

Insights

## **PRE-CONDITIONS TO ARBITRATION: ADMISSIBILITY V JURISDICTION APPROACHES FROM ENGLAND AND HONG KONG SAR**

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### **Pre-conditions to Arbitration**

It is common for commercial contracts to contain a dispute resolution clause specifying pre-conditions or escalation mechanisms that parties must comply with before being able to refer a dispute to arbitration. From this arises an often-debated question of whether failure to comply with enforceable pre-conditions affects the jurisdiction of the relevant tribunal to hear a claim arising out of the arbitration agreement, or it is simply a matter of the admissibility of the claims.

In response to this issue, there is increasing international recognition of the distinction between jurisdiction and admissibility – that is, whether an arbitral tribunal has the power to hear a dispute versus whether, in the tribunal's view, despite having such power, it does not consider it appropriate to exercise it to hear the case. This blog considers recent court decisions from England and Hong Kong SAR that recognise this distinction and find that the issue of compliance with such pre-conditions is generally one of admissibility and not jurisdiction.

This finding has an important implication for finality of arbitral awards. The English courts are able to adjudicate upon an arbitral tribunal's finding that it has jurisdiction to hear a case on a *de novo* basis under section 67 of the Arbitration Act 1996. Similarly, the Hong Kong SAR courts are able to review such findings of jurisdiction on the standard of "correctness" under Section 81 of the Hong Kong Arbitration Ordinance, CAP 609, which incorporates Article 34 of the UNCITRAL Model Law.

In contrast, unless the parties agree otherwise and save for procedural irregularities and/or findings made in bad faith or contrary to public policy, arbitral decisions on admissibility are final and not open to judicial appeal or review. The recent decisions therefore bring welcome certainty that, in England and Hong Kong SAR, tribunals' determination on issues with respect to compliance with pre-arbitration conditions will likely be subject to limited scrutiny by the courts.

### **Recent Decisions from England**

*NWA & FSA v NVF & others* [2021] EWHC 2666 (Comm) and *Republic of Sierra Leone v S L Mining* [2021] EWHC 286 (Comm)

In *NWA & FSA*, the Claimants and Defendants entered into a contract to shift existing arrangements concerning patents and pending applications for patents to protect intellectual property for the display of life-size, HD and 3D, interactive video holograms. The contract included a typical arbitration clause - providing that, in the event of a dispute, the parties should first attempt settlement via mediation in accordance with the LCIA Mediation Procedure. If the parties were unable to settle within 30 days, arbitration could be commenced under the LCIA Arbitration Rules.

In April 2019, the Defendants referred the dispute to arbitration by filing a Request for Arbitration with the LCIA. In both the Request and the cover letter to the Claimants, the Defendants applied to stay the arbitration immediately to allow the parties to settle the dispute by mediation, as per the arbitration agreement. The Claimants subsequently failed to engage with the mediation and submitted a challenge to the courts under Section 67 of the Act, claiming that the Defendant breached the arbitration agreement by requesting mediation at the same time as it requested arbitration and thereby did not “first seek settlement of the dispute by mediation” per the agreement.

The High Court considered if the Defendants’ alleged breach went to the sole arbitrator’s substantive jurisdiction, thus falling within Section 67 of the Act and subjecting the award to review, or if it went to the admissibility of the claim. It confirmed the latter, finding both that the arbitration was validly commenced and that it is for the sole arbitrator to decide the consequences of any failure to comply with such pre-conditions.

The judgment in *NWA & FSA* reflected the High Court’s previous finding in *Republic of Sierra Leone*. This case involved an arbitration agreement contained in a mining licence where the parties agreed to attempt settlement in good faith for a three-month period before referring a dispute to arbitration administered by the ICC. The Defendant issued its Request for Arbitration only six weeks after the notice of dispute and, in response, the Claimant argued that the tribunal had no jurisdiction to hear the dispute. The tribunal, going against the previous position established in *Emirates Trading* [2015] 1 WLR 1145, found non-compliance with the escalation mechanism to be an issue of admissibility and not jurisdiction. The Claimant then pursued the courts, requesting that it invoke its right to review under Section 67 of the Act.

The High Court held that the common intention of parties to an arbitration agreement is to seek swift and final determination of disputes arising out of their contractual relationship. As such, courts should avoid enforcing any contrary construction that would allow parties to frustrate this common intention. Justice Calver in *NWA & FSA* particularly noted that, should the Claimant’s construction be accepted, the result would be that a single party refusing to mediate (in breach of contract or not) would frustrate a designated arbitrator from ever gaining jurisdiction over the dispute.

## Recent Decisions from Hong Kong SAR

*T v B* [2021] HKCFI 3645 and *C v D* [2021] HKC 65

The latest decision on this issue in Hong Kong SAR is *T v B* and it involved a contractor and subcontractor who entered into a works agreement with a multi-tiered arbitration clause. The clause here was different from the two English cases previously discussed in that, instead of requiring mediation, it prohibited arbitration until completion of the works. The Defendant served a Notice of Dispute on the Claimant before the project had completed and, as a result, the Claimant argued that the Defendant had done so in breach of the terms of their agreement.

In deciding this case, the court closely followed the reasoning in *C v D*; the first case in Hong Kong SAR to recognise the admissibility vs jurisdiction distinction. In both cases, the Hong Kong High Court held that non-compliance with pre-conditions to arbitration is an issue of admissibility and therefore within the arbitrator's realm of determination. The reasoning in each claim is similar to that of the English High Court as Justice Lam and Justice Coleman focused on the pragmatic consideration of ensuring swift and final determination of disputes and the sensibility of allowing arbitrators to decide themselves if they should hear a claim. As explained by Justice Lam in *C v D*:

"The fact that a condition is regarded as going to admissibility rather than jurisdiction does not mean it is unimportant. What it does mean is that the arbitral tribunal has jurisdiction and may deal with the question as it sees fit. If it comes to the view that the earlier stages in a multi-tier dispute resolution clause have not been fulfilled, it can give effect to the contractual requirement by, for example, ordering a stay of the arbitral proceedings in whole or in part pending compliance with the clause, imposing costs sanctions, or even dismissing the claim outright as inadmissible. This approach has considerable advantages, for these clauses can be complex in their operation and the arbitral tribunal chosen by the parties' agreed mechanism will usually be well-placed to consider and determine what needs to be done having regard to commercial realities and practicalities including whether it would be futile to compel the parties to go through the motions."

In *T v B*, Justice Coleman also placed value on respecting parties' autonomy in deciding to refer a dispute to arbitration, particularly where their commitment to arbitrate is unquestioned. Justice Coleman also stressed importance of refraining from judicial interference with dispute resolution procedures voluntarily adopted by parties. The latter was equally emphasised in *C v D* where Justice Lam explained that arbitral awards are difficult to set aside precisely because of the judicial desire to avoid interfering with arbitrations unless actually required to facilitate justice.

## Implications

The decisions in England and Hong Kong SAR go a long way to align the common law position across jurisdictions with the views of the wider academic community. Namely, that non-compliance with escalation mechanisms built into arbitration agreements is generally a procedural issue going to the admissibility of claims. These issues are best deliberated by the duly appointed tribunal and

cannot, and should not, save in limited circumstances, be challenged before a court. The cases thereby give further certainty as to the enforceability and effect of multi-tiered dispute resolution clauses, albeit warning that the obligations within them should be sufficiently defined. Likewise, the courts in England and Hong Kong SAR have emphasised their deference to arbitral tribunals where parties have voluntarily committed to this method of dispute resolution.

Following the decisions, tribunals may seek to stay claims wholly or partly, make relevant orders and/or impose costs sanctions to encourage parties to comply with the contractual pre-conditions to commencing arbitration. Parties continue to be able to require expressly compliance with these pre-conditions and clarify that, without this, tribunals should not hear the claim. Notwithstanding the presence of this clarification, parties should nevertheless aim to comply with any contractual pre-conditions to arbitration to avoid judicial challenges being raised in the enforcement of an arbitral award.

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