



Hong-Kong

Pre-condition to arbitration – landmark decision by the Hong Kong Court of Appeal

The Hong Kong Court of Appeal ruled in a landmark decision (C v D [2022] HKCA 729) that any dispute regarding pre-conditions to arbitration should generally be resolved by the arbitral tribunal, rather than the courts.

This case involves an appeal brought by a party before the Hong Kong Court of Appeal against a judgment rendered by a lower court refusing to set aside an arbitration award on jurisdictional grounds under section 81 of the Arbitration Ordinance (Cap 609) - which adopts Article 34 of the UNCITRAL Model Law. The Appellant argued that reversal was warranted as the arbitration was commenced by the Claimant to the arbitration proceedings prematurely, i.e., without complying with the pre-arbitral steps required under the arbitration agreement, which, according to the Appellant, deprives the arbitral tribunal of jurisdiction.

The Court of Appeal dismissed the appeal and held, *inter alia*, that, as is the position in many Model Law jurisdictions, there is a well-recognised distinction, one that is “rooted in the nature of arbitration itself”, between the admissibility of a claim and the jurisdiction of the arbitral tribunal. Whilst jurisdiction refers to “the power of the tribunal to hear a case”, admissibility refers to “whether it is appropriate for the tribunal to hear” a claim. Compliance with pre-arbitration conditions is an issue pertaining to admissibility rather than jurisdiction and as such, cannot be reviewed under Article 34(2)(a)(iii) of the UNCITRAL Model Law.

Notably, the Court of Appeal referred to and applied the well-established principle of one-stop shop which derives from *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 952. According to the latter decision, absent clear language to the contrary, it is presumed that the parties, “as rational businessmen”, have intended any dispute arising out of an underlying agreement to be decided by the same arbitral tribunal. The Court held that, notwithstanding the distinction between admissibility and jurisdiction, it sees no reason justifying that an arbitral tribunal be granted jurisdiction over substantive disputes under the underlying agreement and denied jurisdiction over disputes relating to (non)compliance with pre-arbitral steps.

The decision by the Hong Kong Court of Appeal is a welcoming one. The conclusion according to which compliance with pre-arbitral steps is an issue that needs to be decided by the arbitral tribunal rather than the courts is in line with the general approach in arbitration to minimise courts’ interference with arbitral proceedings. Such approach is also consistent with

the international position adopted by other Model Law jurisdictions, and reinforces Hong Kong's status as a major arbitration centre both internationally and in the Asia-pacific region.

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