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Escalating Arbitration Agreements, Admissibility or Jurisdiction: Singapore, England and Hong Kong

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Escalating arbitration clauses (also known as multi-tier dispute resolution clauses) are commonly found in commercial contracts. Typically, such clauses require the parties to attempt, within a specified time period, to reach an amicable settlement; to enter into negotiations; and/or participate in conciliation or mediation proceedings. The purpose of such clauses is to offer a contractually mandated opportunity to resolve disagreements relatively inexpensively without the costs and delays associated with arbitration proceedings. Such clauses may combine different pre-conditions and levels of resolution with arbitration being the ultimate "*tier*".

A hot topic in this area has been whether the enforceability of such procedural pre-conditions is a matter of admissibility or jurisdiction:

- **Admissibility** refers to the appropriateness of the claim for the arbitral tribunal to exercise its jurisdiction; and
- **Jurisdiction** refers to the power of the arbitral tribunal to decide the case.

This is an important distinction as the consequences of a decision on admissibility and a ruling on jurisdiction are dramatically different. A ruling on admissibility will not prevent the tribunal from rehearing the case once the flaw in question has been redressed or the relevant procedural pre-condition has been complied with.

This article examines this question under a comparative lens from the perspective of three jurisdictions: Singapore, England and Wales and Hong Kong. In particular, this article considers the recent decision of the Hong Kong Court of Appeal in *C v D* [2022] HKCA 729.

Singapore

In *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd & Anor*[2014] 1 SLR 130, the Singapore Court of Appeal held that non-compliance with a binding precondition to arbitration could deprive a tribunal of its jurisdiction. At [63], the Court held: "*Given that the preconditions for arbitration*[…] *had not been complied with, and given our view that they were conditions precedent, the agreement to arbitrate* […] *could not be invoked. The Tribunal therefore did not have jurisdiction over the Appellant and its dispute with the Respondent*."

Therefore, since *Lufthansa Systems* the position in Singapore has been considered to be relatively well-settled, namely that the enforceability of procedural pre-conditions is a matter of jurisdiction. However, this has been called into question by two recent decisions of the Singapore Court of Appeal, *BBA v BAZ* [2020] 2 SLR 53 and *BTN v BTP* [2020] SGCA 105.

In *BBA v BAZ*, the Singapore Court of Appeal affirmed the first instance decision that issues of time bar

arising from statutory limitation periods are an issue of admissibility, rather than jurisdiction. In doing so, the Court endorsed the "Tribunal vs Claim Test" which 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 contest to arbitration), or at the claim (in that the claim itself is defective and *should not be raised at all*). The former concerns jurisdiction; the latter concerns admissibility.

In *BTN v BTP*, the Singapore Court of Appeal held that res judicata was an issue of admissibility and not jurisdiction and therefore, the Court had no basis upon which to set aside the award. In its reasons, the Court of Appeal adopted the proposition that "*tribunals' decisions on objections regarding preconditions to arbitration, like time limits, the fulfilment of conditions precedent such as conciliation provisions before arbitration may be pursued, mootness and ripeness are matters of admissibility, not jurisdiction*."

It remains to be seen whether these two recent judgments of the Singapore Court of Appeal will (finally) sound the death knell for the *Lufthansa Systems* view that enforceability of procedural pre-conditions is a matter of jurisdiction.

England and Wales

The English position is clearer. The question of whether compliance with an escalation clause is a matter of admissibility or jurisdiction has been conclusively decided by Sir Michael Burton in the Commercial Court in *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm); 194 ConLR 162. The issue arose in the context of an application to challenge the jurisdiction of a tribunal by the Republic of Sierra Leone, pursuant to section 67 of the Arbitration Act 1996. The underlying dispute arose out of Sierra Leone's suspension and cancellation of a large-scale mining licence and licence agreement that had been granted to SL Mining Ltd.

The licence agreement provided that, in the event of any disputes arising thereunder, the parties would in good faith endeavour to reach an amicable settlement and only if none was reached within a period of three months from a written notice by one party to the other specifying the nature of the dispute and seeking an amicable settlement could either party submit the matter to the exclusive jurisdiction of an ICC arbitration tribunal. In the arbitration, Sierra Leone unsuccessfully argued that no arbitration proceedings should have been commenced until three months after the notice of dispute and therefore that the arbitrators were without jurisdiction. That challenge was rejected by the arbitrators. In the Commercial Court, the section 67 challenge failed and the court refused to set aside a partial arbitral award.

Sir Michael Burton, having analysed case law from England, Singapore (i.e. *BBA* and *BTN*) and the U.S., and academic commentary (variously by Born, Paulsson, Mills, and Merkin and Flannery), considered that it was plainly correct that non-fulfilment of this type of pre-condition in an arbitration agreement was a question of admissibility rather than a question going to the tribunal's jurisdiction. He made clear that this was not dependent on how categorical the wording of an arbitration clause was. He did not accept that there was any distinction between a clause which stated "No arbitration shall be brought unless X" and one which said "In the event of X the parties may arbitrate". Compliance with either was a matter of admissibility.

The central principle underpinning the distinction was stated at [18], following the analysis of Paulsson (as approved in *BBA* at [77]): "*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 section 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 section 30(1)(c) does not apply.*"

The approach in *SL Mining Ltd* has also been followed by Calver J in *NWA v NVF* [2021] EWHC 2666 (Comm). It may now be considered well-settled in England.

Hong Kong

The Hong Kong Court of Appeal addressed this issue in *C v D* [2022] HKCA 729 (judgment handed down on 7 June 2022). The relevant escalation clause included a requirement to negotiate in good faith prior to a referral to arbitration. It was common ground that the first sentence in the relevant clause meant that it was

a condition precedent to any reference to arbitration that there should have been a request in writing for negotiation and that the dispute nevertheless could not be resolved amicably within 60 business days.

Hong Kong is a Model Law jurisdiction like Singapore. It was argued that the English decision in *SL Mining Ltd* should not be followed on account of differences in the wording of Article 34 of the Model Law and the English Arbitration Act 1996. The Hong Kong Court of Appeal rejected that submission, correctly recognising at [31] that Sir Michael Burton's judgment in *SL Mining Ltd* was not based on the particular wording of the English Arbitration Act, but on a much more fundamental distinction between admissibility and jurisdiction.

After also surveying the decisions of the Singapore and New South Wales courts, the Hong Kong Court of Appeal concluded that the distinction applied equally in Hong Kong and could be given effect by way of statutory construction of Article 34 of the Model Law. The court provided three principled reasons (apart from identifying persuasive Commonwealth and academic authority) for adopting that position. At [46], it stated that:

1. this is more likely to give effect to the intention of the parties for a single arbitral tribunal to decide all their disputes (referring to the principle of separability stressed by the UK House of Lords in *Fiona Trust v Privalov* [2007] UKHL 40; [2007] 4 All ER 951);
2. consistent with the "*general trend of minimizing the permissible scope of judicial interference in arbitral proceedings and awards*";
3. in furtherance of the object of the relevant Hong Kong Ordinance, namely "*to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expenses*"; and
4. in keeping with the trend in London and Singapore, as "*major international arbitration centres*".

Lastly, and importantly, the Hong Kong Court of Appeal rejected the further submission that it followed from acceptance that a requirement in an escalation clause was a "pre-condition" that compliance was an issue going to jurisdiction. The court reasoned at [57] that this was an "*over-simplification*" and, instead, considered that "[t]*he true and proper question to ask is whether it is the parties' intention (or agreement) that the question of fulfilment of the condition precedent is to be determined by the arbitral tribunal, and thus falls "within the terms of the submission to arbitration" under Art 34(2)(a)(iii)*". On the facts, the court concluded that the relevant clause in *C v D* was aimed at premature claims and thus only went to admissibility.

Concluding remarks

The above survey demonstrates the clear direction of travel in all major common law arbitration centres and, indeed in England and Hong Kong. The settled position is that compliance with pre-arbitral conditions in escalation or multi-tier dispute resolution clauses will generally be treated as going to admissibility. While the courts in England, Singapore and Hong Kong have all stressed that each clause has to be construed individually, the overarching principle in England and Hong Kong (at least) is that characterisation of these issues as ones of admissibility not jurisdiction is, and will continue to be, the norm. The English court in *SL Mining Ltd* also made clear that the issue is not to be decided by reference to how emphatically a clause is phrased. Instead, it is a question of ascertaining the true intention of the parties and, if a matter is to go to jurisdiction, a court would have to effectively conclude that the parties intended for the supervisory courts not the tribunal to decide the relevant issue. That will be a rare case.

While the position in Singapore is not entirely certain given the *Lufthansa Systems* decision, at least the English and Hong Kong treatment in *SL Mining Ltd* and *C v D* respectively has been to focus on the 2020 Singapore Court of Appeal decisions in *BBA* and *BTN* instead. It remains to be seen whether *Lufthansa Systems* is formally overruled in due course, which would complete the trilogy of recent cases in these jurisdictions and cement the consensus reached.

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