



Hong Kong Court of Appeal rules that Arbitral Tribunal is to determine whether pre-arbitration conditions have been fulfilled

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Many contracts provide that before a dispute is to be resolved by arbitration, certain conditions are to be first fulfilled, such as a requirement to mediate before commencing arbitration. The Hong Kong Court of Appeal in the recent decision in C and D (Arbitration) [2022] 3 HKLRD 116 held that where the parties have agreed for a dispute to be referred to arbitration, the court will presume that the parties also agreed that the arbitral tribunal, and not the court, is to determine whether pre-arbitration conditions have been fulfilled, unless the arbitration agreement provided otherwise.

C and D (Arbitration)

The decision concerned an arbitration agreement which stated that prior to any reference to arbitration, there should be a request in writing for negotiation between the parties (the condition precedent to arbitration).

The parties agreed that the relevant dispute fell within the scope of the arbitration agreement, but disagreed on whether the condition precedent was satisfied in the circumstances, and on whether the court or the arbitral tribunal should determine whether the pre-arbitration conditions were satisfied (the procedural issue).

The Court of First Instance of the High Court decided that the procedural issue was an issue of admissibility of claim, rather than an issue of jurisdiction of the arbitral tribunal. Overseas case law has defined an issue of admissibility to be whether a claim is admissible before the arbitral tribunal and is to be decided by it, and an issue of jurisdiction to be whether the arbitral tribunal has jurisdiction at all to hear the claim, such that the claim is to be decided instead by the court.

The main ground of appeal was that the learned Judge erred in two respects. First, the court ought not adopt the distinction between 'admissibility' and 'jurisdiction', because such distinction is not found in Article 34(2)(a)(iii) of the UNCITRAL Model Law (adopted in Hong Kong by

Section 81 of the Arbitration Ordinance). The argument was the statute only provided that an arbitral award may be set aside if *'the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration'*. Second, even if such a distinction existed, the pre-arbitration conditions in question were jurisdictional in nature, because in contract law, where an agreement is subject to a condition precedent, before the occurrence of such condition, there is no duty on either party to perform as agreed.

The Court of Appeal held that, although the distinction between 'admissibility' and 'jurisdiction' is not found in Article 34(2)(a)(iii), it is a concept rooted in the nature of arbitration itself and may properly be relied upon for the interpretation and application of Section 81. The distinction can be given proper recognition though statutory construction, namely, that a dispute which goes to the admissibility of a claim rather than the jurisdiction of the tribunal should be regarded as a dispute *'falling within the terms of the submissions to arbitration'* under Article 34(2)(a)(iii). Ultimately, the test is whether or not the parties intended the question of fulfilment of the condition precedent is to be determined by the arbitral tribunal.

The Court of Appeal further held that whether the pre-arbitration procedural requirement has been fulfilled is usually to be decided by an arbitral tribunal, to give effect to the parties' presumed intention to have any dispute arising out of their relationship to be decided by the same tribunal, and to achieve a quick, efficient and private determination of their dispute by arbitration. Such presumed intention is only rebutted if the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

The full judgment can be found [here](#).



Takeaway

Whether an issue went to the '*admissibility of claim*' or '*jurisdiction of the arbitral tribunal*' is to be decided by whether the parties intended for the issue to be determined by the arbitral tribunal. If the parties intend to restrict the scope of disputes to be referred to arbitration, that needs to be written clearly in the dispute resolution provision.

Our trainee solicitor Adrian Luk assisted with preparing this article.