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Hong Kong Court of Appeal Confirms That Disputes Over Arbitration Clauses Are for Arbitrators but Not Courts to Resolve

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In ***C v D*** [2022] HKCA 729, the Court of Appeal[1] confirmed the lower court's decision that a dispute over a multi-tiered dispute resolution clause, which stipulates that the parties must first negotiate in good faith before resorting to arbitration, should be resolved by the arbitral tribunal and is not open to attack at the local courts. As the Court of Appeal itself succinctly summarised:

> ***"…the question of whether the pre-arbitration procedural requirement …has been fulfilled is a question intrinsically suitable for determination by an arbitral tribunal, and is best decided by an arbitral tribunal in order to give effect to the parties' presumed intention to achieve a quick, efficient and private adjudication of their dispute by arbitrators chosen by them on account of their neutrality and expertise."***

This decision is of general significance to arbitration law both in Hong Kong and internationally. From a local perspective, this judgment represents the highest authority in Hong Kong which recognises and draws a distinction between *"jurisdiction"* (namely whether the arbitral tribunal has the jurisdiction) and *"admissibility"* (namely whether the claim should be admissible to be heard by the arbitral tribunal). It seeks to align the Hong Kong court's position with that adopted by other jurisdictions such as Singapore, United Kingdom and the United States, so as to ensure that Hong Kong does not fall out of line with major international arbitration centres like London or Singapore.

From an international view point, this decision is also important given that Hong Kong is an UNCITRAL Model law (the **"Model Law"**) jurisdiction with arbitration legislation similar to that of other Model Law jurisdictions. As it is common to have dispute resolution clauses in commercial contracts requiring that parties negotiate before commencing arbitration, this decision will also be relevant and persuasive in other jurisdictions which adopt the Model Law.

A. Introduction

Under the agreement in question, the dispute resolution provision mandates the parties to, in good faith, resolve dispute by negotiation. Either party may through written notice refer a dispute to the Chief Executive Officers (**"CEOs"**) of the parties for resolution, and the CEOs shall then meet and attempt to resolve such dispute. It is only when a dispute cannot be resolved amicably within 60 business days that such dispute shall be referred to arbitration.

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However, after an initial letter from the CEO of one party, C, to the Chairman of the other party, D, there was no further correspondence from D and neither party referred the dispute to the respective CEOs for negotiation. Instead, D commenced arbitration and C in turn claimed that the arbitral tribunal did not have jurisdiction to hear the dispute as there was no prior negotiation between the parties.

The arbitral tribunal issued an award (the **"Partial Award"**) in favour of D (the party who commenced the arbitration) and rejected C's contention that the arbitral tribunal had no jurisdiction to hear the dispute. C then commenced proceedings in the High Court seeking a declaration that the Partial Award was made without jurisdiction hence not binding on C, and sought an order that the Partial Award be set aside under section 81 of the Arbitration Ordinance (Cap. 609, the **"Ordinance"**) which in turn refers to Article 34 of the Model Law.

Relevantly, Article 34 allows for the setting aside of an arbitral award if: *"the award deals with a dispute not contemplated by or not falling within the terms of the submissions to arbitration"* (Article 34(2)(a)(iii)) or *"the composition of the arbitration tribunal or the arbitral procedure was not in accordance with the agreement of the parties"* (Article 34(2)(a)(iv)).

At the Court of First Instance level, the Judge identified the main question for determination to be whether D had complied with the dispute resolution clause provided for in the agreement is a question of admissibility of the claim or a question of the tribunal's jurisdiction, and does that question fall within section 81 of the Ordinance (hence Article 34 of Model law)?

The Judge held that: (i) notwithstanding that the Ordinance draws no distinction between *"jurisdiction"* and *"admissibility"*, C's objection concerns the admissibility of the claim but not the jurisdiction of the tribunal, and hence such objection does not fall under Article 34(2)(a)(iii); and (ii) Article 34(2)(a)(iv) is also not applicable, as it concerns the way in which the arbitration was conducted but not the contractual procedures *before* the arbitration. In the appeal, C contends that these rulings are wrong.

B. The Court of Appeal's decision

1. *1st Main Ground - jurisdiction vs. admissibility and Article 34(2)(a)(iii) of the Model Law*

The Court of Appeal noted that there is a substantial body of judicial and academic jurisprudence which supports the drawing of a distinction between *"jurisdiction"* and *"admissibility"* for the purpose of determining whether an arbitral award is subject to review by the court under Article 34(2)(a)(iii). Even though such distinction is not found in the language of Article 34(2)(a)(iii), it can be given recognition in the course of statutory construction, namely that a dispute which goes to the admissibility of a claim (but not jurisdiction of the tribunal) should be regarded as a dispute *"falling within the terms of the submissions to arbitration"*.

C also argued that its objection is in any event *"jurisdictional"* in nature, and the parties intend that there is no obligation to arbitrate unless the condition precedent has been satisfied. The Court of Appeal considered this to be oversimplifying matters, as the true and proper question is whether the parties' intention (or agreement) that the question of fulfilment of such condition precedent is a matter to be determined by the arbitral tribunal, and as such falls "*within the terms of the submissions to arbitration"*. In other words, one has to look at whether an objection is *"targeted at the tribunal"* or *"targeted at the claim"*.

In this case, since C was not saying that D's claim cannot be referred to arbitration but that the reference was premature, such objection was targeted *"at the claim"* but not *"at the tribunal"* and only goes to the *"admissibility"* of the claim. The Partial Award therefore was not subject to review by the court under Article 34(2)(a)(iii) and this ground of appeal was rejected.

For the sake of completeness, the Court of Appeal also mentioned that its conclusion would not have changed even if the distinction between *"jurisdiction"* and *"admissibility"* is disregarded. The Court of Appeal took the view that because the dispute resolution provision provides for *"any"* dispute which cannot be resolved amicably within 60 business days to be referred to arbitration, there is no reason to confine the scope of arbitrable disputes to substantive disputes, and exclude from it disputes on whether the pre-arbitration procedural requirement has been fulfilled.

2. 2nd Main Ground – applicability of Article 34(2)(a)(iv) of th Model Law

This ground was not the focus of the appeal, and C seeks to argue that the phrase *"arbitral procedure"* as used in Article 34(2)(a)(iv) can encompass pre-arbitration condition precedent, and whether a condition precedent to arbitration is part of *"arbitral procedure"* depends on the intention of the parties, in particular whether they intended non-satisfaction of such condition precedent to bar arbitration altogether.

The Court of Appeal considered that since it has come to the conclusion that the parties intended the question of fulfillment of the pre-arbitration procedural requirement to be determined by arbitration, it follows that it was not their intention that non-satisfaction of such requirement would bar arbitration altogether and this ground was similarly dismissed.

C. Conclusion and Key Takeaways

Careful consideration during the negotiation and drafting stage of the contract: The Court of Appeal recognises that ultimately what goes to the issue of *"jurisdiction"* and what goes to the issue of *"admissibility"* is controlled by the parties' agreement, given that arbitration is a consensual process and the parties determine the scope of the disputes which may be submitted to arbitration. If the parties wish to make satisfaction of a pre-arbitration condition precedent something which goes to the arbitral tribunal's jurisdiction, explicit and unambiguous language should be used to indicate such intention in order to avoid any future dispute, although careful consideration should be given in making such a decision, bearing in mind the extra time and costs which may be involved in the court's review of jurisdictional matters.

Other consequences of non-satisfaction of pre-arbitration condition precedent: The fact that non-satisfaction of a contractual procedure before the arbitration will not bar arbitration does not mean that such clause is not important. The non-satisfaction can still have significant practical consequences, such as the arbitration proceedings being stayed pending the fulfillment of the contractual procedure, or the party who does not fulfill such contractual procedure could potentially face sanction on costs.

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[1] A copy of the judgement of the Court of Appeal is available here: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=144748&QS=%2B%7C%28CACV%2C387%2F2021%29&TP=JU

The judgment of the Court of First Instance ([2021] HKCFI 1474) is available here: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=136552&QS=%2B%7C%28HCCT%2C24%2F2020%29&TP=JU

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