DUBAI COURT OF CASSATION CONFIRMS THAT CONTRACTUAL PRECONDITIONS TO ARBITRATION ARE MATTERS OF ADMISSIBILITY AND NOT JURISDICTION

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UAE Litigation and Dispute Resolution Alert

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The Dubai Court of Cassation (Court of Cassation), in its recently surfaced decision in Case No. 1514 of 2022, held that issues relating to the parties' compliance with contractual preconditions to arbitration are matters of admissibility rather than jurisdiction, bringing the United Arab Emirates (UAE) in line with other jurisdictions, such as England and Wales.

COURT OF CASSATION PROCEEDINGS

The respondent in an arbitration administered by the Dubai International Arbitration Centre (DIAC) commenced proceedings in the Dubai Court of Appeal (Court of Appeal) to set aside the arbitral award. The Court of Appeal held that the arbitral award was enforceable and dismissed the case. The respondent appealed that decision to the Court of Cassation.

The respondent argued, among other things, that the arbitral award was invalid because the claimant had not satisfied the contractual preconditions to arbitration, which first required the claim to be submitted to the project engineer for determination, followed by a mandatory period of amicable settlement discussions for 56 days before referring the dispute to arbitration.

The Court of Cassation rejected this argument. The Court of Cassation held that contractual preconditions to arbitration are not matters related to the jurisdiction of the arbitral tribunal, but rather are questions of admissibility (i.e., whether the substantive claims asserted in the arbitration can be heard at that time or whether there is a legal impediment that prevents them from being heard, such as the claim being prematurely filed). Accordingly, even if a party can demonstrate that any preconditions to arbitration have not been fulfilled, it does not result in the UAE courts assuming jurisdiction over the dispute. Jurisdiction to determine the dispute remains with the arbitral tribunal. However, if a party can demonstrate that the preconditions to arbitration have not been fulfilled, it may result in the arbitral tribunal postponing the arbitration pending fulfilment (if possible) of those preconditions.

In this case, the Court of Cassation determined that the contractual preconditions to arbitration had been satisfied to the extent necessary and logical. While the onshore UAE courts have consistently held that contractual dispute escalation provisions act as mandatory preconditions that must be satisfied before commencing arbitration proceedings, the Court of Cassation stated that such clauses should not be interpreted in a manner that leads to unjustifiable delays. The Court of Cassation found that, as the dispute related to interim payment certificates that

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had already been approved by the engineer, it was illogical to assume that the parties intended to refer to the engineer the same matter that the engineer had already determined. The Court of Cassation further held that the mandatory period of amicable settlement discussions had been satisfied because the claimant had requested the respondent to engage in settlement negotiations on two occasions, without any response from the respondent, and the claimant had only commenced arbitration proceedings after more than 56 days had passed since its second request.

COMMENTARY

This judgment is important, as it should reduce the risk of parties arguing that noncompliance with contractual preconditions to arbitration means that the arbitral tribunal lacks jurisdiction to determine the dispute. It also serves as a reminder of the importance of parties ensuring that they have, to the extent possible, satisfied all contractual preconditions prior to commencing arbitration proceedings.

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