Jurisdiction, Admissibility and FIDIC

Written by Andrew Tweeddale

An issue that often arises in international arbitrations involving the FIDIC forms of contract is whether a claimant's failure to: (a) go through the dispute resolution provisions; or (b) comply with a time-bar clause gives rise to a question of admissibility or jurisdiction. Put another way, if a claimant has failed to issue a notice of claim within 28 days or failed to refer a dispute to a DAB, does the arbitral tribunal have jurisdiction to make an award on the merits or should the arbitral tribunal make an award stating that it lacks jurisdiction?

Jurisdiction and Admissibility

In an arbitration context, jurisdiction refers to the authority of an arbitral tribunal to make a decision affecting the merits of the case. If an arbitrator decides it has no jurisdiction it cannot make an award on the merits.The word 'admissibility' is used in international commercial arbitration to refer to the power of a tribunal to decide a case at a particular point in time, having regard to a possible temporary or permanent defect within the claim. If a tribunal concludes it has jurisdiction then it must proceed to rule on the merits of the claim, which may include considering questions of admissibility.

Some leading arbitrators have argued that the approach to determining whether there is a question of jurisdiction or admissibility is to examine whether the challenge is to the arbitral tribunal or the claim. Challenges to the arbitral tribunal give rise to questions of jurisdiction whereas challenges to the claim give rise to issues of admissibility. However, this is not the only approach. Under English law the distinction between admissibility and jurisdiction is not made. A failure by a claimant to comply with a condition precedent for bringing a claim would, under English law, give rise to an issue of jurisdiction. In the cases of *Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd & Ors*[1] and *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd*,[2] the courts accepted that a failure to comply with an ADR clause, as a prerequisite to commencing the arbitration, would give rise to a jurisdictional challenge to the arbitral tribunal.

Jurisdiction and Admissibility – Why it is Important

Where an arbitral tribunal rules that it has jurisdiction then that decision will invariably be reviewable by the courts. Where, however, the parties have consented to the jurisdiction of the arbitral tribunal to deal with the dispute, for example in the Terms of Reference of the arbitration, a decision as to the admissibility of a claim should be final and binding. It has also been argued that where an arbitral tribunal decides that is has no jurisdiction, a claimant will be prevented from re-referring the same dispute to the same arbitral tribunal at a later date. However, dismissing a claim because it is inadmissible will not in principle prevent the claimant from resubmitting its claim, so long as it has cured the flaw in the claim which caused it to be inadmissible.[3] However, this is not the case in every jurisdiction, for example England.

Cases on Admissibility and Jurisdiction

The FIDIC 1999 forms of contract (as well as 2017) contain conditions precedent to the commencement of arbitration.There are mandatory time-bar clauses and a multi-tiered dispute resolution clause.The view of some civil law arbitrators is that since FIDIC contracts contain a valid and binding arbitration clause that gives them jurisdiction, arguments about notices or whether one party has taken all the steps required by the dispute resolution provisions are questions of admissibility. However, not every arbitral tribunal will adopt this approach.

[1] [2012] EWHC 3198 (Ch)
[2] [2014] EWHC 2104 (Comm)
[3] Abaclat and others v Argentine Republic, Decision on Jurisdiction and Admissibility, ICSID Case No. ARN/07/5, 4 August 2011, [287]

Tel: + 44 (0)20 8614 6200
Fax: + 44 (0)20 8614 6222
Email: info@corbett.co.uk
www.corbett.co.uk

Some tribunals find this sort of clause to be a condition precedent to the commencement of the arbitration and decline jurisdiction. The following cases, which mostly relate to the FIDIC forms of contract, illustrate the differences in approach.

In *Interim Award in Case 16083*[4] the arbitral tribunal found that a failure to comply with the dispute resolution provisions in the contract gave rise to an issue of admissibility and not jurisdiction, although it accepted that there was some debate on this issue.The arbitral tribunal reasoned that it was bound to follow French law, as the arbitration had its seat in Paris, and that under French law the French Cour de cassation[5] had termed this type of challenge one of admissibility ("recevabilité"). Second, the arbitral tribunal held that there was no evidence that the parties' consent to arbitration was conditional on the pre-arbitral procedures being undertaken. It therefore did not affect the jurisdiction or authority of the arbitral tribunal.[6] The arbitral tribunal reached a similar conclusion in *Interim Award in Case 16155*[7] where, again, the seat of the arbitration was in Paris. In this arbitration both parties accepted that the requirement to refer a dispute to the Dispute Adjudication Board was a condition precedent to arbitration, except where there was no Dispute Adjudication Board in place.[8] Both parties proceeded on a presumption that a failure by one party to refer a dispute to the engineer and then to the Dispute Adjudication Board was an issue of admissibility. Similarly, in *Interim Award in Case 14431*,[9] which was in Zurich, Switzerland, the arbitral tribunal found that the requirement to refer a dispute to a FIDIC Dispute Adjudication Board was a mandatory requirement and that the arbitral tribunal had therefore the option to dismiss the claims or stay the arbitration so that the adjudication could take place.The arbitral tribunal decided to stay the arbitration.The case proceeded on the basis that this was a question of admissibility.

A comparison between jurisdiction and admissibility was undertaken in *Final Award in Case 19581*.[10] The arbitral tribunal referred to the ICSID case of Abaclat and others v Argentine Republic[11]and stated that it had jurisdiction because there was a dispute and a valid arbitration agreement. The arbitral tribunal then considered the admissibility of the claims and concluded, based on the facts, that these were admissible. The seat of the arbitration in this case was an East European country.

Arbitral tribunals sitting in London have taken very different approaches. In a case dealing with FIDIC's 2nd edition,[12] the arbitral tribunal found that it was a condition precedent to its jurisdiction that the claimant first submits a dispute to the Engineer. In that case the arbitral tribunal concluded that it lacked jurisdiction because that process had not taken place. In *Partial Award in Case 16262*[13] which involved FIDIC's Yellow Book, the arbitral tribunal found:

"that a reference to the DAB was a condition precedent to arbitration and that, since that condition precedent has not been satisfied, the Arbitral Tribunal has no jurisdiction. It follows from the Arbitral Tribunal's opinion that a reference of a

[4] Interim Award in Case 16083, ICC Dispute Resolution Bulletin 2015, No 1, p.57
[5] *Poiré v Tripier* Rev arb., 2003, p.403; C. Jarrosson, "Observation on *Poiré v Tripier* (2003) 19:3 *Arbitration International* p.363
[6] The arbitral tribunal referred to Jan Paulsson, *Jurisdiction and Admissibility*, Libor Amicorum in honour of Robert Biner, ICC Publishing, page 601
[7] Interim Award in Case 16155, ICC Dispute Resolution Bulletin 2015, No 1, p.71
[8] Interim Award in Case 16155, ICC Dispute Resolution Bulletin 2015, No 1, at [61] and [63]; see also Final Award in Case 18505, ICC Dispute Resolution Bulletin 2015, No 1, at p.137
[9] Interim Award in Case 14431, ICC Dispute Resolution Bulletin 2015, No 1, p.35; and see also Final Award in Case 16765, ICC Dispute Resolution Bulletin 2015, No 1, p.101 at [127]
[10] Final Award in Case 19581, ICC Dispute Resolution Bulletin 2015, No 1, p.147
[11] Abaclat and others v Argentine Republic, Decision on Jurisdiction and Admissibility, ICSID Case No. ARN/07/5, 4 August 2011, [287]. See also the decision of the Philippines court in Hutama-RSEA joint Operations, Inc. v. Citra Metro Manila Tollways Corporation -G.R. No. 180640 [2009] PHSC 435
[12] Final Award in Case 6535, ICC International Court of Arbitration Bulletin Vol. 9, No. 2 at p. 60
[13] ICC Dispute Resolution Bulletin 2015 No. 1, page 75

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Fax: + 44 (0)20 8614 6222
Email: info@corbett.co.uk
www.corbett.co.uk

dispute to a DAB is mandatory and a condition precedent to arbitration … that, absent such reference, there is no jurisdiction save only where Sub-Clause 20.8 applies. In the present case, Sub-Clause 20.8 does not apply."

The following cases illustrate that some arbitral tribunals have found that a final and binding decision of an Engineer or Dispute Adjudication Board gives rise to questions of jurisdiction and not admissibility. In *Final Award in Case No 7910*[14] the arbitral tribunal considered whether an Engineer's decision had become final and binding where no notice of dissatisfaction had been given. On the facts, the arbitral tribunal concluded it was both final and binding and stated: "the said decision has become final and binding justifies inadmissibility of such claims for lack of jurisdiction of the Arbitral Tribunal." While the arbitral tribunal used the words inadmissibility and jurisdiction synonymously it was clear that their decision involved a finding of no jurisdiction. A similar decision was reached in *Final Award in Case No 16435*[15] where the arbitral tribunal had to consider a contract which contained the following clause: "Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision shall be final and binding." The seat of the arbitration was Mauritius and the case was influenced by English common law. The arbitral tribunal held that the claimant was not entitled to refer the dispute to arbitration as it had not made the referral within the specified 28 day period. Its conclusion was "that, therefore, it does not have the power or jurisdiction to decide the claims."[16]

The Seat of the Arbitration Matters

An arbitral tribunal seated in one country can find that matters such as time-bar clauses; mandatory ADR clauses; claims for extinctive prescription; waiver of claims; or final and binding third party decisions give rise to questions of admissibility. In other countries the law may differentiate between clauses that make a third-party decision final and binding and clauses that mandate an ADR process, such as clause 20.4 of the FIDIC 1999 forms. Once a third-party decision has become final and binding under such a clause, arbitral tribunals in these countries may find the effect to be a bar on a remedy, which will affect its jurisdiction.[17] At the other end of the spectrum is the approach of some common law countries which do not recognise the concept of admissibility and treat conditions precedent, such as time bar clauses and clauses that make the decision of a third party final and binding, as affecting the jurisdiction of the arbitral tribunal.

Conclusion

Whether a particular issue is a matter of jurisdiction or admissibility is not clear. It will depend where the arbitration has its seat and the background of the arbitral tribunal making the decision. If the law of the arbitration agreement is different to the law of the seat, this may also affect the question. The choice of Paris or London as the seat for the arbitration may result in big differences to the result of the arbitration. As the distinction between admissibility and jurisdiction has a material effect on a party's rights, it is a fundamental question and important for users of FIDC because of sub-clauses 20.1 and 20.4. It is the Employer who often challenges claims based on a failure by the Contractor to comply with a time-bar clause or go through the ADR process. London, as a seat for the arbitration, may be preferable to Paris for Employers who intend to assert that the conditions precedent for bringing a claim have not been met.

[14] Final Award in Case 7910, ICC International Court of Arbitration Bulletin, Vol. 9, No 2, p.46
[15] Final Award in Case 19581, ICC Dispute Resolution Bulletin 2015, No 1, p.147
[16] Ibid at [161]
[17] Ewelina Kajkowska, Enforceability of Multi-Tiered Dispute Resolution Clauses, Bloomsbury Publishing, 2017 at §4.76

Tel: + 44 (0)20 8614 6200
Fax: + 44 (0)20 8614 6222
Email: info@corbett.co.uk
www.corbett.co.uk

Article Author
Andrew Tweeddale

Email: andrew.tweeddale@corbett.co.uk

Tel: + 44 (0)20 8614 6200
Fax: + 44 (0)20 8614 6222
Email: info@corbett.co.uk
www.corbett.co.uk