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C v D: Hong Kong in Step with the Admissibility Versus Jurisdiction Debate

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The differences between admissibility and jurisdiction in arbitration have been recognized in various jurisdictions, such as the UK, US and Singapore, and they have been covered extensively in academic scholarship. This post will discuss the distinctions drawn between admissibility and jurisdiction by the Court of Appeal in Hong Kong in ***C v D***.[1)]

C v D marks an important development in the judicial landscape of Hong Kong, as it confirms the arbitral tribunal's prerogative to decide on pre-arbitration procedural requirements as an issue of admissibility, thereby precluding subsequent review by the Courts.

Background

Procedural pre-conditions sometimes require parties to use more consensual methods of alternative dispute resolution (such as negotiation, joint fact-finding teams or mediation) before resorting to arbitration. Such pre-conditions may be optional or mandatory, depending on the language used in the clause.

Before going into the question of whether such procedural pre-conditions are a matter of admissibility or jurisdiction, it is important to understand the distinction between the two concepts. While admissibility of a claim relates to whether it is appropriate for the claim to be brought before the tribunal, jurisdiction concerns the power of the tribunal to decide the matter.[2)] While explaining this core aspect of the distinction between jurisdiction and admissibility, Jan Paulsson[3)] laid down a "tribunal versus claim" test. If the objection negates consent to the forum and thereby affects arbitrability of the matter, it is targeted at the tribunal, whereas if the objection is that the claim itself is defective and should not be raised at all, it is targeted at the claim.

Judgment

In *C v D*, the Court of Appeal in Hong Kong held that the question of whether a pre-arbitration procedural requirement, such as negotiation, has been fulfilled or not is a question suitable for determination by an arbitral tribunal, i.e., a matter of admissibility. In doing so, it made a firm

distinction between admissibility and jurisdiction of claims in arbitration, in line with international best practice and jurisprudence.

In brief, the facts of the case are that the dispute resolution clause in the contract between the parties for the development and building of a satellite, stipulated that the parties shall resolve their disputes, first and foremost, by negotiation. Thereafter, if within 60 days, the negotiation is unsuccessful, the parties may refer the dispute to arbitration for further determination.

C contended that since there was no request for negotiation as per the dispute resolution clause, the arbitral tribunal did not have jurisdiction over the matter. In its Partial Award, the tribunal found that D had made a request for negotiation, rejected C's objections on jurisdiction and held that C was liable to pay damages.

C sought a declaration to set aside the Partial Award before the Court of First Instance, citing a lack of jurisdiction under Article 81 of the Hong Kong Ordinance, CAP 609 ("Ordinance"), which mirrors Article 34 of the Model Law ("Model Law"). The grounds in the setting aside application were that the award deals with a dispute that is not within the ambit of the terms of submission to arbitration (Article 34 (2)(a)(iii) of the Model Law) and that the arbitral procedure was not in accordance with the agreement of the Parties (Article 34 2 (a)(iv) of the Model Law).

Following an in-depth analysis of judgments on the topic in the UK,[4] Singapore,[5] and the U.S.,[6] as well as various authorities,[7] the Court of First Instance observed that although the distinction between jurisdiction and admissibility may not be found in written law, it is "a concept rooted in the nature of arbitration itself."[8] Although Section 81 of the Ordinance on setting aside proceedings, which essentially aligns with Article 34 of the Model Law, does not distinguish between the two, the distinction may be relied upon to inform the construction and application of Section 81. This was based on the approach of achieving the underlying principles and object of the Ordinance, i.e., to facilitate efficient dispute resolution without unnecessary expense, and to uphold party autonomy whilst limiting the court's interference to a minimum.

Against this backdrop, the Hong Kong Court clarified that compliance with procedural pre-arbitration conditions must be considered a matter of admissibility (and not of jurisdiction), regarding which the decision of the arbitral tribunal is considered final.

This ruling in *C v D* has been confirmed in two further cases before the Hong Kong Courts. In ***Kinley Civil Engineering Ltd v Geotech Engineering Ltd [2021] HKCFI 2503***, Kinley initiated proceedings against Geotech, for payment under a construction sub-contract for a public housing development project. The dispute resolution clause under the contract provided that the arbitration shall not be conducted before either the completion of the main contract or the completion of the sub-contract. The Hon. Madam Justice Mimmie Chan held that the question of compliance with the procedure or pre-conditions to arbitrate, as set out in the arbitration agreement, is a question of admissibility to be decided by the tribunal. The Court had no role to play in such a matter, as it does not go to the jurisdiction of the tribunal. In ***T v B [2021] HKCFI 3645***, the claimant sought to refer certain disputes arising out of a sub-contract in relation to reclamation and advance works to arbitration. The defendant objected on the basis that it was premature as the completion certificate had not been issued, which was confirmed by the arbitrator in an interim award. The claimant subsequently filed a setting aside application. In this case too, the Court upheld *C v D*, and refused to set aside the arbitral award while holding that the issue of prematurity was a matter of

admissibility.

The first instance court's decision in *C v D* was thereafter appealed to the Court of Appeal, which observed that it was necessary to gauge whether the parties intended or agreed for the question of fulfillment of the pre-arbitration procedural requirement to be determined by the arbitral tribunal.[9] Considering the intention of the parties to refer the dispute to arbitration, the Hon. Justice G Lam of the Court of Appeal held that any dispute on whether a pre-arbitration procedural requirement is met was best decided by the arbitral tribunal, and is an issue that goes to the admissibility of the matter.

The Court further held that, since disputes on fulfillment of pre-arbitration procedural requirements were not excluded by parties from the jurisdiction of the arbitral tribunal, an inference could be made about parties' intention to refer such disputes to the same tribunal. Therefore, disputes relating to fulfillment of pre-procedural requirements were within the scope of submission to arbitration and could not be set aside under Article 34(2)(a)(iii) of the Model Law. Accordingly, in *C v D*, the Court found that it was not the parties' intention to treat non-fulfillment of such requirement as disagreement to arbitration.

Commentary and Conclusion

Gary Born has opined that parties presumably desire arbitration to be a centralized forum or a "one stop shop" for dispute resolution. In this regard, determining compliance with pre-arbitrational procedural requirements is better suited for resolution by the arbitral tribunal, as this pertains to admissibility and is subject to minimal judicial review, unlike other procedural decisions.[10]

Debates on admissibility and jurisdiction often involve the question of why distinguishing them is necessary. The distinction is important for two main reasons. Primarily, it elucidates the difference between questions of whether it is appropriate for the tribunal to proceed with the matter (admissibility) and whether the tribunal has the power to decide on the merits of the matter (jurisdiction). Depending on whether an issue is one of admissibility or jurisdiction, one can tell if the tribunal's decision on that issue will be subject to *de novo* review by the Court or not. In the case of admissibility issues, the hands of the Court are tied, while in the case of jurisdiction issues, the decision may be set aside pursuant to Article 34 of the Model Law.

Although the distinction between admissibility and jurisdiction is not explicitly articulated in the Ordinance, the judgment in *C v D* has firmly established that it shall be relied upon for the construction and application of setting aside of awards under Section 81, which mirrors Article 34 of the Model Law. By referring to the parties' intentions in its reasoning to decide whether non-compliance with pre-arbitration procedural requirements falls within the scope of arbitration, the Hong Kong Court essentially validated the arbitration proceedings. This result in *C v D*, in turn, validates the pro-arbitration nature of Hong Kong's arbitration regime by encouraging party autonomy, restricting court interference in arbitration proceedings, and satisfying the objective of arbitration to achieve efficient dispute resolution.

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References

?1 [2022] HKCA 729; CACV 387/2021 (7 June 2022)

?2 Dissenting Opinion of Keith Highet, in *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/98/2.

?3 Jan Paulsson, "Jurisdiction and Admissibility" (2005) in Global Reflections on International Law, Commerce and Dispute Resolution, LiberAmicorum in honour of Robert Briner (Gerald Aksen et al, eds) (ICC Publishing, 2005) at pp 616 and 617; see also CIArb Guideline on Jurisdictional Challenges (2015) at paras 6–8 of the preamble and the commentary on Article 3).

?4 See *PAO Tatneft v Ukraine [2018] 1 WLR 5947*, in *Sierra Leone v. SL Mining Limited [2021] EWHC 286.*

?5 See *BBA v. BAZ [2020] 2 SLR 453, BTN V. BTP [2021] 1 SLR 276.*

?6 *BG Group PLC v Republic of Argentina 134 S Ct 1198 (2014).*

Gary Born, International Commercial Arbitration (3rd ed 2021), at pp 997-1001, Jan Paulsson, in Jurisdiction and Admissibility in Global Reflections on International Law, Commerce and Dispute Resolution (ICC Publishing, 2005), at pp 615-617; Merkin and Flannery on the Arbitration Act

?7 1996 (6th ed 2019), at §§30.3 and 30.13; Merkin and Flannery, Emirates Trading, good faith, and pre-arbitral ADR clauses: a jurisdictional precondition?, in Arbitration, International (OUP 2015), 31, 63-106, at p 105; and Chartered Institute of Arbitrators, International Arbitration Practice Guideline on Jurisdictional Challenges (29 November 2016), at Preamble 6 and pp 15-16.

?8 *C v D [2021] HKCFI 1474*

?9 *Fiona Trust Corp v. Privalov* [2007] 4 All ER 952

?10 Gary Born, International Commercial Arbitration (3rd ed 2021), at pp 997-1001

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