

Failure to comply with pre-arbitration requirement to mediate a matter of admissibility, not jurisdiction

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Two recent rulings from the English and Hong Kong courts have highlighted that the question of compliance with procedural steps in an arbitration clause relates to the admissibility of a claim rather than the tribunal's substantive jurisdiction.

In NWA & FSA v NVF & others [2021] EWHC 2666 (Comm), the English Court declined a jurisdictional challenge of a London Court of International Arbitration (LCIA) award under section 67 of the Arbitration Act 1996. It held that the basis of challenge was a question of admissibility to be determined by the arbitrator, not an issue of jurisdiction falling within section 67.

In C v D [2021] 5 HKC 65, the Hong Kong court decided that the question of whether non-compliance with a condition precedent to arbitrate went to admissibility of the claim and not to the jurisdiction of the arbitral tribunal, and dismissed the claimant's jurisdictional challenge under section 81 in Chapter 609 of the Hong Kong Arbitration Ordinance (AO), which gave effect to section 34 of the UNCITRAL Model Law.

Under the laws of both England and Hong Kong, there is a strong presumption that commercial parties intend all disputes to be determined by a single forum, such that disputes will fall outside the scope of an arbitration clause only if excluded expressly or by clear implication (the 'Fiona Trust' principle). Parties seeking certainty that their arbitration agreements will be upheld, and the issue determined by the tribunal rather than the court, will welcome the English and Hong Kong courts' respective decisions.

These decisions do not mean that procedural conditions precedent are without contractual force or purpose. They mean simply that questions related to the construction of the condition precedent and whether it has been satisfied should be decided by the arbitral tribunal, without being considered 'de novo' by the courts. If the tribunal finds on the facts that the conditions were not fulfilled, it may order a stay of proceedings to give

effect to the condition precedent, impose costs sanctions on the defaulting party, or dismiss the claim outright as inadmissible. The point is that the tribunal, chosen by the parties' agreed mechanism, is best placed to make such decisions.

The cases

In the English case, the commercial contract between the parties required mediation of the dispute before commencing LCIA arbitration. The defendants NVF filed a request for arbitration and asked the arbitration to be stayed for mediation under the LCIA mediation procedure provided in the arbitration agreement.

However, the claimants NWA and FSY refused to do so and no mediation took place. The arbitrator issued an award finding that the failure to mediate did not affect his jurisdiction to deal with the dispute. The claimants challenged the award under section 67 of the Arbitration Act 1966 (UK), arguing that the primary obligation to arbitrate had not yet accrued and the consent to arbitration was therefore defective. The tribunal did not have jurisdiction to decide the dispute.

Justice Calver rejected the challenge, finding that dispute as to whether the duty to mediate constitutes a condition precedent and whether it has been breached are matters in relation to the admissibility of the dispute and should be resolved by the tribunal.

The claimant itself was found responsible for preventing the parties' compliance with the pre-arbitral mediation condition precedent. The court held that a construction which allowed a party to frustrate the parties' intention to resolve their dispute by arbitration by refusing to mediate was a factor that favoured an 'admissibility' construction rather than a 'jurisdiction' construction.

In the Hong Kong case, C v D, clause 14.2, of the tiered dispute resolution clause provided that the parties were to attempt to resolve disputes in good faith by negotiation, and that either party may refer such dispute to the CEOs of the parties for resolution. Under clause 14.3, if any dispute could not be resolved within 60 days of the date of a party's request in writing to attempt good faith negotiation, such dispute may be referred to arbitration under UNCITRAL Rules in Hong Kong.

C claimed that the tribunal did not have jurisdiction because of the absence of request for negotiations under clauses 14.2 and 14.3. The tribunal held that the reference to the CEOs in clause 14.2 was optional, and that the attempt to negotiate under clause 14.3 had been fulfilled, so rejected C's objection. C challenged the tribunal's jurisdiction based on section 81 of the AO. The issue before the court was whether D's compliance with the dispute resolution procedure was a question of admissibility of the claim or a question of jurisdiction.

Justice Lam dismissed C's objections and held that, although the characterisation of contractual procedural requirements varies among different legal systems, international tribunals and national courts generally accept that non-compliance with procedural pre-

arbitration conditions such as the requirement to engage in prior negotiations is relevant to admissibility of the claim, rather than the tribunal's jurisdiction.