Kluwer Arbitration Blog

Pre-Arbitration Conditions: the English High Court Provides Further Clarity in the Admissibility v Jurisdiction Debate

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Arbitration agreements often provide that certain procedural steps must be undertaken before arbitration is commenced, such as mediation or negotiation. This provides a 'cooling-off period' in which the parties can seek to resolve their dispute amicably before resorting to formal proceedings.

When a party fails to satisfy a pre-arbitration procedural step and launches prematurely into arbitration, a respondent party wishing to challenge such conduct may claim that an arbitral tribunal has no jurisdiction to hear the dispute.

The approach to this issue varies across different jurisdictions as has been noted in prior blog posts. Until relatively recently, there was some uncertainty as to the correct approach under English law. Earlier this year, *Sierra Leone v SL Mining Limited [2021] EWHC 286* ("***Sierra Leone***"), a case in which the authors' firm acted, provided welcome clarity on this issue after a jurisdiction challenge to an arbitral award was brought under s.67 of the Arbitration Act 1996 (the "**Act**"). The Court found that a failure to wait until the end of a pre-arbitration notice period before commencing arbitration did not deprive the tribunal of jurisdiction. Rather it was an issue which concerned the admissibility of the dispute and so was one on which the tribunal could rule without being amenable to challenge under s.67 of the Act. The Court reached this finding having considered leading commentary and international authorities on the issue as there was no clear guidance under English law.

An even more recent High Court decision from October 2021 which is the focus of this post, *NWA and others v NVF and others [2021] EWHC 2666* ("***NWA***"), has endorsed the approach taken in *Sierra Leone* and provides further guidance on the issue.

These judgments are of significance because the characterization of a failure to satisfy pre-arbitral conditions as a matter of admissibility rather than jurisdiction would prevent an aggrieved party from using such failure as a basis to appeal an arbitral award under s.67 of the Act.

Arbitration as a 'One-Stop Shop'

In *NWA*, the dispute resolution clause required that the parties first attempt to resolve their dispute through an LCIA mediation before commencing an LCIA arbitration. The claimants filed a request for arbitration with the LCIA in which they requested that the arbitration be immediately stayed prior to the constitution of the tribunal to allow the parties to settle the dispute by mediation in

accordance with the dispute resolution clause. The claimants also communicated their proposal to mediate via email, which the defendants refused.

Following a decision of the sole arbitrator that he had jurisdiction to hear the dispute, the defendants brought a s.67 challenge on the basis that the sole arbitrator wrongly reached that conclusion. The defendants' position was that the failure to mediate deprives the tribunal of substantive jurisdiction within the meanings at section 30(1)(a) and (c) of the Act. These subsections require, respectively, that there is a valid arbitration agreement, and that matters are submitted to arbitration in accordance with the arbitration agreement.

Admissibility v Jurisdiction

The central question for the Court was whether the alleged non-compliance with the requirement for prior LCIA mediation goes to the admissibility of the claim or to the tribunal's substantive jurisdiction to determine the claim.

The Court's starting point was to consider the wording of the arbitration clause and apply ordinary principles of contractual interpretation. When interpreting the clause, the Court emphasized the importance of firmly keeping in mind the seminal dictum of Lord Hoffmann in *Fiona Trust* which highlights that parties who choose to arbitrate want their dispute to be decided in a 'one-stop shop' by a tribunal, and not before the national courts.

The Court held that it was clear from the dispute resolution clause that the parties agreed to refer *any* dispute arising out of or in connection with their agreement to arbitration and that they should first seek to settle their dispute by LCIA mediation. The Court rejected the defendants' interpretation that the failure to mediate before referring the dispute to arbitration goes to jurisdiction. In the Court's view, that interpretation would be "*absurd*" and would not accord with "*business common sense*" because it would mean that where one party refuses to mediate, the tribunal would never gain jurisdiction over the dispute.

The Court was also persuaded by the decision in *Sierra Leone* and leading practitioner texts on arbitration which favour an "admissibility" construction rather than a "jurisdiction" approach to pre-arbitration conditions. Accordingly, the Court concluded that the dispute had been validly submitted to arbitration in accordance with the dispute resolution clause and that it was for the arbitrator to decide the consequences of the alleged breach of the procedural requirement to mediate prior to arbitration.

Competence of Tribunal to Rule on its Own Jurisdiction

Having concluded that the requirement to mediate was a question of admissibility, the Court went on to consider whether the defendants' arguments regarding section 30(1) of the Act would alter its conclusion. Specifically, the defendants argued that (i) the arbitration agreement was "*inoperative*" because of the failure to comply with the mediation provision and accordingly there was not a "*valid*" arbitration agreement for the purposes of s.30(1)(a); and (ii) the failure to comply with the mediation provision meant that no matters had "*been submitted to arbitration in accordance with the arbitration agreement*" and so the arbitrator could not have had jurisdiction as per section 30(1)(c) of the Act.

The Court rejected both of these arguments. As to (i), the Court held that the arbitration agreement was plainly valid and the failure to mediate did not impact its validity or its operability. On (ii), the

Court held that the issues covered by s.30(1)(c) of the Act concern whether matters referred to arbitration are within the scope of the arbitration agreement, not whether the procedure has been followed. The Court also endorsed the view of Sir Michael Burton in *Sierra Leone* where he held that section 30(1)(c) was not engaged in respect of a challenge to a claim made prematurely. The defendants' attempt to distinguish *Sierra Leone* on the basis that it involved a claim being brought too early, rather than a claim that should not have been brought to arbitration at all because mediation had not taken place, was rejected by the Court which characterized it as "*a distinction without substance*".

Can a Failure to Satisfy Pre-Arbitration Conditions Ever Engage a Tribunal's Jurisdiction Under English Law?

The much criticized decision of *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd [2015] 1 WLR 1145* had arguably suggested that pre-arbitration procedural requirements may be relevant to a tribunal's jurisdiction. However, the Court in *Sierra Leone*, and again in *NWA*, distinguished *Emirates Trading* on the basis that it was simply assumed in that case that the failure to satisfy a pre-condition was a jurisdictional question rather than one related to admissibility. In other words, the issue was apparently never considered by the court. Now that it has been considered by two recent High Court decisions, the matter appears settled at first instance.

However, this does not necessarily mean that a failure to satisfy pre-arbitration conditions will never engage a tribunal's jurisdiction. As the Court noted in *NWA*, the outcome of each case depends on the proper construction of the arbitration agreement at issue. For example, in *Laker Vent Engineering v Jacobs [2014] EWHC 1058* (a case relied on by the defendants but distinguished on the facts), the arbitration agreement specifically provided that if the parties failed to agree an arbitrator in a specified time frame, then the dispute would be settled under the terms of the main contract, under which disputes were settled by court proceedings. In those circumstances, where there was a clear intention for the forum of the dispute to change after a certain time period, an arbitration agreement was deemed to have become inoperative.

Practical Considerations

While *NWA* has provided further clarity as to the English law position and reinforces the pro-arbitration policy of the English courts, it remains the case that parties would be well advised to follow any pre-arbitration conditions. A failure to do so may have practical consequences.

Specifically, arbitral tribunals have the power to stay or adjourn proceedings to allow time for the pre-condition to arbitration to be satisfied, and there may be cost consequences for a party that refuses to comply. A tribunal may rule that a claim submitted prematurely is inadmissible, which could lead to delay and cost should a party need to initiate a fresh claim after having followed the procedural steps.

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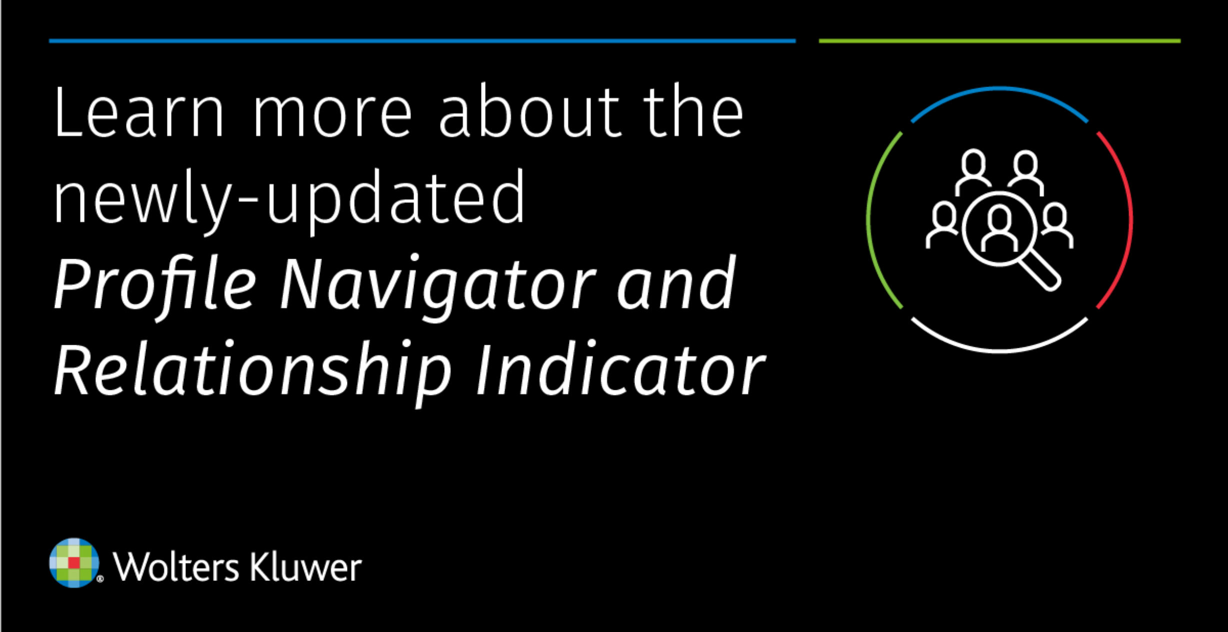

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