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Vietnamese Courts' Perspectives on the Jurisdictional Effects of Non-Compliance with a Tiered Clause – Viewed through the Lens of the Hong Kong Appellate Courts' Decisions in *C v D*

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Jan Paulsson once said, “*There is a twilight zone. But only a fool would argue that the existence of the twilight zone is proof that day and night do not exist.*”¹⁾ Here, the term “twilight zone” is used to metaphorically illustrate the distinction between issues of jurisdiction and admissibility. The “twilight zone” in the context of non-compliance with pre-arbitral requirements or preconditions to arbitration has been expressly addressed by various national courts worldwide (see the blog post [here](#)); most notably perhaps by the recent Hong Kong Court of Final Appeal decision (“**HKCFA**”) of *C v D* [2023] HKCFA 16. The Hong Kong Court of Appeal (“**HKCA**”) took its first step into the “twilight zone” last year in *C v D* [2022] HKCA 729, expressly finding compliance with pre-arbitral conditions in a tiered clause to be a matter of admissibility, as opposed to a matter of jurisdiction (see the blog post [here](#)). The HKCA’s decision was reaffirmed by the HKCFA earlier this year.

This article does not centre around *C v D*, but rather aims to discuss the perspective of Vietnamese courts regarding non-compliance with pre-arbitral requirements or preconditions to arbitration. Given that both domestic arbitration laws – the Hong Kong Arbitration Ordinance in Hong Kong (Cap 609) and the 2010 Law on Commercial Arbitration in Vietnam (“**LCA**”) – have their roots in the UNCITRAL Model Law on International Commercial Arbitration (“**Model Law**”), it is pertinent to draw on certain relevant insights from the HKCA and HKCFA’s decisions on *C v D* regarding Article 34(2)(a)(iii) and Article 34(2)(a)(iv) of the Model Law to address the diverse viewpoints of Vietnamese courts in similar matters.

Whether the Non-compliance With Preconditions to Arbitration Makes an Award Liable to Be Set Aside Under Article 34(2)(a)(iii) of the Model Law

In *C v D*, the appellant’s case before the HKCFA predominantly rested on Article 34(2)(a)(iii) of the Model Law. Specifically, the appellant argued that the pre-arbitral requirement operates as a condition precedent under the law of contract such that the respondent’s failure to comply with the precondition negated its consent to the arbitration. Therefore, the underlying arbitral award should be set aside under Article 34(2)(a)(iii) on the basis that the “*the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration.*”

The HKCFA dismissed this argument as “untenable.” The HKCFA held that an objection under Article 34(2)(a)(iii) relates to objections that the arbitral reference or content of the award go beyond what was agreed to be referred to arbitration, negating consent to the tribunal’s authority. However, the appellant’s objection that the claim had been prematurely referred to arbitration was of a different nature. In fact, the disputes in question came within the parties’ contemplation and intended submission to arbitration.

The HKCFA also expressly recognised the admissibility/jurisdiction distinction and adopted a presumption that the failure to meet a precondition should be regarded as a matter of admissibility, unless the parties establish a well-defined clause with clear language expressly stating their intent to seek recourse to a court instead of an arbitral tribunal for determining the fulfilment of the precondition.

While the Vietnamese courts have not expressly ruled on the issue of whether compliance with pre-arbitral conditions in a tiered clause is a matter of jurisdiction or admissibility, some recent decisions suggest that the Vietnamese courts appear to lean towards the view that the question of compliance with preconditions is a matter falling within the terms of submission to arbitration that should be decided by the arbitral tribunal, *i.e.*, a matter of admissibility and not jurisdiction.

A precondition is not considered as a condition precedent to arbitration

[Decision No. 04/2022/QD-PQTT](#) dated 21 March 2022 (“**Decision No. 04**”) by the Hanoi People’s Court suggests that under Vietnamese law, a precondition to arbitration does not operate as a condition precedent to a party’s agreement to arbitrate. The dispute in Decision No. 04 arose from a design construction contract, which included a tiered clause stating that the parties must first attempt to resolve any disputes through mediation. If they fail to reach a settlement within 15 days, either party can then initiate arbitration. The respondent filed a request with the court to set aside the award, arguing, *inter alia*, that the condition precedent to arbitration was not met, thereby depriving the tribunal of the jurisdiction to handle the case. However, the court rejected the respondent’s argument, stating that mediation cannot be a condition precedent to arbitration, as stipulated in Article 5 of the LCA. The court further clarified that parties were encouraged to mediate alongside arbitral proceedings but were not obligated to go through mediation in order to initiate arbitration. Article 5 of the LCA provides for the requirement for a dispute to be resolved through arbitration, contingent on the presence of an arbitration agreement between the parties. The reference to Article 5 in this decision suggests that the Hanoi People’s Court believes that a pre-arbitral requirement does *not* operate as a condition precedent to parties’ agreement to arbitrate.

Implied perspective towards a matter of admissibility, not jurisdiction

The LCA does not expressly state whether compliance with pre-arbitral conditions in tiered clauses is a matter of “admissibility” or “jurisdiction.” There are also no publicly accessible Vietnamese cases addressing this issue. Nevertheless, [Decision No. 795/2017/QD-PQTT](#) dated 27 June 2017 (“**Decision No. 795**”) from the Ho Chi Minh City (“**HCMC**”) People’s Court appears to treat preconditions which mandate settlement through negotiation and mediation prior to arbitration as a matter of “admissibility.” The court considered the respondent’s challenges regarding the

compliance with such preconditions to concern the merits of the disputes. The HCMC People's Court therefore held that these were matters to be determined by the arbitral tribunal, and that it did not have the power to re-examine substantive matters already resolved by the arbitral tribunal under Article 71.4 of the LCA.²⁾

Although the “twilight zone” issue has yet to be expressly addressed by Vietnamese courts, Decision No. 04 and Decision No. 795 suggest that the Vietnamese courts are in alignment with the view expressed by the HKCFA in *C v D* that the question of whether a precondition to arbitration is fulfilled is a matter of admissibility rather than jurisdiction, and that it is for the tribunal to rule on the substantive matter of whether a pre-condition has been complied with in a particular case.

Whether the Non-compliance With Preconditions to Arbitration Makes an Award Liable to Be Set Aside Under Article 34(2)(a)(iv) of the Model Law

In the case of *C v D*, the appellant initially sought to invoke Article 34(2)(a)(iv) of the Model Law before the HKCA to set aside the arbitral award on the basis that preconditions to arbitration are covered in the spectrum of “*arbitral procedures*,” and the non-compliance with such preconditions meant that “*the arbitral procedure was not in accordance with the agreement of the parties.*” The appellant was unsuccessful and did not seek to raise this ground again before the HKCFA.

Despite recognising that the term “arbitral procedures” could potentially encompass pre-arbitral requirements, the HKCA in *C v D* held that the parties in this case clearly intended to resolve the question of compliance with the precondition to arbitration via arbitration itself. As a result, the HKCA ruled that the failure to meet the precondition cannot be deemed a sufficient reason to completely bar arbitration. Although this ground was not raised again before the HKCFA, the HKCFA's finding that a true construction of the arbitration agreement indicates that the parties intended for the question of compliance with the precondition to arbitration to be dealt with exclusively and finally by the tribunal³⁾ suggests that it would likely have decided the same way had this question been raised before it.

The Hanoi People's Court considered a similar question in [Decision No. 10/2014/QD-PQTT](#) dated 28 October 2014 (“**Decision No. 10**”). However, contrary to the HKCA's ruling in *C v D*, the Hanoi People's Court held that commencing arbitration without adhering to the pre-arbitral requirements constitutes a substantial breach of arbitral procedures and annulled the arbitral award.

In this case, the disputed contract included a tiered clause stating that when a dispute arises, parties should first attempt negotiation before initiating arbitration. The court determined that the dispute could only be submitted to binding arbitration if the parties first attempted negotiation but failed to achieve an amicable resolution. The Hanoi People's Court also found that pre-arbitral requirements fall within the scope of “arbitration procedures” specified in Article 68.2(b) of the LCA,⁴⁾ and that a failure to fulfil pre-arbitral requirements constitutes a violation of arbitral procedures, thereby rendering the arbitral award liable to be set aside.

Here, there appears to be a divergence in views between the HKCA in *C v D* and the Hanoi People's Court in Decision 10. The latter Court persisted in setting aside the arbitral award without

acknowledging the arbitral tribunal's authority to decide on the issue of compliance with preconditions. Simply put, the Hanoi People's Court's stance is straightforward: the arbitral procedures cover the preconditions, and failure to comply with the preconditions constitutes a breach of the parties' agreement, making the arbitral award liable to be set aside under Article 34(2)(a)(iv) of the Model Law. Unlike the HKCFA, the Hanoi People's Court's conclusion was simply based on the inherent breach of the tiered clause, without delving into whether the parties had expressed an intention for the question of compliance with the precondition to arbitration to be resolved by arbitration.

Conclusion

Decision No. 10 admittedly appears to be somewhat at odds with Decision No. 04 and Decision No. 795. Because Vietnam's legal system operates as a statutory law system, *i.e.*, primarily relying on written laws enacted by legislature and with limited recognition of court precedents as a source of law, different courts and judges in Vietnam often present diverging perspectives on similar or identical legal issues.

Given the inconsistencies that exist among the various Vietnamese courts' rulings discussed above, parties in dispute should always err on the side of caution and ensure compliance with pre-arbitral requirements in a tiered dispute resolution clause. Additionally, contracting parties should also take special care when drafting arbitration clauses. If parties do not intend for the escalation steps to act as mandatory pre-conditions to arbitration, they should make clear their mutual intention to refer a dispute to arbitration without going through the escalation procedure. This may help avoid challenges in the courts on grounds similar to those presented in Decision No. 10.

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References

- ?1 Jan Paulsson, “Jurisdiction and Admissibility,” *Global Reflections on International Law, Commerce and Dispute Resolution*, ICC Publishing, Publication 693, November 2005, at 603.
- Article 71.4 of the LCA makes reference to the *res judicata* doctrine, specifically stipulating that “when considering a “setting-aside” application, the (Judge) Panel shall refer to Article 68 of this
- ?2 *Law (the LCA) and the supporting documents to examine, and decide upon the application; and shall not re-examine the substance of the dispute that the Arbitral Tribunal has resolved [..].*” (emphasis added)
- ?3 *C v D* [2023] HKCFA 16 At [66].
- Article 68.2(b) of the LCA mirrors Article 34(2)(a)(iv) of the Model Law and pertains to situations
- ?4 where the composition of the arbitral tribunal or the arbitral procedure deviates from the parties’ agreement or is inconsistent with the law.

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