CLIENT BRIEFING

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# DISTINCTION BETWEEN A CHALLENGE TO THE ADMISSIBILITY OF A CLAIM IN ARBITRATION AND A CHALLENGE TO JURISDICTION CONFIRMED IN C V D

Nowadays, it is common for contractual parties to adopt arbitration as a way to resolve any dispute arising out of their contracts. It is indeed not uncommon for the parties to also agree that certain steps be taken in an attempt to resolve their dispute before it is referred to arbitration, for example, negotiation involving the parties' respective senior management, conciliation and mediation. In the unfortunate event of a dispute, questions often arise as to whether those pre-arbitration steps are obligatory and when is the right timing to commence formal arbitration.

The case of C v D[1] raised an issue of general significance as to whether an arbitral tribunal has the power to determine whether certain pre-arbitration steps have been fulfilled and should it so determine, whether the determination would be subject to recourse to a Hong Kong court under Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (the **UNCITRAL Model Law**)[2], which sets out the only grounds upon which the court may be asked to set aside an arbitral award.

This client briefing discusses the Court of Appeal's recent decision in C v D and the implications for arbitration users.

## Background

C (a Hong Kong company) and D (a Thai company) are both satellite operators. They entered into an agreement (the **Agreement**) for the development, building and deployment of a satellite at a certain orbital slot. A dispute subsequently arose between the parties relating to the video content of the broadcast from the transponders belonging to D. The parties had discussed with a view to finding an amicable solution but in vain. This was followed by the exchange of correspondence between their respective legal representatives. Eventually, C ceased the video transmission of the transponders concerned, which D considered constituted a repudiatory breach of and a material default under the Agreement.

The Agreement contained a dispute resolution clause and an arbitration clause. The dispute resolution clause provided that: "*The Parties agree that if any controversy, dispute or claim arises between the Parties out of or in relation to this Agreement, or the breach, interpretation or validity thereof, the Parties shall attempt in good faith promptly to resolve such dispute by negotiation. Either Party may, by written notice to the other, have such dispute referred to the Chief Executive Officers of the Parties for resolution. The Chief Executive Officers (or their authorised representatives) shall meet at a mutually acceptable time and place within ten (10) Business Days of the date of such request in writing, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute through negotiation.*" (the **Dispute Resolution Clause**)

The arbitration clause provided that if the dispute could not be resolved amicably within 60 business days counting from the date of "*a Party's request in writing for such negotiation (or such other time period as may be agreed)*", the dispute shall be referred to arbitration in Hong Kong at the Hong Kong International Arbitration Centre in accordance with the UNCITRAL Arbitration Rules. The parties also agreed that any award made by the arbitral tribunal shall be final and binding on each of them and to the extent permissible under the relevant laws, any right of appeal against the award be waived (the **Arbitration Clause**).

In this regard, D's CEO had written to C's Chairman expressing D's willingness to refer the dispute to the parties' respective senior management teams in accordance with the Dispute Resolution Clause. However it was also made clear that unless the dispute could be

[1] [2022] HKCA 729

[2] UNCITRAL Model Law has the force of law in Hong Kong subject to certain modifications expressly provided for under the Arbitration Ordinance (Cap 609) (the **Arbitration Ordinance**). Article 34 is adopted in section 81 of the Arbitration Ordinance.

resolved swiftly and amicably, D would take all relevant steps to safeguard its rights.

There does not seem to have been any direct response from C's Chairman. Neither party referred the dispute to their respective CEOs with a view to resolving the dispute through negotiation. D eventually commenced arbitration. C, however, argued that the arbitral tribunal did not have the jurisdiction to hear the dispute as there had not been a request for negotiation which, it said, was a condition precedent to arbitration.

Notwithstanding C's objection, the arbitral tribunal decided that it had jurisdiction to determine whether it was premature to commence arbitration. More specifically, it was decided that whilst the parties were mandatorily required to attempt in good faith to resolve any dispute by negotiation, the reference to the respective CEOs was only optional. Further, the condition for arbitration referred to a written request for good faith negotiation and the condition was fulfilled by the letter from D's CEO.

The arbitral tribunal decided against C and found that it had breached the Agreement (the **Partial Award**).

C applied to the court to set aside the Partial Award under section 81 of the Arbitration Ordinance (i.e. Article 34, the UNCITRAL Model Law) on the principal ground that the Partial Award dealt with "a dispute not contemplated by or not falling within the terms of the submission to arbitration". Under Article 34 of the UNCITRAL Model Law, recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with Article 34(2). Article 34(2)(a)(iii), which is the paragraph concerned in this case provides that an arbitral award may be set aside by the court only if the party making the application furnishes proof that the award deals with a dispute not contemplated by or not falling with in the terms of the submission to arbitration.

## Court of First Instance decision

The matter came before G Lam J (as he then was) (the **Judge**). The Judge dealt with two questions, the first one being whether the question whether D complied with the pre-arbitration procedure set out in the Dispute Resolution Clause was a question of admissibility of the claim or a question of jurisdiction. Only a question of jurisdiction falls under Article 34(2)(a)(iii). If the first question is answered in C's favour, the Judge would need to answer the second question, i.e. what the condition precedent to the arbitration was on proper construction of the Agreement and whether the condition was fulfilled.

On the first question, the Judge decided that C's objection went to the admissibility of the claim, rather than the jurisdiction of the arbitral tribunal. In particular, the Judge took the view that whilst the distinction between admissibility and jurisdiction is not expressed in the Arbitration Ordinance, it is well recognised both in court decisions of other jurisdictions and in various academic writings. The distinction therefore may be properly relied upon to inform the construction and application of Article 34(2)(a)(iii). Since the court held in favour of D on the first question, it was unnecessary to determine the second question.

## Court of Appeal decision

C appealed against the Judge's decision, seeking to challenge the Judge's conclusion that its objection to the Partial Award did not fall within Article 34(2)(a)(iii). The Judge, C said, erred in holding that it had failed to show that the Partial Award dealt with a dispute not falling within the terms of the submission to arbitration.

### *Distinction between "admissibility" and "jurisdiction" adopted*

C's case was that the distinction between admissibility and jurisdiction ought not to be adopted. The court should only be concerned with the question of whether the Partial Award dealt with a dispute "not contemplated by or not falling within the terms of the submission to arbitration". In any case, C argued that its objection was jurisdictional in nature.

The Court of Appeal decided that for the purpose of determining whether C's challenge falls under Article 34(2)(a)(iii), the distinction between admissibility and jurisdiction is well-recognised. In so deciding, the Court of Appeal considered case law in other jurisdictions (including the UK, Singapore, New South Wales and the United States) and relevant academic writings which support this approach. Being a concept rooted in the nature of the arbitration itself, the distinction, though not expressly written into the Arbitration Ordinance, could be given proper recognition through the route of 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" and that an award in respect of such a dispute is not reviewable under Article 34(2)(a)(iii).

### *Parties' intention concerning the fulfilment of the condition precedent to arbitration*

As to whether the tribunal's decision on whether the condition precedent to arbitration had been fulfilled was jurisdictional in nature, the Court of Appeal considered that the true and proper question to ask was whether the parties intended or agreed that the question of fulfilment of the condition precedent be determined by the tribunal. The answer depended on the parties' intention or agreement, to be ascertained as a matter of true construction of their agreement.

The Court of Appeal agreed with the Judge on the parties' intention. The parties' commitment to arbitrate was not doubted. C's objection was simply that the tribunal should reject the reference to arbitration as premature as the pre-arbitration procedures had not been followed through. The Agreement did not contain any provision which indicated the parties' intention that the compliance with the Dispute Resolution Clause and the Arbitration Clause be a matter of jurisdiction. On this basis, the Court of Appeal considered it to be clear that C's objection went to the admissibility of the claim.

The Court of Appeal went on to consider whether the dispute on the question of fulfilment of the pre-arbitration procedure requirements was in fact a dispute falling within the terms of the submissions to arbitration under Art 34(2)(a)(iii).

Both the Dispute Resolution Clause and the Arbitration Clause referred to "any" dispute. The Court of Appeal did not see any reason to confine the scope of arbitrable disputes to substantive disputes in relation to the Agreement, and exclude disputes on whether the pre-arbitration procedural requirement had been fulfilled. The court construed the relevant provisions in the Agreement with the presumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their relationship into which they have entered to be decided by the same tribunal. Such presumption, however, is rebuttable by clear language that certain questions were to be excluded from the arbitrator's jurisdiction.

Indeed, the Court of Appeal took the view that the question of fulfilment of pre-arbitration procedural requirement was a question intrinsically suitable for determination by an arbitral tribunal, in order to give effect to the parties' presumed intention to achieve a quick, efficient and private adjudication of their dispute by arbitrators of their choice.

### *Scope of Article 34(2)(a)(iv)*

C also tried to argue that its objection fell within Article 34(2)(a)(iv) of the UNCITRAL Model Law, which provides that an arbitral award may be set aside by the court if it is proved that the arbitral procedure was not in accordance with the agreement of the parties. This ground of appeal was premised upon the contention advanced under the first ground discussed above, namely that the parties intended the non-fulfilment of the condition precedent to arbitrate to bar a party from initiating an arbitration. Since the condition precedent had not been fulfilled, the arbitration was not commenced in accordance with the parties' agreement.

This ground of appeal was rejected by the Court of Appeal. Since the Court of Appeal had concluded that the parties intended the question of fulfilment of the pre-arbitration procedural requirement to be determined by arbitration, it followed that the parties did not intend that non-satisfaction of such requirement would bar arbitration altogether.

It is interesting to note that the Judge decided that Article 34(2)(a)(iv) did not apply to C's case because that provision concerns the way in which the arbitration was conducted, but not contractual procedures preceding the arbitration. The Court of Appeal, however, did not address the issue concerning the scope of Article 34(2)(a)(iv).

### Takeaways

The decision in C v D provides welcome clarity in that, if a contract contains a multi-tiered dispute resolution clause, in the absence of clear and unequivocal language otherwise, a determination by an arbitral tribunal that such a clause has been complied with will not be reviewable by the court in Hong Kong (being the seat court).

Apart from the question of fulfilment of pre-arbitration procedure requirements, questions of time-bar and as to whether a prior decision has any *res judicata* effect would generally be considered as matters going to admissibility, rather than jurisdiction.

Having said that, if the parties intend certain matters to be excluded from the tribunal's jurisdiction, they are expected to include clear wording in their agreements so as to rebut the presumption that they intend to refer any disputes arising out of the agreements to arbitration.

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