HCCT 24/2020
[2021] HKCFI 1474

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO 24 OF 2020

IN THE MATTER OF an Arbitration

and

IN THE MATTER OF Section 81 of the Arbitration Ordinance (Cap 609) regarding a Partial Award on Jurisdiction and Liability dated 21 April 2020

BETWEEN

"C" Plaintiff

and

"D" Defendant

Before: Hon G Lam J in Chambers (Not Open to Public)
Date of Hearing: 24 February 2021
Date of Judgment: 24 May 2021

J U D G M E N T

"**Redacted version for publication**"

The background

1. This is an application by Company C [redacted] pursuant to section 81 of the Arbitration Ordinance (Cap 609) ("**Ordinance**") for a declaration that the Partial Award on Jurisdiction and Liability dated 21 April 2020 ("**Award**") in the arbitration between Company C and Company D [redacted] was made without jurisdiction and is not binding on Company C, and for an order that the Award be set aside.

2. Company C is a [redacted] company and carries on business as an owner and operator of satellites. Company D is a [redacted] company that carries on business as a satellite operator in Asia Pacific.

3. On 15 December 2011, Company C and Company D entered into a Co-operation Agreement ("**Agreement**") for the development and building of a satellite [redacted] ("**Satellite A**"). [redacted] Satellite A has [●] transponders, i.e. the equipment used to transmit broadcasts to, and receive broadcasts from, Earth. Half of the transponders belong to Company C, and the other half belong to Company D, [redacted] The Agreement is to continue in force for the operating life of Satellite A unless terminated earlier (clause 13.1).

4. [redacted]

5. Section 8 of the Agreement is headed "Other Provisions". Clause 8.2 provides:

> " Material Default by either Party. In the event that either Party believes that the other Party is in material default of its obligations under this Agreement, such Party shall give a written notice to the defaulting Party in writing requiring remedy of the default (the 'Material Default Notice'). If defaulting Party fails to remedy the default within thirty (30) Business Days of receipt of the Default Notice, the Parties shall resolve the dispute by referring to the procedure set forth at Section 14.2."

6. Section 14 of the Agreement provides as follows:

> "
> **SECTION 14**
> **GOVERNING LAW AND DISPUTE RESOLUTION**
>
> 14.1 Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of Hong Kong, without regard to the principles of conflicts of law of any jurisdiction.
>
> 14.2 Dispute Resolution. The Parties agree that if any controversy, dispute or claim arises between the Parties out of or in relation to this Agreement, or the breach, interpretation or validity thereof, the Parties shall attempt in good faith promptly to resolve such depute by negotiation. Either Party may, by written notice to the other, have such dispute referred to the Chief Executive Officers of the Parties for resolution. The Chief

Executive Officers (or their authorized representatives) shall meet at a mutually acceptable time and place within ten (10) Business Days of the date of such request in writing, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute through negotiation.

14.3 Arbitration. If any dispute cannot be resolved amicably within sixty (60) Business days of the date of a Party's request in writing for such negotiation, or such other time period as may be agreed, then such dispute shall be referred by either Party for settlement exclusively and finally by arbitration in Hong Kong at the Hong Kong International Arbitration Centre ('HKIAC') in accordance with the UNCITRAL Arbitration Rules in force at the time of commencement of the arbitration (the 'Rules').

(a) There shall be three (3) arbitrators. Each Party shall appoint one arbitrator and the arbitrators thus appointed shall appoint the third arbitrator who shall act as the Chairman.

…

(c) The arbitration shall be conducted in English. The arbitrators shall decide any such dispute or claim strictly in accordance with the governing law specified in Section 14.1. Judgment upon any arbitral award rendered hereunder may be entered in any court having jurisdiction, or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be.

…

(e) Any award made by the arbitration tribunal shall be final and binding on each of the Parties that were parties to the dispute. To the extent permissible under the relevant laws, the Parties agree to waive any right of appeal against the arbitration award."

7. [redacted]

[redacted]

8. [redacted]

9. [redacted]

10. [redacted]

11. [redacted]

12. [redacted]

13. [redacted]

[redacted]

14. [redacted]

[redacted]

15. [redacted]

[redacted]

16. [redacted]

17. On 24 December 2018, the CEO of Company D issued a letter to the Chairman of the Board of Directors of Company C, copied to the other directors of Company C. Company C's CEO also received a copy from the Chairman. There is an issue whether this letter qualified as the written notice under clauses 14.2 and 14.3. The letter (in part) read as follows:

> " Dear Chairman of the Board of Directors
>
> Re: Cooperation Agreement between Company C [redacted] and Company D [redacted]
>
> We write with regard to the recent serious breach of the Cooperation Agreement by Company C, which now requires your urgent attention.
>
> Our legal representatives have written separately to your lawyers on this issue, but have not received a satisfactory response. Given the longstanding cooperation between our two companies, Company D is raising its concerns directly with the Company C

> board in a final effort to resolve this issue and avoid further legal proceedings.
>
> …
>
> Breach of the Cooperation Agreement
>
> … Company D has therefore received legal advice that Company C's actions constitute a repudiatory breach of contract under Hong Kong law, and a material default under Section 8.2 of the Cooperation Agreement.
>
> Proposed Solution
>
> Company D, through its lawyers, has already served a notice of material default under the Cooperation Agreement. It is therefore clear from the correspondence that a relevant dispute now exists for the purpose of Section 14 of the Cooperation Agreement.
>
> In accordance with the contract, Company D now invites the Company C Board to reconsider its position and avoid further legal proceedings by taking all necessary steps to reinstate the relevant transponders and desist from any further interference with Company D's portion of the payload.
>
> Company D is willing to refer the dispute to the parties' respective senior management teams in accordance with Section 14.2 of the Cooperation Agreement if necessary. Unless the dispute can be resolved swiftly and amicably, however, Company D will take all relevant steps to safeguard its rights.
>
> Company D reserves all of its legal rights accordingly."

18. On 7 January 2019, B&M wrote to HSF, stating that the procedure in clauses 8.2 and 14 of the Agreement and the potential engagement of the respective CEOs did not concern Company C's directors, and that Company D's direct communication with them was neither appropriate nor productive. B&M requested that all further correspondence on this matter be directed to them or, if pursuant to clause 14.2 of the Agreement, be addressed to Company C's CEO.

19. There was no such further correspondence from Company D. Nor did Company C itself refer the dispute to the CEOs. On 18 April 2019, Company D issued a notice referring the dispute to arbitration under

clause 14.3 of the Agreement. In its response, Company C claimed, among other things, that the arbitral tribunal did not have jurisdiction because of the absence of a request for negotiations under clauses 14.2 and 14.3. Meanwhile, the parties negotiated on a without prejudice basis throughout the arbitration, including a meeting of, amongst others, the parties' CEOs in Singapore in June 2019.

20. A tribunal of three arbitrators[1] was formed ("**Tribunal**"). They decided to deal with Company C's objection to jurisdiction and the issue of liability together, with quantum to be addressed, if necessary, in the second phase. After the exchange of pleadings and evidence, a two-day hearing of the first phase of the arbitration was held in Hong Kong on 2-3 January 2020. On 21 April 2020, the Tribunal issued the Award.

21. On the objection to jurisdiction, the Tribunal held that the first sentence in clause 14.2 of the Agreement mandatorily requires the parties to attempt in good faith to resolve any disputes by negotiation, but the reference of disputes to the respective CEOs mentioned in the second sentence of clause 14.2 is optional. It held that the condition in clause 14.3 that the dispute cannot be resolved within 60 business days of a party's request in writing for such negotiation refers to a request for negotiation under the first sentence of clause 14.2, and that the condition had been fulfilled by Company D's letter of 24 December 2018. The tribunal therefore rejected Company C's objection, and proceeded to find that Company C had breached clause 4.7 of the Agreement and had to pay damages in an amount to be determined in the second phase of the arbitration.

[1] One of them was an arbitrator in the previous arbitration that resulted in the First Award.

22. By originating summons filed in the High Court on 21 May 2020, Company C seeks a declaration that the Partial Award was made without jurisdiction and an order for it to be set aside.

The parties' positions and the questions arising

23. It is common ground that the first sentence in clause 14.3 means that it is a condition precedent to any reference to arbitration that there should have been a request in writing for negotiation and that the dispute nevertheless cannot be resolved amicably within 60 business days.

24. The parties disagree, however, on what the condition means. Company C contends that the condition refers to the giving of a written notice to have the dispute referred to the CEOs for resolution, as referred to in the second sentence of clause 14.2. Company D, in contrast, contends that the condition is satisfied by a written request to negotiate in good faith, as referred to in the first sentence of clause 14.2, and that it had given the requisite request by its letter of 24 December 2018. Company C contends that the letter of 24 December 2018 did not amount to such request even on Company D's own construction of clause 14.

25. As an overarching objection, however, Company D contends that the question of whether the condition precedent had been fulfilled is a question of "admissibility" rather than "jurisdiction", and as such the court should not interfere with the arbitral tribunal's decision on that question.

26. The issues arising are therefore as follows:

(1) The primary issue is: Is the question whether Company D complied with the dispute resolution procedure set out in the

Agreement a question of the admissibility of the claim, or a question of the tribunal's jurisdiction, and does that question fall within section 81 of the Ordinance?

(2) Only if the primary question is answered in Company C's favour do the following two questions arise: What is the condition precedent to arbitration on the proper construction of the Agreement? And was the condition fulfilled by Company D's letter of 24 December 2018?

Section 81 of the Ordinance

27. Section 81 of the Ordinance, incorporating Art 34 of the Model Law, sets out exhaustively the bases on which the court may set aside an award in the following terms:

> " **81. Article 34 of UNCITRAL Model Law (Application for setting aside as exclusive recourse against arbitral award)**
>
> (1) Article 34 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(5)—
>
> *Article 34. Application for setting aside as exclusive recourse against arbitral award*
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.".

(2) Subsection (1) does not affect—

(a) the power of the Court to set aside an arbitral award under section 26(5);

(b) the right to challenge an arbitral award under section 4 of Schedule 2 (if applicable); or

(c) the right to appeal against an arbitral award on a question of law under section 5 of Schedule 2 (if applicable).

(3) Subject to subsection (2)(c), the Court does not have jurisdiction to set aside or remit an arbitral award on the ground of errors of fact or law on the face of the award.

(4) The leave of the Court is required for any appeal from a decision of the Court under article 34 of the UNCITRAL Model Law, given effect to by subsection (1)."

28. The grounds of Company C's application set out in the originating summons are Art 34(2)(a)(iii) and (iv). There is no dispute that, if the question raised is a true question of jurisdiction properly falling within Art 34, the court may review the arbitral decision on the standard of "correctness" and decide the question *de novo*: *S Co v B Co* [2014] 6 HKC 421, §§18-38; *X v Jemmy Chien* [2020] HKCFI 286, §4.

Admissibility and jurisdiction

29. For Company D, it is submitted that Company C's objection goes to the admissibility of the claim rather than the jurisdiction of the arbitral tribunal. Such a question is one for the tribunal, and its ruling is not subject to review by the court under section 81. Reliance is placed on court decisions in the United Kingdom, Singapore and the United States as well as academic works. Company C did not deal with this argument in its skeleton submissions but lodged a supplemental list of authorities and made oral submissions disputing Company D's contentions.

30. The distinction between jurisdiction and admissibility has been dealt with in a number of academic works. In Mills, *Arbitral Jurisdiction*, in *Oxford Handbook on International Arbitration* (OUP 2018), the author states:

> " … the question of jurisdiction concerns the power of the tribunal. The question of admissibility is related to the claim, rather than the tribunal, and asks whether this is a claim which can be properly brought. In particular, it considers the question of whether there are any conditions attached to the exercise of the right to arbitrate which have not been fulfilled. Those conditions might be, for example, a limitation period applicable to the right to commence arbitration, or a requirement to mediate and/or negotiate before arbitral proceedings may be commenced.
>
> …

> The most important consequence of the distinction between issues of jurisdiction and admissibility is that the latter are usually considered not to provide a challenge to the general authority of the parties' agreement to arbitrate. As a result, while a tribunal's decision on jurisdiction cannot be decisive concerning whether such jurisdiction exists …, The determination of a tribunal on questions of admissibility should generally be considered decisive … As a further consequence of this, the general approach is that … an arbitral tribunal should be considered to have the exclusive authority to consider questions of admissibility — that these are questions which fall within the purview of the agreement to arbitrate, whose validity is itself not in question, and should not be addressed by a court." (footnotes omitted)

31. In Born, *International Commercial Arbitration* (3rd ed 2021), after stating that the correct characterisation of contractual procedural requirements as jurisdictional defences, admissibility defences or procedural requirements varies among different legal systems, the author states (at pp 999-1000):

> " … the better view is that the character of such requirements, and the consequences of their breach, depends on the intentions of the parties. … Characterising a particular procedural requirement in one way or another depends ultimately upon an interpretation of the parties' contractual language and intentions.
>
> In interpreting the parties' arbitration agreement, the better approach is to presume, absent contrary evidence, that pre-arbitration procedural requirements are not 'jurisdictional'. As a consequence, in most legal systems, these requirements would presumptively be both capable of resolution by the arbitrators and required to be submitted to the arbitrators (as opposed to a national court) for their initial decision. Similarly, the arbitral tribunal's resolution of such issues would generally be subject to only minimal judicial review in subsequent annulment or recognition proceedings.
>
> The rationale for this presumption is that requirements for cooling off, negotiation or mediation inherently involve aspects of the arbitral procedure, often requiring interpretation and application of institutional arbitration rules or procedural provisions of the arbitration agreement. Equally important, the remedies for breach of these requirements necessarily involve procedural issues concerning the timing and conduct of the arbitration. In both cases, these issues are best suited for resolution by arbitral

> tribunal, subject to minimal judicial review, like other procedural decisions.
>
> Similarly, parties can be assumed to desire a single, centralised forum (a 'one-stop shop') for resolution of their disputes, particularly those disputes regarding the procedural aspects of their dispute resolution mechanism. Fragmenting resolution of procedural issues between national courts and the arbitral tribunal produces the risk of multiple proceedings, delays and expense, inconsistent decisions, judicial interference in the arbitral process and the like. The more objective, efficient and fair result, which the parties should be regarded as having presumptively intended, is for a single, neutral arbitral tribunal to resolve all questions regarding the procedural requirements and conduct of the parties' dispute resolution mechanism." (footnotes omitted)

The author nevertheless recognises that the parties may by their contractual language opt for judicial determination of pre-arbitration procedural requirements, with jurisdictional consequences, but he adds (at p 1001):

> " In general, this requirement is not satisfied merely by a showing that contractual procedural requirements were a pre-arbitration condition or condition precedent to commencing an arbitration …"

Similar views are expressed in Born and Šćekić, *Pre-Arbitration Procedural Requirements 'A Dismal Swamp'*, in *Practising Virtue: Inside International Arbitration* (Caron *et al* eds, 2015), pp 227-263.

32. Paulsson, in *Jurisdiction and Admissibility* in *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC Publishing, 2005), discusses how issues of jurisdiction and admissibility are to be distinguished and states (at pp 615-616):

> " In his development of this idea, Rau quotes a US court which asked whether the challenge was 'relevant to the nature of the forum in which the complaint will be heard'.
>
> There is promise in the notion of 'relevance to the nature of the forum'. It enables us to see that the nub of the classification problem is whether the success of the objection necessarily negates consent to the forum. Our lodestar takes the form of a

question: is the objecting party taking aim at the tribunal or at the claim?"

In conclusion, at p 617, the author offers the following test:

> " To understand whether a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds:
>
> - 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 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.
>
> … Once it is established that the parties have consented to the jurisdiction of a particular tribunal, there is a powerful policy reason — given the multiplicity of fora which might otherwise come into play internationally, with hugely different practical outcomes — to recognise its authority to dispose conclusively of other threshold issues. Those are matters of admissibility: alleged impediments to consideration of the merits of the dispute which do not put into question the investiture of the tribunal as such."

33. *Merkin and Flannery on the Arbitration Act 1996* (6th ed 2019) at §30.3 similarly states:

> " … we regard issues that concern compliance with pre-arbitral procedures as nonjurisdictional, even if the condition in question is certain enough to be binding … The preferable analysis is to treat such matters as conditioning the admissibility of the claim, rather than the tribunal's jurisdiction.
>
> … Of course, we accept that on occasion it may be difficult to know where one ends and the other begins, yet that is no different from being able to know when day becomes night. There is always going to be a twilight twixt the two. In broad terms, if the issue concerns the validity of the arbitration agreement, the standing of the claimants to bring claims, or the identity of the named respondents to receive them, it becomes more likely that the issue relates to jurisdiction rather than admissibility. If, on the other hand, the issue concerns whether the claim has been brought too late, or too early, or under a contract said to be illegal in some way, it is more likely to be a question of admissibility rather than jurisdiction." (footnote omitted)

The same authors have earlier expressed a similar view in *Emirates Trading, good faith, and pre-arbitral ADR clauses: a jurisdictional precondition?* Arbitration International, 2015, 31, 63–106, at p 105, with reference to a contractual obligation to negotiate in good faith before commencing an arbitration:

> " … the far better view is to treat such clauses as procedural, or even substantive, but certainly not jurisdictional, so that any claim based on an alleged breach (in terms of its commission and its consequences) is a matter that the tribunal should determine, but only as a procedural (or at best substantive, but not jurisdictional) matter."

34. Zeiler has explained the distinction in *Jurisdiction, Competence, and Admissibility of Claims in ICSID Arbitration Proceedings* in C Binder and others (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP New York 2009) as follows:

> " Fitzmaurice rightly observed that an objection to the substantive admissibility of the claim 'is a plea that the tribunal should rule the claim inadmissible on some ground other than its ultimate merits', while an objection to the jurisdiction of the tribunal 'is a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim'. …"

35. In Jolles, *Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement* (2006) 72 Arbitration 329, 335, the author answers the question whether failure to satisfy prior negotiation requirements affects the arbitral tribunal's jurisdiction as follows:

> " … the answer should be no, unless the parties have explicitly provided that a failure to comply with the pre-arbitral stages excludes the tribunal's jurisdiction. The tribunal's jurisdiction describes its authority to decide a dispute. By the arbitration agreement, the parties mutually granted this authority to a tribunal and excluded state courts. To argue that this choice is contingent on certain pre-arbitral steps would imply that failure

> to take them would allow a party to withdraw from its commitment to arbitrate. It is hard to imagine that parties made their agreement to exclude state courts in favour of arbitration *contingent* on compliance with pre-arbitral negotiation and/or conciliation, in the sense that, if one party had known that the other would not engage in the agreed pre-arbitral steps, it would have preferred to submit the dispute to litigation rather than to arbitration. This hardly corresponds with the parties' intention. Thus, the question whether the parties had complied with agreed settlement procedures should not be seen as affecting the authority (jurisdiction) of the parties' ultimate decision-making body."

36. The distinction is also recognised in the *International Arbitration Practice Guideline* on *Jurisdictional Challenges* issued by the Chartered Institute of Arbitrators, which states in Preamble, §6:

> " When considering challenges, arbitrators should take care to distinguish between challenges to the arbitrators' jurisdiction and challenges to the admissibility of claims. For example, a challenge on the basis that a claim, or part of a claim, is time-barred or prohibited until some precondition has been fulfilled, is a challenge to the admissibility of that claim at that time, i.e. whether the arbitrators can hear the claim because it may be defective and/or procedurally inadmissible. It is not a challenge to the arbitrators' jurisdiction to decide the claim itself." (footnote omitted)

and in Article 3 on p 15:

> " After deciding upon the jurisdictional challenges, arbitrators may also be called upon to decide on the admissibility of the claim. This may include a determination as to whether a condition precedent to referring the dispute to arbitration exists and whether such a condition has been satisfied. It also involves challenges that the claim is time-barred."

37. The distinction between jurisdiction and admissibility has also been recognised in authorities from other jurisdictions. In *BG Group plc v Republic of Argentina* 134 S Ct 1198 (2014), the relevant investment treaty provided for a party to submit a dispute to the local court of the other party and permitted arbitration where, after 18 months had elapsed from the date

when the dispute was submitted to the local court, it had not given its final decision. An award having been issued by arbitrators against Argentina, it sought to vacate the award in the US courts, arguing that the arbitrators lacked jurisdiction because BG Group had not complied with the local litigation requirement. The US Supreme Court stated that the courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration, including the satisfaction of "prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate". The court held that the provision in the treaty in question was of the procedural variety: "It determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all".

38. The Singapore Court of Appeal in *BBA & others v BAZ* [2020] SGCA 53, approving the views of Paulsson, Merkin and Flannery (among others) as referred to above, considered that the "tribunal versus claim" test underpinned by a consent-based analysis should apply for purposes of distinguishing whether an issue goes towards jurisdiction or admissibility. This test "asks whether the objection is targeted at the tribunal (in the sense that the claim *should not be arbitrated* due to a defect in or omission to consent to arbitration), or at the claim (in that the claim itself is defective and *should not be raised at all*)". The court concluded that a plea of statutory time-bar goes towards admissibility as it attacks the claim (see §§73-80). In *BTN & another v BTP & another* [2020] SGCA 105, it was held, following *BBA*, that an arbitral decision on an objection based on the doctrine of res judicata should likewise be treated as a decision on admissibility, not jurisdiction (see §§68-71).

39. In the recent English case of *The Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm), the contract in question required the parties to endeavour in good faith to reach an amicable settlement of their disputes and stipulated that if they were unable to settle within three months from a written notice by one party to the other specifying the dispute and seeking an amicable settlement, either party might submit the matter for arbitration. A notice of dispute was served on 14 July 2019, and a request for arbitration was served on 30 August 2019. By a partial award, the arbitrators held that they had jurisdiction. The award was challenged in the English High Court under section 67 of the (UK) Arbitration Act 1996.

40. The judge (Sir Michael Burton) noted that it was common ground that there was a distinction between a challenge that the claim was not admissible before the arbitrators (admissibility) and a challenge that the arbitrators had no jurisdiction to hear a claim (jurisdiction). Under the wording of sections 30 and 67 of the 1996 Act, the claimant argued that it could challenge in court the "substantive jurisdiction"[2] of the arbitrators, and that the question of "what matters have been submitted to arbitration in accordance with the arbitration agreement" (the question referred to in section 30(1)(c)), [3] which is an issue of substantive jurisdiction, encompassed the question of whether the arbitral claim should not have been brought before the expiry of the stipulated period for amicable

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[2] Section 67 permits an application to the court to challenge any award as to its "substantive jurisdiction".

[3] Section 30(1) provides:

"Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to –

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement."

settlement. After considering the views of leading academic writers (including some of those cited above), which were "all one way", and international authorities (including *BG Group*, *BBA* and *BTN*), which were "overwhelmingly" against the claimant's argument, the learned judge held (at §18):

> " I consider that, to accord with the views of Paulsson, as approved in the Singapore Court of Appeal (at [77] of *BBA v BAZ*), if the issue relates to whether a claim could not be brought to arbitration, the issue is ordinarily one of jurisdiction and subject to further recourse under s 67 of the 1996 Act, whereas if it relates to whether a claim should not be heard by the arbitrators at all, or at least not yet, the issue is ordinarily one of admissibility, the tribunal decision is final and s 30(1)(c) does not apply. The short passage in the Singapore Court of Appeal set out in paragraph 15(ii) above is useful: '*Jurisdiction* [and so susceptibility to a s 67 challenge] *is commonly defined to refer to 'the power of the tribunal to hear a case', whereas admissibility refers to 'whether it is appropriate for the tribunal to hear it'*.' The issue for (c) is, in my judgment, whether an issue is arbitrable. The issue here is not whether the claim is arbitrable, or whether there is another forum rather than arbitration in which it should be decided, but whether it has been presented too early. That is best decided by the Arbitrators."

41. In *PAO Tatneft v Ukraine* [2018] 1 WLR 5947, Butcher J of the English High Court also considered that:

> " Issues of jurisdiction go to the existence or otherwise of a tribunal's power to a judge the merits of the dispute; issues of admissibility go to whether the tribunal will exercise that power in relation to the claims submitted to it."

In that case it was held that a contention that a party was not able to bring any claim in arbitration because it was an abuse of rights to do so was an objection that went to the question of admissibility rather than the jurisdiction of the tribunal (see §§95-99).

42. Although, as pointed out in *Born* at p 998, the characterisation of contractual procedural requirements varies among different legal systems, it appears that the generally held view of international tribunals and national courts is that non-compliance with procedural pre-arbitration conditions such as a requirement to engage in prior negotiations goes to admissibility of the claim rather than the tribunal's jurisdiction: *The Republic of Sierra Leone v SL Mining Ltd*, at §16; see also *Williams & Kawharu on Arbitration* (2nd ed 2017), p 246.

43. These academic works and international authorities demonstrate that the distinction between jurisdiction and admissibility is not one only to be drawn on the specific wording of the written law of a particular jurisdiction, but is a concept rooted in the nature of arbitration itself. They also point out the policy reasons that justify different legal treatment of jurisdictional challenges and admissibility challenges. In Hong Kong, the governing provision on recourse against arbitral awards is section 81 of the Ordinance, which gives effect to Art 34 of the Model Law. Whether this distinction has significance in Hong Kong for the setting aside of arbitral awards depends on the application of section 81 to the facts of the actual case. Although the Ordinance does not in terms draw a distinction between jurisdiction and admissibility, it may in my view properly be relied upon to inform the construction and application of section 81. As Mimmie Chan J stated in *X v Jemmy Chen* at §6, in approaching applications to set aside arbitral awards, the court must confine itself to *true* questions of jurisdiction.

44. Company C seeks to distinguish *SL Mining* as a decision on the specific wording of particular provisions of the (UK) Arbitration Act 1996. The decision there was that the challenge against the award on the

ground that the notice period for amicable settlement had not expired did not fall within the question of "what matters have been submitted to arbitration in accordance with the arbitration agreement". In my opinion this is not substantially different in nature from a question arising under Art 34(2)(a)(iii).

45. Further, it is notable that the same approach has been adopted in Singapore, a Model Law jurisdiction, where recourse to the court for the purpose of setting aside an arbitral award is also limited by Art 34 of the Model Law as in Hong Kong. In *BBA*, the argument was that time-barred claims fell outside the scope of the parties' submission to arbitration (see §35) and that the arbitrators' error therefore fell within Art 34(2)(a)(iii) and was reviewable by the court. This argument was rejected by the court, which held that the objection went towards admissibility of the claim rather than the jurisdiction of the tribunal.

46. Company C relies on *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2015] 1 WLR 1145, where a contractual requirement for friendly discussions in good faith before the dispute might be referred to arbitration was treated as a matter going to jurisdiction. As pointed out in *SL Mining* (at §13), however, the distinction between jurisdiction and admissibility was not raised in *Emirates Trading*. Indeed it appears to have been common ground in *Emirates Trading* that the court should conduct a rehearing *de novo* of the challenge (see §6).

47. Company C has also referred to *HZ Capital International Ltd v China Vocational Education Co Ltd* [2019] HKCFI 2705. There it was argued that a contractual requirement for mutual consultation among the parties was a condition precedent to arbitration, and that since it had not

been fulfilled, the arbitral tribunal lacked jurisdiction. On the facts, Deputy Judge Raymond Leung SC held that the relevant parties had waived the requirement and could not therefore insist upon fulfilment of the condition precedent.[4] While the case of *Emirates Trading* was cited, there was no debate or decision as to whether non-fulfilment of the condition precedent, had it not been waived, would have resulted in the tribunal lacking jurisdiction. It may also be noted that the court did not have the benefit of any adversarial argument in that case.[5] In my respectful opinion, neither *Emirates Trading* nor *HZ Capital* provides any real support for Company C's argument.

48. Company C submits that arbitration is based on the parties' consent, and that "if there was no contract to go to arbitration at all an arbitrator's award can have no validity": *Fiona Trust & Holding Corporation & others v Privalov & others* [2007] UKHL 40 at §34. It submits that where an agreement is subject to a condition precedent, there is, before the occurrence of the condition, no duty on either party to render the principal performance promised by him: *Chitty on Contracts* (33rd ed), Vol. I, §2-160. With respect, these observations do not address the real issue. Treating a procedural condition precedent as a matter of admissibility of the claim rather than jurisdiction of the tribunal does not deny contractual force to the requirement. Company D does not dispute that clause 14.3 of the Agreement imposes a condition precedent which is enforceable and binding. Nor does it contend that it should be allowed to arbitrate even if the condition precedent is not fulfilled. Rather, the crux is whether the question should be left to be decided by the arbitral tribunal, including what

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4 See §§54, 60, 70.

5 See §§6 and 82.

the condition precedent means as a matter of construction and whether it has been satisfied on the facts, without any *de novo* assessment by the court.

49. 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.

50. The approach espoused in the international materials referred to above seems to me to be entirely consistent with the policy in Hong Kong law which respects the parties' autonomy in choosing arbitration as the means to resolve their disputes with its incident of speed and finality as well as privacy: section 3(2) of the Ordinance; *China International Fund Ltd v Dennis Lau & Ng Chun Man Architects & Engineers (HK) Ltd* [2015] 4 HKLRD 609 at §§14(b), 18 and 25.

51. One of the objects of the Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense: section 3(1). Multi-tiered dispute resolution mechanisms are not

uncommon. It would not be conducive to swift dispute resolution if controversies regarding procedural conditions such as that in the present case are regarded as jurisdictional questions, opening the way for duplicated arguments in court proceedings.

52. Company C submits that the court should be wary of curtailing the fundamental right of access to the court enshrined in Art 35 of the Basic Law and that any restriction of that right has to satisfy the proportionality test. In this connection, reliance is placed on *Solicitor v Law Society of Hong Kong & another* (2003) 6 HKCFAR 570 at §45, *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735 at §34, and *China International Fund Ltd v Dennis Law & Ng Chun Man Architects & Engineers (HK) Ltd* [2015] 4 HKLRD 609 at §9. The following points are however of note:

(1) The question of compatibility with the Basic Law is not to be examined on a piecemeal basis with regard to specific rules or concepts in arbitration law, but on the basis of the entire scheme of judicial scrutiny of arbitration awards: *China International Fund*, §20.

(2) One of the underlying principles of the Ordinance is to restrict the court's interference in arbitration to the circumstances expressly provided for in the Ordinance: section 3(2)(b). The bases for setting aside an arbitral award are exhaustively set out in section 81.

(3) As Mimmie Chan J said in *S Co v B Co*, §§28-29 & 38, albeit in a somewhat different context, the courts should be circumspect in their approach to determining whether an

alleged error properly falls within Art 34(2)(a)(iii); the courts take a narrow view of the extent of any question of jurisdiction.

(4) The approach based on the distinction between jurisdiction and admissibility serves the object of the Ordinance which is "to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense": section 3(1).

(5) The approach also respects the parties' autonomy: as stated above, they are not prevented from agreeing that pre-arbitral procedural requirements should go to the tribunal's jurisdiction, but such agreement requires clear and unequivocal language. An example is given by Born in *International Commercial Arbitration* at p 999, where the arbitration agreement states that it shall not take effect, and no arbitral tribunal shall have any authority or jurisdiction, until specified pre-arbitration procedural requirements have been satisfied. In *BBA*, the court also gave an example of an arbitration clause that provides "the tribunal shall have no jurisdiction to hear claims that are time-barred under statute" (see §80). Seen in this light, there is no absolute exclusion of the court's involvement in this type of question. The extent of available access to the court is a matter of the parties' bargain: see *China International Fund*, §§31-34.

I am satisfied that the approach is a proportionate aid for the application of section 81.

53. The objection in the present case seems to me to be one going to admissibility of the claim. There is no dispute about the existence, scope and validity of the arbitration agreement. There is no dispute that Company D's claim, as far as its subject matter is concerned, "arises out of

or in relation to" the Agreement and falls within the scope of the arbitration agreement. The issue is not whether there was "initial consent" to the submission of the dispute to arbitration and to the tribunal's determination: (*S Co v B Co*, §35). The parties' commitment to arbitrate is not in doubt; they intend the arbitral award to be final and binding. Company C's objection is that the particular reference to arbitration was invalid because the stipulated mechanism of negotiation between the CEOs had not been gone through. The objection is not that such a claim should not be arbitrated at all, but that the tribunal should reject the reference as premature. There is no indication in clauses 14.2 or 14.3 of the Agreement that the parties intended compliance with these provisions to be a matter of jurisdiction. It seems unlikely to be the parties' intention that despite a full hearing before and a decision by a tribunal of their choice the same issue should be re-opened in litigation in the courts. In my view the challenge is one of admissibility rather than jurisdictional.

54. As such, the objection does not seem to me to fall under Art 34(2)(a)(iii). That provision contains two limbs: the first limb is where the award deals with a dispute not falling within or contemplated by the parties' agreement to arbitrate; the second is where the tribunal had authority to deal with the dispute, but exceeded its powers by deciding on matters beyond the scope of the parties' submission to arbitration. These are well recognised instances of excess of jurisdiction. Indeed, the Ordinance, in providing that an arbitral tribunal has competence to rule on its own jurisdiction, specifically mentions the power to decide as to "what matters have been submitted to arbitration": section 34(2)(b). It cannot be said that because the condition precedent to arbitration had not been fulfilled, Company D's claim fell outside the parties' arbitration agreement. In my view, Company C has failed to show that the Award dealt with a

dispute "not falling within the terms of the submission to arbitration". Indeed, at the hearing, Mr Yu SC who appeared on behalf of Company C based his argument solely on Art 34(2)(a)(iv).

55. Company C's reliance on Art 34(2)(a)(iv) ("the arbitral procedure was not in accordance with the agreement of the parties") is strange, for that provision seems to me to be concerned with a procedural objection, rather than a matter of jurisdiction as alleged in the originating summons. In my opinion, this provision is apt to refer to the way in which the arbitration was conducted, but not to contractual procedures *preceding* the arbitration that merely go to the admissibility of the claim.

56. Referring to the corresponding Art V(1)(d) of the New York Convention, Prof van den Berg wrote in *The New York Arbitration Convention of 1958* at p 323:

> " As far as the agreement on the arbitral procedure is concerned, which agreement is usually embodied in Arbitration Rules of a specific arbitral institution, such an agreement generally affords wide discretionary powers to arbitrators as to the conduct of the arbitral procedure. It therefore rarely happens that the arbitral procedure has not been conducted in accordance with the agreement of the parties."

57. The arbitral rules in this case were stipulated in clause 14.3 of the Agreement to be the UNCITRAL Arbitration Rules. The arbitral procedure was governed by those rules. There is no complaint that the arbitral tribunal failed to act in accordance with the procedures laid down in those rules. Company C has not been able to refer to any authority or principle which suggests that Art 34(2)(a)(iv) should be construed to encompass the type of pre-arbitration dispute resolution procedures such as provided in the Agreement.

58. Thus analysed, Company C's complaint against the Award on the ground that the dispute had not been referred to the CEOs for resolution does not fall within either Art 34(2)(a)(iii) or (iv). In the light of this conclusion, it is unnecessary to deal with the construction of clauses 14.2 and 14.3 or the question whether the condition precedent had been met.

Conclusion

59. For the above reasons, Company C's originating summons is dismissed. Following the established practice of awarding indemnity costs against a party who has applied unsuccessfully to set aside an arbitral award, there will be an order *nisi* that Company C do pay Company D's costs of these proceedings on the indemnity basis.

(Godfrey Lam)
Judge of the Court of First Instance
High Court

Mr Benjamin Yu SC and Mr Brian Lee, instructed by Baker & McKenzie, for the Plaintiff

Mr Simon Chapman (Solicitor Advocate) of Herbert Smith Freehills, for the Defendant