# Kluwer Arbitration Blog

## Trends in Questions of Jurisdiction and Admissibility in International Arbitration

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A common issue in commercial contracts across a range of industries is whether a claimant's failure to comply with the provisions of a dispute resolution clause gives rise to an issue of admissibility or jurisdiction. There have been a range of recent decisions from across the globe ruling on this very question, with all of them ruling that questions of compliance with pre-arbitral procedures go to the admissibility of an issue in dispute rather than the arbitral tribunal's jurisdiction.

The distinction between issues of jurisdiction and issues of admissibility can be an important one. If an arbitral tribunal does not have jurisdiction over an issue, then it cannot proceed to issue an award on the merits of that issue. In contrast, admissibility goes to whether the arbitral tribunal may exercise its power to judge the merits in relation to the claims submitted to it.

The distinction also has a number of practical consequences. For example, decisions on admissibility cannot generally be reviewed by national courts unless there is some fundamental breach of fair procedure. This means that recalcitrant parties will not have the opportunity to re-open admissibility issues in the national courts as a tactic to delay or prevent enforcement. It also means that arbitral tribunals have a wide discretion to rule on issues of admissibility without fear of those decisions being reviewed by the courts. That includes the ability to issue directions to allow compliance with the relevant conditions to make the claim or issue admissible.

### *BG Group v Republic of Argentina*

Back in 2014, the US Supreme Court in BG Group v Republic of Argentina 134 S.Ct. 1198 rejected a challenge to an arbitral award on the basis that a mandatory pre-condition to arbitration had not been complied with. This case concerned an arbitration brought by BG Group under the Argentina-UK BIT following actions taken by Argentina in light of its economic collapse in late 2001. BG Group prevailed in the arbitration, which was seated in Washington DC. The Argentina-UK BIT required claimants to litigate their claims for 18 months in Argentina prior to commencing a claim in arbitration. The arbitral tribunal had held that BG Group's claim was admissible even though it had not first sought relief in the Argentinian courts.

The US Supreme Court held, by a majority, that in the absence of a contrary provision in the

arbitration agreement, questions as to whether the parties are bound by an arbitration clause are for the courts to decide. Conversely, it is for the arbitral tribunal to decide the meaning and application of particular procedural preconditions to the use of arbitration. The US Supreme Court viewed the litigation requirement in the Argentina-UK BIT as a procedural requirement and the arbitral tribunal's decision on this question could not be reviewed *de novo* by the courts.

### *BBA v BAZ and BTN v BTP*

BBA v BAZ [2020] SGCA 53 and BTN v BTP [2020] SGCA 105 are two 2020 decisions from the Singapore Court of Appeal in which it recognised the distinction between jurisdiction and admissibility.

The first case related to a dispute arising under a sale and purchase agreement which contained an arbitration clause providing for arbitration in Singapore. The contract provided that the arbitral tribunal could not award punitive, exemplary or consequential damages. BAZ was successful in the arbitration and sought to enforce the award in Singapore. BBA resisted enforcement on the grounds that (i) the arbitral tribunal had exceeded its jurisdiction by awarding damages, as well as pre-award interest, that, they said, amounted to compensation for loss of opportunity contrary to the prohibition on awarding consequential damages and (ii) that the claim for fraud was time-barred. The Singapore Court of Appeal declined to set aside the award, holding that the first question related to the merits of the award rather than to jurisdiction, and that the time-bar issue was one of admissibility rather than jurisdiction, as it was targeted at the claim rather than at the tribunal.

The second case concerned payments under earn-out provisions in a sale and purchase agreement in circumstances where two individuals were terminated under a promoter employment agreement. The agreements provided for different outcomes depending on whether the individuals were terminated with or without cause. Unusually, the contracts contained arbitration agreements but also vested exclusive jurisdiction in the courts of, in the case of the sale and purchase agreement, Mauritius, and, in the case of the promoter employment agreement, Malaysia. In each case, the jurisdiction clause in favour of the courts was expressed to be subject to the arbitration agreement.

A dispute arose as to whether BTP was entitled to the earn-out payments. He had invoked his rights under Malaysian law and brought an action in the Malaysian Industrial Court, which found in BTP's favour and declared that he had been terminated without cause. BTP then commenced an arbitration under the sale and purchase agreement seeking payment under the earn-out provision in accordance with the more generous provisions where employment was terminated without cause. BTN argued that BTP had been terminated for cause and the arbitral tribunal held that this issue was *res judicata*. BTN sought a declaration from the Singaporean courts that the issue of whether BTP had been dismissed could be reviewed by the courts. BTP argued before the Singapore Court of Appeal that the arbitral tribunal had abdicated its duty to decide on whether BTP had been terminated for cause despite this question falling within the arbitral tribunal's jurisdiction. The Singaporean courts rejected this, holding that the *res judicata* determination was a question of admissibility and not jurisdiction, and therefore the courts could not review it on its merits.

### *Republic of Sierra Leone v SL Mining Ltd and NWA v NVF*

The English High Court decision in Republic of Sierra Leone v SL Mining Ltd [2021] EWHC 286 (Comm.) saw the English courts decline to set aside an arbitral award on the basis that the defendant had failed to comply with certain pre-conditions to arbitration.

The underlying dispute concerned the cancellation of a mining licence. The licence contained a multi-tiered dispute resolution clause under which the parties agreed to attempt an amicable resolution of disputes prior to commencing arbitration proceedings for three months after sending a notice of dispute. The defendant had served a notice of dispute followed by a Request for Arbitration just six weeks later.

The claimant sought to set aside the award under section 67 of the English Arbitration Act 1996 on the basis that the arbitral tribunal did not have substantive jurisdiction to determine the dispute. The English court held that the leading commentary and authorities all leant "*one way*" in that pre-conditions to arbitration are questions of admissibility and not jurisdiction.

The second English decision, NWA v NVF [2021] EWHC 2666 (Comm.) is a recent High Court judgment relating to a dispute where the parties agreed in their arbitration agreement to seek to mediate a settlement of any dispute before referring it to arbitration. The High Court noted the Sierra Leone case with approval and held that this was a matter going to admissibility rather than jurisdiction. NWA attempted to distinguish the Sierra Leone case by arguing that no matters had been submitted to arbitration in accordance with the arbitration agreements. This was rejected as a "*distinction without substance*", with the High Court going on to hold that the claim had been properly brought to arbitration and the issue was whether the claim had been brought too early, which is a matter for the arbitral tribunal, rather than supervisory courts, to decide.

### *C v D*

C v D [2021] HKCFI 1474 is a Hong Kong case arising from a contract that required parties to attempt in good faith to resolve disputes by negotiation for 60 days prior to commencing arbitration. A dispute arose between the parties and the defendant commenced arbitration proceedings. The plaintiff challenged the arbitral tribunal's jurisdiction on the basis that the dispute escalation provisions in the contract had not been complied with. The arbitral tribunal rejected this challenge and the plaintiff subsequently sought to set aside the arbitral tribunal's award on the basis the award dealt with a dispute not falling within the terms of the submission to arbitration.

The Hong Kong court noted, having reviewed the above authorities, that the "*generally held view of international tribunals and national courts*" was that failure to comply with a pre-condition to arbitration is a question of admissibility and not jurisdiction. The Hong Kong court accepted that the generally held view could be displaced if the parties explicitly provide that failure to comply with pre-arbitration requirements exclude the arbitral tribunal's jurisdiction but found that no such express provision existed on the facts.

This position was recently affirmed in Hong Kong in the case of Kinli Civil Engineering v Geotech Engineering [2021] HKCFI 2503 in the context of a dispute brought under a contract containing an arbitration agreement providing that a party "*may*" submit a dispute to arbitration. The court granted a stay of litigation proceedings in favour of arbitration noting that the court has no role in determining whether conditions as to the exercise of the right to arbitrate had been satisfied.

***Key takeaways***

The courts' decisions show a clear trend in favour of treating compliance with dispute resolution and escalation clauses as questions of admissibility, and not of jurisdiction. As well as being of great practical significance by preventing unnecessary jurisdictional challenges to arbitral awards, it also engages fundamental policy considerations towards arbitration, including a respect for upholding arbitration agreements and promoting the efficient resolution of disputes. These types of policy considerations are likely to be relevant in other jurisdictions other than those considered in this blog post, and could mark a global trend towards treating compliance with these types of clauses as a matter of admissibility rather than jurisdiction.

Nonetheless, parties to contracts are likely to want to continue to comply with their dispute escalation provisions to the extent possible, as it would still be open to an arbitral tribunal to determine that – as a question of admissibility – a claim is not ripe for determination. The trend for national courts to treat compliance with dispute resolution clauses as going to questions of admissibility does not mean that such clauses are unimportant. Rather, it means that the arbitral tribunal is empowered to deal with the issue as it sees fit. This could entail parties incurring additional costs and delay and even potentially having to re-commence the dispute, likely with a new arbitral tribunal, after they have complied with the relevant provisions in the dispute resolution clause. Even if such extreme measures are not required, non-compliance with the relevant dispute resolution provisions in the contract could still entail adverse costs consequences or even a stay of proceedings to allow for the party in default to comply with its obligations.

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