration may be pursued (Sierra Leone case), mootness, and ripeness. That is because they don't amount to attacks on the tribunal or the forum as having the parties' consent as a decision-maker, matters of admissibility rather than jurisdiction: The classification problem, is whether the success of the objection necessarily negates consent to the forum.

Hong Kong - C v D ⁵⁸

In a recent case C v D before the Court of First Instance in Hong Kong; Mr. Justice G Lam addressed a challenge to a partial award based on non-compliance with contractual provisions that mandated certain written notices and attempts to negotiate before any request for arbitration. They determined that the non-compliance went to admissibility, not jurisdiction. The relevant legislation incorporated Article 34 of the UNCITRAL Model Law, only allowing the court to set aside an award on limited grounds that included lack of jurisdiction, but importantly, not admissibility.

The court rejected an argument that treated the procedural condition as an admissibility matter. In doing so, it dealt head-on with one of the more powerful points in favour of a jurisdictional analysis to these cases, namely, party autonomy. The judge stressed that considering a condition as going to admissibility doesn't diminish its importance. The arbitral tribunal, having jurisdiction, can address non-compliance by ordering a stay, imposing cost sanctions, or dismissing the claim. This nuanced approach recognizes the significance of admissibility without rendering the clause ineffective. The

⁵⁸ C v D [2021] HKCFI 1474

judge highlighted the tribunal's flexibility in using various mechanisms, such as adjourning or staying the claim, to account for non-compliance, considering commercial realities and practicalities.

Armada Ship v Gas Nigeria⁵⁹

In the 2021 case Armada Ship Management against Schister Oil and Gas Nigeria Limited. In decision in England under Section 32 of the 1996 Act. Section 32 of the 1996 Act permits the court to determine, as a preliminary issue, any question as to the substantive jurisdiction of the tribunal. And that's on the application of a party to the arbitration proceedings. The dispute involved a time charter party, conflicting terms (LMAA and UNCITRAL), and uncertainty about appointing a sole arbitrator. The claimant and the arbitrator wanted the matter to be determined as a preliminary issue.

The commercial court refused the application, on the grounds that “Schister had chosen to take no part in the arbitral tribunals, it shouldn't be deprived of separate protection that's afforded to a non-participating party under section”. However, the court did give a non-binding indication that it would have granted the Application.

The reason why the court in armada declined to actually rule on an application was that, if the section 32 application happened in the absence of a party but nonetheless determined the jurisdiction issue that, it felt would be in conflict with the party's right to take no part in the proceedings and still contest jurisdiction. As stated by the court; Section 72 protects a person's right not to participate in arbitration proceedings, with the court emphasizing it's the party's choice.

⁵⁹ Armada Ship Management (S) Pte Ltd v Schiste Oil and Gas Nigeria Ltd [2021] EWHC 1094 (Comm)

Summary

As the BBA case shows, this does all still leave room for the type of case where the parties specify that a particular condition precedent is a jurisdictional requirement and breach of it prevents a tribunal having jurisdiction at all. However, it emphasized that parties must use clear and express words to achieve that result. The prevailing view among commentators and authorities worldwide is that non-compliance with contractual preconditions to arbitration are matters of admissibility, not jurisdiction.

The Sierra Leone case is expected have a big impact in other pro-arbitration jurisdictions, recited in the Hong Kong decision, and may resonate in Singapore, due to its reliance on the earlier Singapore judgments. And although England isn't a Model Law jurisdiction, Singapore is. Despite England not being a Model Law jurisdiction, the judgment is deemed significant for other Model Law jurisdictions, notably Singapore.

The concepts of arbitrability, admissibility, and jurisdiction matter:

The differences matter because they delineate when the court, not the arbitral tribunal, must act in the case of arbitrability, when the court may intervene in the case of jurisdiction, and when only the arbitral tribunal may act in the case of admissibility.

In the English context, the court will intervene when an arbitral tribunal claims jurisdiction over a non-arbitrable matter. Challenges to an arbitral award for lack of substantive jurisdiction are more viable under Section 67 of the Arbitration Act 1996 than challenges related to issues wrongly included or excluded as inadmissible, which fall under Section 68 and are less likely to succeed except in exceptional circumstances. Issues of arbitrability are not susceptible to party agreements. They are matters of public policy or public interest.

The tribunal's decision on lack of jurisdiction is conclusive, pending review by the supervising court. In contrast, a tribunal's ruling of inadmissibility does not automatically prevent it from later determining the claim. In such cases, the tribunal retains jurisdiction and may, in suitable circumstances, stay proceedings until the inadmissible aspects (like failure to comply with prerequisites) are addressed. If one tribunal rejects a claim rather than dismissing it based on admissibility, the parties can pursue determination by a different tribunal once the objection to inadmissibility no longer applies.

Jurisdiction issues may be shared between the arbitral tribunal and the court, whereas arbitrability and admissibility issues may not be, other than in the event of a challenge to an award. One example concerns interim relief, where the power to grant it may generally speaking be exercised by the court or the tribunal. Admissibility issues are many and varied, whereas arbitrability and jurisdiction issues, once properly identified and characterized as such, are more limited.

3.4 Latest Approach in the UAE

In an ICC arbitration seated in the DIFC,⁶⁰ the tribunal addressed the distinction between admissibility and jurisdiction. However, the tribunal primarily addressed an important requirement from a procedural standpoint, that is whether this plea should be dealt with as a jurisdiction objection or substantive admissibility. The tribunal considered that, should it deal with this matter as a jurisdiction objection, Article 23(2) of the DIFC Arbitration Law, as this case was seated in DIFC, was considered by the tribunal on whether the party's plea on jurisdiction was timely raised, i.e., not later than that party's first written statement in the arbitration.

⁶⁰ ICC Case 24026/HTG/MDY, 217

The foregoing consideration by the tribunal indicates that a matter considered to be jurisdiction would add another layer of procedural compliance under applicable procedural rules and/or law, i.e., the requirement to raise this objection as soon as possible after being aware of the claim/issue being outside the Tribunal's jurisdiction. In other words, a plea of admissibility, rather than of jurisdiction, could relieve a party from being subjected to compliance with that requirement and vice versa.

In the above case, the claimant's plea concerned the respondent raising its counterclaim under Clause 67.1 of the contract (which incorporates the General Conditions of FIDIC 1987 Conditions of Contract), in which the claimant presented its plea to the tribunal as a jurisdiction and/or admissibility against the respondent's counterclaim, being non-compliant "*...with the condition precedent provided for under clause 67 of FIDIC General conditions before referring this dispute to Arbitration..*". In dealing with matter, the tribunal made the clear distinction that the issue of whether the respondent is entitled to bring a counterclaim for delay is one of admissibility, and not of the Tribunal's jurisdiction. The tribunal highlighted lack of grounds for arguing that a tribunal must find that it lacks jurisdiction when a condition precedent has not been complied with. Accordingly, the tribunal proceeded on the basis that this matter is a matter of admissibility and not of jurisdiction.⁶¹

Positive development in this front was witnessed in a recent judgement by Dubai Court of Cassation issued on 8 June 2023 between East Sheen Properties Limited vs Reem Capital Contracting LLC. The court 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.⁶²

⁶¹ Ibid

⁶² Dubai Court of Cassation 1514/2022 Commercial Appeal

On 13 July 2022, the respondent filed a case to set aside a DIAC arbitration award (DIAC Case no. 47/2020) relying on three grounds, all of which were rejected by the court. The respondent contended that the claimant did not satisfy agreed preconditions to arbitration as it did not send the case for the Engineer's decision before resorting to arbitration in line with article 67 of the construction contract. The court dismissed the respondent argument and explained that "preconditions to arbitration" such as referral of the matter to the engineer are "questions of admissibility" not "questions of jurisdiction".

As such, the court concluded that, non-fulfilment of any such condition does not strip the tribunal of its jurisdiction or convey jurisdiction to the courts, but only postpones the hearing of the dispute in arbitration until the required circumstances have been met. The court further clarified that as a result the arbitral tribunal might assess whether a given 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 issues have been met.

In this specific case, the disagreement focused on the non-payment of funds which had been subject to interim payment certificates approved by the engineer. The court confirmed the tribunals findings that the precondition under Clause 67 was moot: if the engineer had already certified the payment, it made no sense to resubmit the case to him if the challenge was limited to the non-payment of the certified sums.

In other words, if the engineer has verified the contractor's eligibility to the interim payments, there can be no expectation that the identical question be brought to the engineer for determination. Furthermore, compliance with Clause 67 was proven by the fact that the claimant had submitted more than one notice to the respondent in order to enter into peaceful solutions in line with Clause 67(1). The respondent had not reacted to these

notices and the arbitral procedures were launched after the period of 56 days required for settlement had gone.

The relevance of this ruling lies in its finding of the nature of the condition precedent. The court affirms through this case that conditions precedent relate to admissibility and not jurisdiction, which is an issue not previously discussed in any court judgments. The clarification offered by the court on this point is tremendously beneficial considering as the lower court had considered this question as a jurisdictional issue.

Dubai Court of Appeal, to which the appeal for the nullification of the award had been filed, disregarded the respondent's contention that the condition precedent had not been complied with on the grounds that this case has been previously handled by Dubai Courts. However, Dubai Court of Cassation ruled that the Court of Appeal reasoning was faulty as it had held that the issue of jurisdiction was already *res judicata* as a result of an earlier ruling by the Dubai Courts which had found that the arbitral tribunal had exclusive jurisdiction over the case. In other words, the Court of Appeal treated the issue of non-compliance with the condition 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.

3.5 Conclusion

Dubai Court of Cassation 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 further affirms the UAE's desire and efforts to become an arbitration-friendly jurisdiction.

Although the Dubai Court of Cassation judgment dealt only with the referral of the dispute to the engineer, it is very likely that the courts will treat other forms of conditions precedent in the same manner given that the same logic applies. This is now in line with the recent international decisions, for example, see recent decisions from England (*NWA and others v NVF and others* [2021] EWHC 2666 (Comm)) and Hong Kong (*T v B* [2021] HKCFI 3645).

In summary, according to the recent international and UAE courts approach, distinction between jurisdiction and admissibility can be simplified as follows: If the tribunal refuses to hear the claim because it could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction. However, if the Tribunal refuses to hear the claim because it should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility.

Accordingly, A breach of preconditions to arbitration relates to whether a claim should be heard and is therefore a matter of admissibility.

Chapter 4 : Consequences of Characterizing the Arguments Related to Pre-Arbitration Requirements Under UAE Law

4.1 Introduction

This is an ongoing question that is closely linked to the concerns related to consequences of a party's noncompliance with compulsory pre-arbitration procedural requirement. Once again, this primarily concerns the interpretation of the terms of the agreement between the parties. It involves similar considerations to those mentioned earlier when discussing the validity and obligatory nature of pre-arbitration requirements. According to certain authorities, if a party fails to meet a 'condition precedent' rather than just not fulfilling a 'contractual obligation', it can either prevent the party from making a claim or have a significant impact on the substance of the claim.

It must be noted that charactering such arguments as admissibility, rather than jurisdictional, does not mean that the argument will not be addressed, it simply means that it will be addressed by the competent authority, in this case it would be the arbitral tribunal as later discussed in this chapter.

The author further discuss in this chapter the validity of the arbitration agreement in case pre-arbitration procedural requirements are not satisfied and the main consequences of charactering arguments related to noncompliance with pre-arbitration procedural requirements, being: (1) investigating the competent authority responsible for deciding arguments related to non-compliance with pre-arbitration requirements within the UAE legal practice, and (2) the effect on the court support role and supervisory powers in relation to arbitration.

4.2 Effect on the Validity of Arbitration Agreement

In almost all instances, it is well settled that noncompliance with pre-arbitration procedural requirements prior to initiating an arbitration proceeding will not impact the validity of the parties' original arbitration agreement. However, these nonconformities may only hinder the claimant's ability to pursue a specific claim or referral to arbitration.

Typically, there are no obstacles that would prevent a party from raising a claim again after fulfilling the necessary procedural obligations of an arbitration agreement after failing to do so initially. They can then proceed to initiate a new or alternative arbitration process in a proper manner.

The foregoing is consistent with Article 54.4 of the UAE Arbitration Law which states: *“Unless otherwise agreed by the Parties, the Arbitration Agreement shall remain in force according to this Law after the arbitral award is set aside unless the setting aside is based on an Arbitration Agreement that does not exist or has lapsed or is void or incapable of being performed.”*

It follows from the above provision that a claim prematurely referred to arbitration can be submitted once again to arbitration once pre-arbitration procedural requirements are fulfilled.

4.3 Competent Forum to Decide Matters Related to Pre-Arbitration

Procedural Requirements

Now addressing the main question regarding the determination of conformity with procedural requirements of an arbitration agreement, whether it should be decided by a national court or an arbitral tribunal. Commentators have often noted that various national legal systems have resolved similar challenges in very distinct manners.

National courts in various jurisdictions have typically ruled that arbitral tribunals are responsible for deciding disputes related to adherence to pre-arbitration procedural criteria. In certain instances, they have taken this action based on the aforementioned premise that these procedural requirements are matters of 'admissibility' rather than 'jurisdiction', and hence fall under the arbitrators' substantive decision-making. However, courts often give significant deference to arbitrators' awards regarding pre-arbitration procedural procedures. These decisions are treated with the same level of scrutiny as other decisions related to the substance of the parties' dispute.

The assumption arises from the parties' likely preference for a single, centralized forum where their disagreements may be resolved efficiently, especially when it comes to the procedural components of their dispute resolution process. The fragmentation of resolving procedural concerns between national courts and the arbitral tribunal, which may include many courts, poses the possibility of having multiple legal proceedings, conflicting rulings, interference from the judiciary in the arbitration process, and similar complications. Simultaneously, arbitral tribunals typically possess more extensive expertise in the procedural framework of the parties' dispute and the economic (or investment) environment in which pre-arbitration processes take place, compared to a national court. Similarly, the parties' desires for efficiency and conclusiveness are better fulfilled by restricting the extent of court examination of arbitration findings about adherence to pre-arbitration procedural prerequisites.

It is always preferable by the parties to have a single, impartial arbitration tribunal to handle all matters related to the procedural requirements and conduct of the parties' dispute resolution process, in order to achieve a more unbiased, efficient, and equitable outcome that the parties are presumed to have wanted. In essence, the key analysis involves interpreting the intentions of the parties involved. The general rule is that parties

intend for compliance with pre-arbitration procedures to be determined by the arbitrators, not the courts. Unless there is explicit and unambiguous language stating otherwise, questions regarding compliance with contractual procedural requirements should be referred to the arbitrators as a matter that may affect the admissibility of the parties' claims.

However, if the contractual language of the parties explicitly states that pre-arbitration procedural requirements should be determined by a court rather than through arbitration, the parties' desires will prevail. Typically, this requirement is not met by simply showing that contractual procedural requirements were necessary before starting arbitration. These requirements are part of the parties' agreed method of resolving disputes, and the need for centralized decision-making applies to them as well. Instead, there needs to be an additional explicit indication that the arbitrators would not have the authority to interpret pre-arbitration procedural requirements.

The latest decision by Dubai Court of Cassation referred previously in this research (Dubai Court of Cassation 1514/2022 Commercial Appeal) confirms that the UAE courts would be possibly taking the same approach, this was not the UAE courts traditional approach prior to this recent judgement.

4.4 Effect on the Supportive and Supervisory Role of the Court

4.4.1 Effect on the Constitution of Arbitral Tribunals

Traditionally, UAE courts used to dismiss requests for appointment of arbitrators or constitution of arbitral tribunals whenever, in the court's view, pre-arbitration procedural requirements were not fulfilled (please see various cases referred to in Chapter Two above). In case the UAE courts will adopt the latest approach taken by Dubai Court of Cassation in Commercial Appeal no. 1514/2022, considering that arguments related to

noncompliance with pre-arbitration procedural requirements is a question of admissibility, not that of jurisdiction, it is then likely that the court deciding an application to appoint an arbitrator, playing the role of an appointing authority in ad-hoc arbitration for instance, will proceed with constitution of the arbitral tribunal and leave the admissibility argument for the arbitral tribunal to decide.

4.4.2 Effect on Annulments of Arbitral Awards

It was not until Dubai Court of Cassation ruling in Commercial Appeal no. 1514/2022 dated on 8 June 2023, UAE national courts assumed wide supervisory role in reviewing tribunal's awards and decisions pertaining to satisfying pre-arbitration procedural requirements, the courts have frequently nullified arbitral awards and reversed decisions pertaining to related arguments and further deemed, in some instances, that arbitral tribunals did not have jurisdiction to decide the case when the court was of the opinion that one of the pre-arbitration procedural requirements was not fulfilled.

In case the UAE courts will adopt the latest approach taken by Dubai Court of Cassation in Commercial Appeal no. 1514/2022, considering that arguments related to noncompliance with pre-arbitration procedural requirements is a question of admissibility, not that of jurisdiction, it has to then assume limited supervisory role in reviewing tribunal's awards, i.e., only to review such decisions related to satisfying pre-arbitration procedural requirements with respect to public policy and due processes only. The courts should only review these decisions made by the arbitral tribunal using a deferential standard of judicial review, similar to how the court review other decisions made by the tribunal.

In such a case, the tribunal decisions will not be subject to articles 19 and 53 of the UAE Arbitration Law. The tribunal decisions related to satisfying pre-arbitration

requirements will be final, save for the courts' limited supervisory role mentioned in the preceding paragraph.

4.5 Available Remedies in Case of Non-Compliance with Pre-arbitration Requirements

An important question follows from the above analysis, what choices do arbitrators have when faced with one party's noncompliance with a compulsory pre-arbitration requirement? Typically, the most prudent approach would be for the tribunal to outright reject the claim due to its inadmissibility. This may appear severe, especially in situations where the party's noncompliance was accidental or due to practical circumstances such as the situations discussed in Chapter 2 above.

Several arbitral awards have accepted this outcome, affirming that a procedural prerequisite, such as engaging in amicable settlements, seeking the Engineer's or DAB decisions, can be fulfilled even after the arbitration process has begun. As one tribunal in an investment-treaty arbitration stated “[T]he core objective of this requirement, to give local courts the opportunity to consider the disputed measures, has been met. To require Claimants to start over and re-file this arbitration now that their 18 months have been met would be a waste of time and resources”.⁶³

In response to this issue, a growing practice among arbitrators is to instruct the temporary stay of the proceedings until all pre-arbitration requirements are met, instead of completely dismissing the claim. This solution offers the benefit of time and cost savings for the involved parties, as the tribunal would remain operational. This development aligns with customary legal methodologies. In a recent case heard by the Technology and

⁶³ *Teinver v Argentina* (n 8) para 135

Construction Court (TCC) in the UK, Ohpen Operations UK Ltd v Invesco Fund Managers Ltd, Mrs Justice O'Farrell acknowledged this as a "*clear and robust policy*" that supports the enforcement of alternative dispute resolution provisions and encourages parties to make efforts to resolve disagreements before resorting to litigation.

If a contract includes effective mechanisms for resolving future conflicts between the parties, it is typically required for the parties to adhere to such mechanisms. In such cases, the court will not allow a lawsuit to be filed in violation of the agreement. Based on that rationale, the court deemed it suitable to suspend the legal procedures in order to facilitate a mediation process. Nevertheless, arbitrators in UAE seated arbitrations must assess their authority to suspend proceedings in accordance with the applicable procedural law and/or relevant institutional rules whereas the UAE jurisdiction lacks a specific statutory provision that grants arbitrators the right to halt proceedings in such situations.

Chapter 5 : Conclusion

A variety of pre-arbitration procedural requirements are used in construction contracts in the UAE which aims to increase the effectiveness of arbitration. However, these stipulations have resulted in more disputes and could jeopardise the enforcement of arbitral awards. With the exception of certain government-related disputes, the lack of a defined legal framework in UAE law has resulted in differing interpretations by legal professionals, national courts, and arbitral tribunals, creating a complicated and ambiguous regulatory environment.

Although mutually agreed-upon requirements prior to commencement of arbitration are usually upheld by UAE courts, local courts may not require to consider each and every pre-arbitral step to be necessary. It is imperative to follow clearly specified procedures; otherwise, the arbitration may be deemed premature. The latest Dubai Court of Cassation's reasoning, in particular when comparing admissibility to jurisdiction, is consistent with global norms and upholds the UAE's pledge to be an arbitration-friendly jurisdiction. Despite that the latest Dubai Court of Cassation's decision emphasised on pre-arbitration engineer decision mechanism, however, it is probable that other conditions precedent will be treated similarly in the future, in line with recent international decisions.

The recommendations resulting from this research consist of making contractual modifications to include ambitious, non-compulsory procedural requirements with well-defined wording, increasing awareness and ensuring strict compliance with contractual prerequisites, and implementing legal provisions and updates to institutional rules that govern the acceptability and jurisdiction of cases. Furthermore, it is recommended to grant arbitral tribunals the authority to suspend legal procedures.

In addition, the author recommends that further research is needed to investigate the following topics: Applicable Law on Pre-Arbitration Procedural Requirements and in comparison, with the law governing the validity of the arbitration agreement whereas decisions that deal with pre-arbitration procedural requirements often do not thoroughly explore choice-of-law matters. There are three possible alternatives for the law that can regulate the validity of an arbitration agreement: (i) the law of the state where the judicial enforcement actions are taking place; (ii) the law chosen by the parties to apply to the arbitration agreement; or (iii) the law of the place where the arbitration is taking place. Another topic that is worth further consideration is investigating whether pre-arbitration conditions survive the termination of contract as part of the separability of arbitration agreement?

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