

**Insights**

# **HONG KONG COURT RULES THAT NON-COMPLIANCE WITH PRE-ARBITRATION CONDITIONS GOES TO ADMISSIBILITY, NOT JURISDICTION**

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## **SUMMARY**

In the anonymised case of *T v B* [2021] HKCFI 3645, the High Court of Hong Kong ruled that a challenge concerning the non-compliance with a condition precedent for commencing arbitration (“pre-arbitration condition”) is a challenge of admissibility, rather than a challenge of jurisdiction.

This is the second recent decision in Hong Kong to adopt the admissibility vis-à-vis jurisdiction distinction, affirming its status as part of Hong Kong arbitration law.

The pre-arbitration condition in question in *T v B* was a restriction against commencing arbitration before the construction project is completed (“pre-completion restriction”). Pre-completion restrictions are common in construction and infrastructure contracts in Hong Kong. The court also commented on the nature and validity of such restrictions.

## **BACKGROUND**

The dispute arose out of a construction subcontract between a main contractor (the Plaintiff) and a subcontractor (the Defendant). The subcontract related to a construction project anticipated to complete in July 2024, more than six years after the subcontract was entered into in April 2018.

The subcontract contained a multi-tiered dispute resolution clause (clause 31), under which a dispute may be referred to arbitration if various criteria are met. Materially, the clause prohibited the parties from serving a Notice of Dispute to trigger the tiered dispute resolution mechanism before the completion of the construction project.

In April 2019, the Plaintiff purported to terminate the subcontract on the basis of alleged repudiatory breaches by the Defendant, and commenced an arbitration against the Defendant, claiming substantial damages.

The Defendant argued that the arbitration had been commenced pre-maturely, on the bases that no completion certificate had been issued and that other pre-arbitration conditions had not been satisfied.

In the Award dated 30 October 2020, the Arbitrator ruled that he had no jurisdiction to decide the disputes that had been referred to him for determination.

Relying on the fact that the project would take more than six years to complete, the Plaintiff contended that the dispute resolution clause would have the effect of precluding (some of) the parties' claims from being heard within the statutory limitation period and, therefore, was invalid. Accordingly, the Plaintiff applied to set aside the relevant parts of the Award.

At the same time, the Plaintiff commenced an action by writ in respect of the same claims. The Defendant applied to stay the court action.

The two applications were heard together.

## ISSUES

The court identified the following two broad issues:

1. Whether the challenge determined in the Award was a determination of "admissibility" or "jurisdiction".
2. Whether the dispute resolution clause was invalid on the basis that it denied the parties their constitutional rights.

We will discuss the court's rulings on these two issues in turn.

## ADMISSIBILITY VIS-À-VIS JURISDICTION DISTINCTION

The court decided to follow *C v D* [2021] HKCFI 1474 (discussed in our previous post), where the distinction between a challenge of admissibility and a challenge of jurisdiction was applied for the first time by a Hong Kong court. In summary, the differences are as follows:

	Challenge of admissibility	Challenge of jurisdiction
Target of the challenge	The appropriateness for a claim to be heard by the tribunal, despite its having power to do so.	The power of the tribunal to hear a claim.

	Challenge of admissibility	Challenge of jurisdiction
Nature of the allegation	The claim should not be heard by the tribunal, or at least not yet.	There is no contractual duty to arbitrate, and/or no valid consent to submit the particular claim to arbitration.
Outcome (if successfully raised)	Gives rise to a defence against the claim.	The arbitration could not proceed.
Tribunal's power to deal with the matter	The tribunal has jurisdiction and may deal with the question as it see fit.	The tribunal may rule on its own jurisdiction.
Reviewability of the tribunal's decision	The tribunal's decision on admissibility is final and not subject to review by court.	A positive jurisdictional decision is subject to review by court, on a <i>de novo</i> basis.  A negative jurisdictional decision is not subject to appeal. The dispute must proceed to litigation rather than arbitration.

The court identified the following justifications for adopting the admissibility/jurisdiction distinction in Hong Kong:

- The distinction makes conceptual sense and respects parties' autonomy.
- The distinction is consistent with the trend of judicial restraint from interfering with dispute resolution procedures adopted voluntarily by the parties.
- Its adoption will facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense.
- The distinction has gained traction in other common law jurisdictions, including England & Wales, New South Wales and Singapore. Its adoption would bring Hong Kong in line with the wider international arbitration communities.

Accordingly, the court held that a challenge concerning the timing to institute arbitration is a question of admissibility rather than jurisdiction, and specifically that non-compliance with pre-completion restrictions and statutory time bars are matters of admissibility rather than jurisdiction.

## VALIDITY OF THE DISPUTE RESOLUTION CLAUSE

Turning to the validity of the dispute resolution clause, which in effect would restrict the parties' ability to institute arbitration for more than six years, the court made the following observations:

- The clause had been entered into by the parties voluntarily.
- It was not inherent in the clause's design that there inevitably would be a limitation defence. Specifically, the parties did not contract out of their right to commence arbitration while the claim is still live.
- Both parties knew and accepted a contractual risk that a limitation defence may materialise. Specifically, both parties were familiar with construction projects in Hong Kong, the commonality of delay, and that breaches often are continuing (rather than one-off) in nature.

As regards the question of whether the pre-completion restriction was compatible with the constitutional right of Hong Kong residents to access the courts (under Article 35 of the Basic Law), the court reasoned that:

- Article 35 does not apply to this issue, because Clause 31 restricts the parties' ability to institute arbitration, not their ability to access the courts (other than the restriction inherent to arbitration clauses as a type – see next point).
- Because all arbitration clauses involve a restriction upon the parties' ability to access the courts, the constitutionality of arbitration clauses must be examined on the basis of the entire scheme of judicial scrutiny of arbitration awards. The Plaintiff did not purport to challenge the constitutionality of arbitration clauses in general or, in particular, multi-tiered dispute resolution clauses as a type.

In any event, the court held that no limitation issue has arisen on the facts of this present case.

## DISPOSITION OF THE APPLICATIONS

Having characterised the question of non-compliance with pre-arbitration conditions as a matter of admissibility and having upheld the validity of the dispute resolution clause, the court dismissed the Plaintiff's application to set aside the relevant part of the Award and granted the Defendant's application to stay the court action in favour of arbitration.

## DISCUSSION

The confirmation of the adoption into the laws of Hong Kong of the distinction between admissibility and jurisdiction has the potential in practice to reduce the likelihood of an award being challenged in court on the basis of a failure to follow a pre-arbitration condition. Awards on true matters of jurisdiction may be subject to review by the courts, whereas awards on challenges of admissibility are not subject to appeal unless the parties have agreed otherwise (such as by adopting Schedule 2 of the Arbitration Ordinance).

The adoption by the parties of pre-arbitration conditions will continue to create scope for dispute over admissibility of claims.

Considering that a decision on such a challenge will be final and generally will not be subject to appeal, commercial parties, party representatives and tribunal members should give careful considerations to how they approach questions of alleged non-compliance with pre-arbitration conditions.

Tribunal members should review carefully the nature of the challenges raised before them and, in case of admissibility challenges, issue appropriate procedural directions. Relevant considerations include:

- Whether it is appropriate to dismiss the claims temporarily, suspend the arbitration until the pre-arbitration conditions are met, or proceed with the arbitration despite some pre-arbitration conditions not having been met.
- Whether “protective” notices of arbitration that are issued when a claim is at risk of becoming time barred should be dealt with differently.

Despite the court’s ruling in this case, parties remain free to exclude the tribunal’s jurisdiction altogether where pre-arbitration conditions have not been met (rather than simply affecting the admissibility of claims). However, as pointed by the court, such an agreement must be stated in clear and unequivocal language.

In case of a restriction against commencing arbitration before a specified date/time, parties should consider the effect of this restriction on their potential claims, taking into account the applicable limitation periods. Parties also may wish to execute the contract as a deed to benefit from a longer limitation period.

## **RELATED PRACTICE AREAS**

- Litigation & Dispute Resolution

## MEET THE TEAM



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