C v. D [2022] HKCA 729; CACV 387/2021 (7 June 2022)

CACV 387/2021

[2022] HKCA 729

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 387 OF 2021

(ON APPEAL FROM HCCT NO 24 OF 2020)

IN THE MATTER of an Arbitration

and

IN THE MATTER of Section 81 of the Arbitration Ordinance (Cap 609) regarding a Partial Award on Jurisdiction and Liability dated 21 April 2020

BETWEEN

C	Plaintiff
and	
D	Defendant

Before: Hon Cheung, Yuen and Chow JJA in Court

Date of Hearing: 26 April 2022

Date of Judgment: 7 June 2022

J U D G M E N T

Chow JA (giving the judgment of the Court):

INTRODUCTION

1. The principal issue which arises for determination in this appeal is whether an arbitral tribunal's determination that a pre-arbitration procedural requirement in an arbitration agreement that the parties thereto should first attempt to resolve their dispute by negotiation has been fulfilled is subject to recourse to the court under Article 34(2)(a)(iii) or (iv) of the UNCITRAL Model Law.

BASIC FACTS

2. In what follows, unless the context indicates otherwise, references to:

(1) "Section" and "s" shall be to the Arbitration Ordinance, Cap 609 ("the Ordinance");

(2) "Art" shall be to the UNCITRAL Model Law ("the Model Law");

(3) "Clause" shall be to the Co-operation Agreement of the parties dated 15 December 2011 ("the Agreement").

3. The relevant background facts of this case have been set out in the judgment of G Lam J (as he then was) dated 24 May 2021 ("the Judgment"), from which the present appeal is brought. For the purpose of disposing of this appeal, the following brief summary, taken largely from the Judgment, should suffice.

4. The Plaintiff ("C") is a Hong Kong company, and carries on business as an owner and operator of satellites. The Defendant ("D") is a Thai company that carries on business as a satellite operator in the Asia Pacific region.

5. The government authorities of the PRC and Thailand each holds certain frequency priority rights to an orbital slot at 120^{o} East Longitude in the geostationary arc ("the Orbital Slot").

6. C and D wished to operate, or secure the right to operate, a satellite using the frequencies held by the government authorities of the PRC and Thailand respectively at the Orbital Slot, and entered into the Agreement for the development, building and deployment of a satellite ("Satellite A") at the Orbital Slot.

7. Under the Agreement, C is to take the lead and fully manage the procurement of Satellite A, including its design, construction and launch. Satellite A has 28 transponders, ie the equipment used to transmit broadcasts to, and receive broadcasts from, Earth. Half of the transponders belong to C, and the other half belong to D (referred to as "the Thai Payload"). Each party has the exclusive rights to utilize its own transponders. Clause 4.7 provides that C is to control only its portion of the payload on Satellite A, except that in an emergency and solely for the safety of the satellite, C may exercise control over the whole of Satellite A. The Agreement is to continue in force for the operating life of Satellite A unless terminated earlier.

8. Satellite A was launched in September 2014. In 2016, a dispute arose between the parties relating to the video content of the broadcast from the Thai Payload. To broadcast video content into the PRC, approval of the State Administration of Press, Publication, Radio, Film and Television ("SARFT") of the PRC was required. In the course of its satellite monitoring, SARFT noticed that certain video signals from the Thai Payload of Satellite A were reaching

the PRC. On 1 April 2016, SARFT issued a notice requiring C to take steps to ensure that all foreign television business on the Thai Payload was shut down. C forwarded the notice to D requesting it to cease its video broadcasting pursuant to Clause 6.3(b). That clause states as follows -

> "In the event [C] notifies [D] of a request from the relevant PRC Governmental Authority to cease the transmission of specific broadcast content on the [Thai Payload], then [D] shall forthwith cease transmission of such specific broadcast content or service."

9. D considered that it was not obliged to comply with C's request because it was not a request to cease transmission of *specific* broadcast content within the meaning of Clause 6.3(b). The subsequent arbitration of this dispute resulted in an award in favour of D dated 11 October 2017.

10. Following this award, in late 2017, D indicated its intention to resume television broadcasts from Satellite A, while C contended that any such broadcast would be subject to termination pursuant to a notice from SARFT that was specific enough under Clause 6.3(b). Discussion ensued between C and D with a view to finding an amicable solution, but no compromise was reached.

11. By a letter dated 1 November 2018, C's solicitors (Baker & McKenzie, "B&M") formally demanded D to remove certain video content, believed to be a "test carrier", at one of its transponders on Satellite A. The demand was rejected by D's solicitors (Herbert Smith Freehills, "HSF") by a letter dated 8 November 2018. In response to C's inquiry, on 27 November 2018, the National Television and Radio Administration of the PRC (which had taken over SARFT's functions) required C to cease transmission of television programmes from the Thai Payload in accordance with SARFT's notice of 1 April 2016. On 4 December 2018, D uplinked further video content at another transponder in the Thai Payload.

12. By B&M's letter dated 6 December 2018, C gave notice to D that if it did not cease the video transmission complained of by 3 pm HK time on that day, C would cease the video transmission of the said transponders immediately without further notice. On the same day, at 3:33 pm HK time, C issued commands to Satellite A switching off the two transponders concerned. D considered that C's action constituted a repudiatory breach of the Agreement and a material default under Clause 8.2 thereof[1].

13. At this juncture, it is relevant to refer to the dispute resolution provision contained in the Agreement. Section 14 of the Agreement (sub-titled "Governing Law and Dispute Resolution") states as follows:

> "[14.1] Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of Hong Kong, without regard to the principles of conflicts of law of any jurisdiction.
>
> [14.2] Dispute Resolution. 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 authorized 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.
>
> [14.3] Arbitration. If any dispute cannot be resolved amicably within sixty (60) Business days of the date of a Party's request in writing for such negotiation, or such other time period as may be agreed, then such dispute shall be referred by

> either Party for settlement exclusively and finally by arbitration in Hong Kong at the Hong Kong International Arbitration Centre … in accordance with the UNCITRAL Arbitration Rules in force at the time of commencement of the arbitration …
>
> (e) Any award made by the arbitration tribunal shall be final and binding on each of the Parties that were parties to the dispute. To the extent permissible under the relevant laws, the Parties agree to waive any right of appeal against the arbitration award."

14. On 24 December 2018, the Chief Executive Officer of D issued a letter ("the December Letter") to the Chairman of C, copied to other directors of C. The Chief Executive Officer of C also received a copy of the December Letter from its Chairman. So far as material, the December Letter reads as follows:

> "Dear Chairman of the Board of Directors
>
> Re: Cooperation Agreement between [C] and [D]
>
> We write with regard to the recent serious breach of the Cooperation Agreement by [C], which now requires your urgent attention.
>
> Our legal representatives have written separately to your lawyers on this issue, but have not received a satisfactory response. Given the longstanding cooperation between our two companies, [D] is raising its concerns directly with [C's] board in a final effort to resolve this issue and avoid further legal proceedings.
>
> …
>
> Breach of the Cooperation Agreement
>
> … [D] has therefore received legal advice that [C]'s actions constitute a repudiatory breach of contract under Hong Kong law, and a material default under Section 8.2 of the Cooperation Agreement.
>
> Proposed Solution
>
> [D], through its lawyers, has already served a notice of material default under the Cooperation Agreement. It is therefore clear from the correspondence that a relevant dispute now exists for the purpose of Section 14 of the Cooperation Agreement.
>
> In accordance with the contract, [D] now invites [C's] Board to reconsider its position and avoid further legal proceedings by taking all necessary steps to reinstate the relevant transponders and desist from any further interference with [D]'s portion of the payload.
>
> [D] is willing to refer the dispute to the parties' respective senior management teams in accordance with Section 14.2 of the Cooperation Agreement if necessary. Unless the dispute can be resolved swiftly and amicably, however, [D] will take all relevant steps to safeguard its rights.
>
> [D] reserves all of its legal rights accordingly."

15. In response, B&M wrote to HSF on 7 January 2019, as follows:

> "…
>
> Whilst reserving all of [C]'s rights in this regard, we would observe that the procedure laid out at sections 8.2 and 14 of the Cooperation Agreement, and the

potential engagement of the respective Chief Executive Officers does not concern [C]'s Directors.

[D]'s direct communication with [C]'s Directors in all circumstances is neither appropriate nor productive.

We request that all further correspondence on this matter be directed to us or if pursuant to Clause 14.2 of the Agreement be addressed to the Chief Executive Officer of our client, copying us."

16. There was no further correspondence from D. Neither party referred the dispute to the respective Chief Executive Officers with a view to resolving the dispute through negotiation.

17. On 18 April 2019, D issued a notice referring the dispute to arbitration under Clause 14.3. In response, C claimed, among other things, that the arbitral tribunal did not have jurisdiction to entertain the dispute due to the absence of a request for negotiation under Clauses 14.2 and 14.3.

18. An arbitral tribunal of three arbitrators ("the Tribunal") was formed. They decided to deal with C's objection on jurisdiction and the issue of liability together, leaving the issue of quantum to be addressed, if necessary, at a later stage. After a hearing which took place in Hong Kong on 2 and 3 January 2020, the Tribunal issued an award ("the Partial Award") on 21 April 2020, finding in favour of D:

(1) In relation to the issue of jurisdiction, the Tribunal held that the first sentence in Clause 14.2 mandatorily required the parties to attempt in good faith to resolve any dispute by negotiation, but the reference of dispute to the respective Chief Executive Officers mentioned in the second sentence of Clause 14.2 was optional.

(2) The Tribunal further held that the condition in Clause 14.3, ie the dispute could not be resolved within 60 business days of a party's request in writing for such negotiation, referred to a request for negotiation under the first sentence of Clause 14.2, and that condition had been fulfilled by D by the December Letter.

(3) The Tribunal accordingly rejected C's objection on jurisdiction, and proceeded to find that C had breached Clause 4.7 and was liable to pay damages to D in an amount to be assessed.

THE JUDGMENT

19. On 21 May 2020, C issued an originating summons seeking a declaration that the Partial Award was made without jurisdiction and not binding on C, and an order that the Partial Award be set aside under s 81, which, so far as material, states as follows:

"**Article 34 of UNCITRAL model Law (Application for setting aside as exclusive recourse against arbitral award)**

(1) Article 34 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(5) -

'*Article 34. Application for setting aside as exclusive recourse against arbitral award*

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

…

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law …'"

20. At the hearing of the originating summons before the Judge on 24 February 2021, it was common ground that the first sentence in Clause 14.3 meant that it was a condition precedent to any reference to arbitration that there should have been a request in writing for negotiation and that the dispute nevertheless could not be resolved amicably within 60 business days. The parties differed, however, on what the condition meant:

(1) C contended that the condition referred to the giving of a written notice to have the dispute referred to the Chief Executive Officers for resolution, as referred to in the second sentence of Clause 14.2, and no such written notice was given.

(2) On the other hand, D contended that the condition was satisfied by a written request to negotiate in good faith, as referred to in the first sentence of Clause 14.2, and that it had made the requisite request by the December Letter.

(3) D further contended that the question of whether the condition precedent had been fulfilled was a question of "admissibility" rather than "jurisdiction", and as such the court should not interfere with the Tribunal's decision on that question.

21. The Judge identified two questions which arose for consideration (§26 of the Judgment):

(1) The primary question: is the question whether D complied with the dispute resolution procedure set out in Clause 14.2 of the Agreement a question of the admissibility of the claim, or a question of the tribunal's jurisdiction, and does that question fall within s 81(1)?

(2) The secondary question (only if the primary question is answered in C's favour): what is the condition precedent to arbitration on the proper construction of the Agreement, and was the condition fulfilled by the December Letter?

22. In respect of the primary question, the Judge held that:

(1) The court may review the Tribunal's decision on the standard of "correctness" and decide the question *de novo* if the question of whether D complied with the dispute resolution procedure set out in Clause 14.2 is a true question of "jurisdiction" properly falling within Art 34 (§28 of the Judgment).

(2) The distinction between "jurisdiction" and "admissibility" is recognized both in court decisions in the United Kingdom, Singapore and United States, as well as in various academic works (§§30-36 and 37-42 of the Judgment).

(3) Although the Ordinance does not in terms draw a distinction between jurisdiction and admissibility, it may properly be relied upon to inform the construction and application of s 81 (§43 of the Judgment).

(4) C's objection in the present case is one going to the admissibility of the claim, rather than the jurisdiction of the arbitral tribunal (§53 of the Judgment).

(5) As such, the objection does not fall under Art 34(2)(a)(iii) (§54 of the Judgment).

(6) Neither is Art 34(2)(a)(iv) applicable to C's objection because that provision concerns the way in which the arbitration was conducted, but not contractual procedures *preceding* the arbitration, or pre-arbitration dispute resolution procedures such as those provided in the Agreement (§§55-57 of the Judgment).

(7) Having reached the conclusion that C's objection does not fall within either Art 34(2)(a)(iii) or (iv), it becomes unnecessary to deal with the secondary question (§58 of the Judgment).

THE PRESENT APPEAL

23. On 8 August 2021, the Judge granted C leave to appeal the Judgment, on the basis that multi-tiered dispute resolution clauses are not uncommon, and the question of the proper approach to an application to set aside an arbitral award on the ground that certain prior requisite steps envisaged by such a clause have not been undertaken and that the arbitral tribunal consequently lacks jurisdiction is a subject matter of some general significance to arbitration law in Hong Kong.

24. On 13 August 2021, C filed a Notice of Appeal pursuant to the leave granted by the Judge. The Notice of Appeal contains three grounds. The first two grounds challenge the Judge's conclusion that C's objection to the Partial Award does not fall within Art 34(2)(a)(iii) or (iv):

(1) Under Ground 1, C contends that the Judge 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" under Art 34(2)(a)(iii).

(2) Under Ground 2, C contends that the Judge erred in holding that Art 34(2)(a)(iv) was apt to refer to the way in which the arbitration was conducted but not to the contractual procedures preceding the arbitration.

25. Ground 3 concerns the question which the Judge considered he did not need to deal with (ie the construction of Clauses 14.2 and 14.3, and whether the relevant condition precedent was fulfilled).

GROUND 1: WHETHER PARTIAL AWARD DEALT WITH A DISPUTE NOT FALLING WITHIN THE TERMS OF THE SUBMISSION TO ARBITRATION UNDER ART 34(2)(a)(iii)?

(i) C's argument

26. Mr Benjamin Yu, SC (on behalf of C) argues that the Judge erred in 2 respects:

(1) Assuming that there exists a distinction between questions of "admissibility" and "jurisdiction" and that only the latter falls within Art 34(2)(a)(iii), C's challenge is jurisdictional in nature[2].

(2) The distinction between "admissibility" and "jurisdiction" ought not to be adopted since it is not found in Art 34(2)(a)(iii) or (iv), and the question should simply be whether the Partial Award dealt with a dispute "not contemplated by or not falling within the terms of the submission to arbitration" (as Art 34(2)(a)(iii) states), and whether "the arbitral procedure was not in accordance with the agreement of the parties" (as Art 34(2)(a)(iv) states)[3].

27. Pausing here, it is clear from the Notice of Appeal that Ground 1 is concerned only with Art 34(2)(a)(iii), while Art 34(2)(a)(iv) is dealt with under Ground 2. Accordingly, Mr Yu's argument

in respect of Art 34(2)(a)(iv) will be dealt with in the next section of this judgment relating to Ground 2. In respect of Ground 1, we shall first consider the question of the true construction of Art 34(2)(a)(iii), before dealing with the question of whether C's objection to the arbitration in the present case should properly be characterized as an objection going to the jurisdiction of the tribunal rather than the admissibility of the claim.

(ii) The distinction between "admissibility" and "jurisdiction"

28. For the purpose of determining the permissible scope of challenge to an award made by an arbitral tribunal under Art 34(2)(a)(iii) (or similar provisions), the distinction drawn between objections to admissibility and jurisdiction is well recognised in both case law and academic writings.

Case law

29. UK: s 67(1) of the Arbitration Act 1996 permits a party to arbitral proceedings to challenge an award of an arbitral tribunal as to its "substantive jurisdiction", while s 30(1) of the 1996 Act provides that an arbitral tribunal may rule on its own substantive jurisdiction as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

30. In *Republic of Sierra Leone v SL Mining Ltd* [2021] Bus LR 704, the relevant dispute resolution clause provided that "[t]he parties shall in good faith endeavour to reach an amicable settlement of all differences of opinions or dispute which may arise between them in respect of the execution performance interpretation or termination of the agreement", and that "[i]n the event that the parties shall be unable to reach an amicable settlement within a period of 3 (three) months from a written notice by one party to the other specifying the nature of the dispute and seeking an amicable settlement, either party may submit the matter to the exclusive jurisdiction of a Board of 3 (three) Arbitrators …". An arbitral award was challenged on the ground that the 3-month negotiation period had not yet expired by the time of the request for arbitration, and thus the arbitrators were without jurisdiction. Sir Michael Burton (sitting as a High Court judge) held that there was a distinction between a challenge that a claim was not admissible before arbitrators (admissibility) and a challenge that the arbitrators had no jurisdiction to hear a claim (jurisdiction), and that only the latter was available to a party under s 67, observing that such distinction was seemingly first drawn out judicially by Butcher J in *Obrascon Huarte Lain SA (trading as OHL International) v Qatar Foundation for Education, Science and Community Development* [2020] EWHC 1643 (Comm), *PAO Tatneft v Ukraine* [2018] 1 WLR 5947, and *Republic of Korea v Dayyani* [2020] Bur LR 884. Sir Michael further held that an objection based on an alleged prematurity of a request for arbitration such as that before him was one going to the admissibility of the claim rather than the jurisdiction of the tribunal. At §§16-21 of his judgment, Sir Michael stated as follows:

> "[16] The international authorities are plainly overwhelmingly in support of a case that a challenge such as the present does not go to jurisdiction, but at the end of the day the matter comes down at English law to an issue as to whether the question of prematurity falls within section 30(1)(c) of the 1996 Act. I do not accept Mr Lightfoot's case that much depends upon the precise wording of the clause. I do not see that there would be any difference between 'No arbitration shall be brought unless X' and 'In the event of X the parties may arbitrate'. As Mr Lightfoot himself submitted, sections 30(1)(a) and (b) give a binary choice, and on the face of it (c) does not. The subsection could have said 'whether [or not] the matters have been submitted to arbitration', which might have given more support for his argument.
>
> [18] I consider that, to accord with the views of Paulsson, as approved in the Singapore Court of Appeal (at para 77 of *BBA v BAZ* [2020] 2 SLR 453), if the issue relates to whether a claim could not be brought to arbitration, the issue is ordinarily one of jurisdiction and subject to further recourse under section 67 of the 1996 Act, whereas if it relates to whether a claim should not be heard by the arbitrators at all, or at least not yet, the issue is ordinarily one of admissibility, the

tribunal decision is final and section 30(1)(c) does not apply. The short passage in the Singapore Court of Appeal set out in para 15(ii) above is useful: 'Jurisdiction [and so susceptibility to a section 67 challenge] is commonly defined to refer to 'the power of the tribunal to hear a case', whereas admissibility refers to 'whether it is appropriate for the tribunal to hear it'.' The issue for (c) is, in my judgment, whether an issue is arbitrable. The issue here is not whether the claim is arbitrable, or whether there is another forum rather than arbitration in which it should be decided, but whether it has been presented too early. That is best decided by the arbitrators.

[19] Such a conclusion accords with the guidance given by the Chartered Institute of Arbitrators in its *International Arbitration Practice Guideline: Jurisdictional Challenges*, last revised in November 2016, and still in force, as setting out 'the current best practice in international commercial arbitration for handling jurisdictional challenges'. It reads as follows, in material part, at p 3:

> '6. When considering challenges, arbitrators should take care to distinguish between challenges to the arbitrators' jurisdiction and challenges to the admissibility of claims. For example, a challenge on the basis that a claim, or part of claim, is time-barred or prohibited until some precondition has been fulfilled, is a challenge to the admissibility of that claim at that time, ie whether the arbitrators can hear the claim because it may be defective and/or procedurally inadmissible. It is not a challenge for the arbitrators' jurisdiction to decide the claim itself.'

And at p 15:

> 'After deciding upon the jurisdictional challenges, arbitrators may also be called upon to decide on the admissibility of the claim. This may include a determination as to whether a condition precedent to referring the dispute to arbitration exists and whether such a condition has been satisfied. It also involves challenges that the claim is time-barred.'

[20] The arbitrators are in any event, in my judgment, in the best position to decide questions relating to whether the conditions precedent has been satisfied, consistent with the views of Lord Hoffmann in *Fiona Trust* [2007] Bus LR 1719 referred to in para 8 above.

[21] I consequently agree with the conclusions of the arbitrators (para 110 of the Award) that

> 'if reaching the end of the settlement period is to be viewed as a condition precedent at all, therefore, it could therefore only be a matter of procedure, that is, a question of admissibility of the claim, and not a matter of jurisdiction.'

In any event I am satisfied that sections 30(1)(c) and 67 of the 1996 Act are not engaged in respect of a challenge that the claim was made prematurely to the arbitrators."

31. Mr Yu argues that this decision rested upon a different legislative provision, and thus affords no assistance to the present case. We do not agree with this submission. Similar to s 81 (and Art 34), neither s 30(1) nor s 67 of the 1996 Act draws any distinction between admissibility and jurisdiction. Nevertheless, Sir Michael plainly considered such distinction to be relevant to the consideration of whether a challenge to an award was permissible under the 1996 Act. As observed by the Judge at §44 of the Judgment, the question of "what matters have been submitted to arbitration in accordance with the arbitration agreement" under s 30(1)(c) of the 1996 Act is not substantially different in nature from the question of whether "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration" under Art 34(2)(a)(iii).

32. The distinction between admissibility and jurisdiction was applied more recently by Calver J in *NWA v NVF* [2021] EWHC 2666 (Comm). In that case, the issue was whether the failure of a party to comply with a term of an arbitration agreement that the parties should first seek to mediate a dispute before arbitration resulted in the arbitral tribunal not having jurisdiction to hear the dispute at all such that the award was susceptible to challenge under s 67 of the Arbitration Act 1996. Calver J agreed with the analysis of Sir Michael Burton in *SL Mining Ltd* as well as the approach advocated in various academic commentaries (which were also considered by the Judge in his Judgment), and expressed the view that: "To give an arbitration clause such as this a commercial construction so that pre-arbitration procedural requirements are not jurisdictional is appropriate because, in most cases, if a dispute is not settled in the pre-arbitration procedure, it remains the same dispute, so non-compliance with the pre-arbitration procedure does not affect whether it is a dispute of the kind which the parties agreed to submit to arbitration" (§54). Calver J also pointed out that the outcome of each case depends on the proper construction of the arbitration agreement in question, and stated that "the dispute as to whether the duty to mediate amounts to a condition precedent and if so whether it has been breached, are matters which should be resolved by the arbitral tribunal as relating to the admissibility of the dispute" (§67) such that the court's supervisory jurisdiction over the arbitration in s 67 of the Act was not engaged (§78).

33. Singapore: The Model Law is given the force of law in Singapore by s 3(1) of the International Arbitration Act (Cap 143A). The distinction between admissibility and jurisdiction is well recognised in that jurisdiction, and has been adopted for the purpose of determining whether the Singapore court is entitled to undertake a *de novo* review of an arbitral award in setting aside applications.

34. In *BBA v BAZ* [2020] SGCA 53, one of the grounds raised to support an application to set aside an arbitral award under Art 34(2)(a) was that the claim was time-barred. The Singapore Court of Appeal held that Singapore law (as the *lex arbitri* as well as the law of the seat court) governed the question of whether limitation should be classified as going towards jurisdiction or admissibility (§64), and that issues of time bar which arose from the expiry of statutory limitation periods went towards admissibility, not jurisdiction, and thus were matters for the tribunal and not the court to decide. Consequently, such issues could not be reviewed *de novo* by the seat court in setting aside applications (§73). The court considered that the "tribunal versus claim" test underpinned by a consent-based analysis should apply for the purpose of determining whether an issue went towards jurisdiction or admissibility (§76), and explained that the "tribunal versus claim" test asked whether the objection was targeted at the tribunal (in the sense that the claim should not be arbitrated due to a defect in or omission to consent to arbitration), or at the claim (in that the claim itself was defective and should not be raised at all) (§77). Consent served as the touchstone for whether an objection was jurisdictional because arbitration was a consensual dispute resolution process. Thus, arguments as to the existence, scope and validity of the arbitration agreement were regarded as jurisdictional, as were questions of the claimant's standing to bring a claim or the possibility of binding non-signatory respondents (§78). Conversely, admissibility related to the "nature of the claim, or to particular circumstances connected with it", and asked whether a tribunal might decline to render a decision on the merits for reasons other than a lack of jurisdiction (§79). In the result, the court held that the plea of statutory time bar went towards admissibility as it attacked the claim, although it was recognised that an express provision in the arbitration clause (eg "the tribunal shall have no jurisdiction to hear claims that are time-barred under statute") could turn the objection into a jurisdictional one (§§80-82).

35. The above analysis was adopted and applied in a subsequent decision of the Singapore Court of Appeal in *BTN v BTP* [2020] SGCA 105. In that case, one of the grounds relied upon by a party to an arbitration to set aside an award under Art 34(2) was that the arbitral tribunal prevented that party from arguing an issue on the ground of *res judicata* and thus (it was argued) there was a breach of natural justice, it would be contrary to public policy to enforce the award, and the tribunal had failed to decide matters contemplated by and/or failing within the submission to arbitration. The court rejected the setting aside application, holding that a tribunal's decision on the *res judicata* effect of a prior decision was not a decision on

jurisdiction, but a decision on admissibility (§§68 and 71). At §70, the court accepted that "tribunals' decisions on objections regarding preconditions to arbitration, like time limits, the fulfilment of conditions precedent such as conciliation provisions before arbitration may be pursued, mootness, and ripeness are matters of admissibility, not jurisdiction".

36. New South Wales: The Model Law has been adopted in all the States of Australia, and is applied in New South Wales through the Commercial Arbitration Act 2010. The powers of the court to set aside an arbitral award under s 34(2)(a)(iii) and (iv) of that Act are cast in materially the same terms as Art 34(2)(a)(iii) and (iv). In *The Nuance Group (Australia) Pty Ltd v Shape Australia Pty Ltd* [2021] NSWSC 1498, Rees J adopted the analysis of the Singapore Court of Appeal in *BBA* as regards the distinction between admissibility and jurisdiction, and held that a challenge to a claim referred to arbitration on the basis that it was time barred was not a challenge to jurisdiction (§132).

37. United States: Although the Model Law has been adopted in only a limited number of States in the US, in *BG Group plc v Republic of Argentina* 134 S Ct 1198 (2014), Breyer J (delivering the majority opinion of the Supreme Court) expressed the view that generally courts presume that parties intend that (i) courts, not arbitrators, to decide disputes about "arbitrability" (including questions such as "whether the parties are bound by a given arbitration clause" or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy"), but (ii) arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration (including "prerequisites such as time limits, notice, laches, estoppel and other conditions precedent to an obligation to arbitrate") (at pp 7-8). In that case, the relevant provision was to the effect that arbitration could only be resorted to after a period of 18 months had elapsed from the moment when the dispute was submitted to a competent local tribunal and the tribunal had not given its final decision. It was held that the provision determined *when* the contractual duty to arbitrate arose, not *whether* there was a contractual duty to arbitrate at all, and consequently it was a purely procedural requirement (or procedural condition precedent to arbitration) which was for arbitrators, not courts, primarily to interpret and to apply (at pp 8-9).

38. Hong Kong: The distinction between admissibility and jurisdiction drawn by the Judge in this case has been followed and applied by Mimmie Chan J in *Kinli Civil Engineering Ltd v Geotech Engineering Ltd* [2021] HKCFI 2503, and by Coleman J in *T v B* [2021] HKCFI 3645.

39. The former case concerned an application for a stay of court proceedings in favour of arbitration in relation to a dispute arising out of a building sub-contract, which contained an arbitration clause which provided that "… arbitration shall not be conducted before either the completion of the main contract or the determination of the subcontract". Granting the stay sought, Mimmie Chan J held that "the question of whether a party has complied with the procedure or conditions as to the exercise of the right to arbitrate, as set out in an arbitration agreement, is a question of admissibility of the claim, and the Court has no role to play in relation to such a question, as it does not go to the question of the jurisdiction of the tribunal. It is for the tribunal to decide on admissibility and such decision of the tribunal is final, and not for review by the Court" (§8). Hence, "[t]he question as to when arbitration can be commenced, whether the parties have to wait until the Main Contract has been completed, or the Contract has been determined or terminated by performance or by breach, and whether these events have occurred, is a matter for the tribunal to decide and does not concern the Court at this stage, if it is satisfied that there is a *prima facie* case of the existence of an arbitration agreement" (§33).

40. The latter case concerned, *inter alia*, an application to set aside an arbitral tribunal's decision that the institution of an arbitration by a sub-contractor against the main contractor was premature because the notice of dispute and request for mediation was given prior to the issuance of a completion certificate under the main building contract. The relevant arbitration clause stated as follows:

> "[31.1] Sub-Contract Disputes shall be settled in accordance with the provisions of this Clause 31.
>
> [31.2] For the purpose of this Clause 31, a Sub-Contract Dispute shall be deemed to arise when either Party serves on the other a notice in writing (herein called a 'Notice of Dispute' which in any event shall only be raised after the completion certificate, or where there is more than one certificate, the last completion certificate, issued by the Relevant Persons under the Main Contract) stating the nature of such Sub-Contract Dispute...
>
> [31.5] If … within twenty-eight (28) days of the service of the Notice of Dispute, and, in the case of the circumstances set out in Clauses 31.5(ii) or (iii), within a further twenty-eight (28) days of such refusal [to refer the dispute to certain ADR Procedure] or failure [to resolve the dispute under the ADR Procedure], either Party may refer the Sub-Contract Dispute to arbitration. Provide always that the Notice of Dispute under this Clause 31 shall only be raised after the completion certificate, or where there is more than one certificate, the last completion certificate issued by the Relevant Persons under the Main Contract."

41. Adopting the distinction between admissibility and jurisdiction for determining whether the tribunal's decision was reviewable by the court, Coleman J held that the question of compliance or non-compliance with the pre-arbitration procedures in that case was one going to the admissibility of the claim rather than the jurisdiction of the tribunal, and thus the tribunal's decision was not subject to review by the court (§42). At §23 of his judgment, Coleman J also made it clear that it was open to the parties to an arbitration agreement to agree that pre-arbitral procedural requirements should go to the tribunal's jurisdiction, but such an agreement would require clear and unequivocal language.

Academic writings

42. There is also a substantial body of academic writings which supports the drawing of a distinction between jurisdiction and admissibility for the purpose of determining whether an arbitral tribunal's decision is subject to *de novo* review by a national court, including Mills, *Arbitral Jurisdiction*, in *Oxford Handbook on International Arbitration* (OUP 2018), at pp 6-7; Born, *International Commercial Arbitration* (3rd ed 2021), at pp 997-1001; 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 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. These academic writings have been carefully reviewed by the Judge at §§30-36 of the Judgment, and it is not proposed to repeat the analysis here. Many of the academic writings reviewed by the Judge were also considered by Sir Michael Burton in *SL Mining Ltd*, who pointed out that the views of the leading academic writers, after careful analysis by them, were all one way (§14), and by Calver J in *NWA*, who pointed out that "the approach advocated in these academic commentaries is consistent with, and give effect to, the commercial purpose of arbitration clauses, as explained by Lord Hoffmann in *Fiona Trust* …" (§54).

43. In summary, there is a substantial body of judicial and academic jurisprudence which supports the drawing of a distinction between jurisdiction and admissibility for the purpose of determining whether an arbitral award is subject to *de novo* review by the court under Art 34(2)(a)(iii), and the view that "non-compliance with procedural pre-arbitration conditions such as a requirement to engage in prior negotiations goes to admissibility of the claim rather than the tribunal's jurisdiction" (as stated in §42 of the Judgment).

(iii) The construction of Art 34(2)(a)(iii)

44. Mr Yu argues that the distinction between jurisdiction and admissibility should not be adopted because it is not found in Art 34(2)(a)(iii). Instead, the court should simply ask whether the award deals with a dispute "not contemplated by or not falling within the terms of the submission to arbitration" as stated in that sub-paragraph.

45. We accept, as a matter of principle, that the statutory conditions for the court's exercise of its power to set aside an arbitral award under Art 34(2)(a)(iii) cannot be re-written judicially. The relevant statutory question is whether the award deals with a dispute "not contemplated by or not falling within the terms of the submission to arbitration …". It is clear, from the statutory language used, that the answer to this question depends on the intention (or agreement) of the parties. It does not mean, however, that the distinction between jurisdiction and admissibility is irrelevant when answering the statutory question. As pointed out by the Judge at §43 of the Judgment, the distinction between jurisdiction and admissibility is not one only to be drawn on the specific wording of the written law of a particular country, but is a concept rooted in the nature of arbitration itself, and may properly be relied upon to inform the *construction and application* of s 81 even though the Ordinance does not in terms draw such a distinction.

46. There is, we consider, much to be said for recognising the distinction between admissibility and jurisdiction for the purpose of Art 34(2)(a)(iii). Such an approach would (i) likely give effect to the agreement of the parties who, "as rational businessmen, are likely to have intended any dispute arising out of their relationship … to be decided by the same tribunal" (per Lord Hoffmann in *Fiona Trust Corp v Privalov* [2007] 4 All ER 952, at §13), (ii) be in line with the general trend of minimizing the permissible scope of judicial interference in arbitral procedures and awards, (iii) further the object of the Ordinance as stated in s 3 thereof, ie "to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expenses", and (iv) ensure that Hong Kong does not fall out of line with major international arbitration centres like London or Singapore. In our view, while the distinction between jurisdiction and admissibility cannot be written directly into Art 34(2)(a)(iii), it can be given proper recognition though 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" under Art 34(2)(a)(iii). It is important to emphasise that the distinction between admissibility and jurisdiction is ultimately controlled by the agreement of the parties, because arbitration is consensual and it is the parties' agreement which determines the true scope of the disputes which may be submitted to arbitration.

47. Mr Yu argues that that there is no reason to confine, as the Judge did at §53 of the Judgment, the "terms of the submission to arbitration" to the substantive content or subject matter of the dispute. Such a narrow construction: (i) is inconsistent with one of the objects and purposes of the Ordinance (namely, that the parties should be free to agree on how a dispute should be resolved: s 3(2)); (ii) is inconsistent with the fundamental principle that arbitration is based on the parties' consent; and (iii) would curtail the parties' access to the court guaranteed by Article 35 of the Basic Law. Contrary to the Judge's view at §§48 and 52(5) of the Judgment, the parties' autonomy is plainly curtailed in this case where their agreement that the arbitral process should not be invoked until the procedure in Clause 14.2 has been complied with is not upheld despite the use of clear and unequivocal language in the contract[4].

48. At §53 of the Judgment, the Judge stated as follows:

> "The objection in the present case seems to me to be one going to the admissibility of the claim. There is no dispute about the existence, scope and validity of the arbitration agreement. There is no dispute that [D's] claim, as far as its subject matter is concerned, 'arises out of or in relation to' the Agreement and falls within the scope of the arbitration agreement. The issue is not whether there was 'initial consent' to the submission of the dispute to arbitration and to the tribunal's determination: (*S Co v B Co*, §35). The parties' commitment to arbitrate is not in doubt; they intend the arbitral award to be final and binding. [C's] objection is that the particular reference to arbitration was invalid because the stipulated mechanism of negotiation between the CEOs had not been gone through. The objection is not

> that such a claim should not be arbitrated at all, but that the tribunal should reject the reference as premature. There is no indication in clauses 14.2 or 14.3 of the Agreement that the parties intended compliance with these provisions to be a matter of jurisdiction. It seems unlikely to be the parties' intention that despite a full hearing before and a decision by a tribunal of their choice the same issue should be re-opened in litigation in the courts. In my view the challenge is one of admissibility rather than jurisdiction."

49. It seems to us that the Judge was, at §53 of the Judgment, addressing the question of whether C's challenge to the arbitration in this case went to the admissibility of the claim rather than the jurisdiction of the Tribunal, and not the question of whether the reference to the "terms of the submission to arbitration" in Art 34(2)(a)(iii) should be confined to "the substantive content of subject matter of the dispute" as suggested by Mr Yu. Neither do we read the Judge as saying that Art 34(2)(a)(iii) should be so confined. Further, the Judge's analysis at §53 of the Judgment cannot be faulted.

50. As for the suggested curtailment of the parties' right to access to the court guaranteed by Article 35 of the Basic Law, once it is recognised that the question of whether an award deals with a dispute not contemplated by or not failing within the terms of the submission to arbitration under Art 34(2)(iii) depends ultimately on the parties' own agreement, there can be no question of any unjustified curtailment of the parties' right to access to the court. Had it been necessary to undertake the 4-step proportionality analysis established in *Hysan*, we would have no difficulty in coming to the conclusion that any interference with the right to access to the court by Art 34(2)(iii) is proportional and justifiable, in agreement with the Judge's view at §52 of the Judgment.

51. Mr Yu also argues that the scope of Art 34 can be ascertained by reference to Article V of the New York Convention, since it is recognised to be the source of inspiration for Art 34 and the latter was drafted in a way to ensure a high degree of consistency with the former (*UNCITRAL Model Law on International Arbitration - A Commentary*, Cambridge University Press, at pp 859-860), and it is well established that Article V(1)(c) of the New York Convention (which provides a ground for challenging an award dealing with a difference not "falling within the terms of the submission to arbitration") encompasses challenges other than the substantive content of the dispute falling outside the arbitration agreement (Dr Reinmar Wolff, *New York Convention - Article-by-Article Commentary* (2nd ed 2019), at §§234-254). This argument is based on the same misreading or misunderstanding of §53 of the Judgment mentioned above.

(iv) The condition precedent argument

52. Mr Yu argues that, assuming there exists a distinction between questions of "admissibility" and "jurisdiction" and that only the latter falls within Art 34(2)(a)(iii), C's objection is "jurisdictional" in nature[5]:

> (1) The characterization of a particular objection as one of "admissibility" or "jurisdiction" depends on the parties' intention and the proper construction of the arbitration agreement in question. There are two different situations. The first is where the parties intend that no obligation to arbitrate should arise unless the condition precedent has been satisfied. The second is where the parties intend the stipulation to be in the nature of procedural regulation of the arbitral process itself or a substantive limitation on the parties' ability to assert claims in the arbitration which the parties intended for the final decision to be made by the tribunal. The former would be a jurisdictional objection, whilst the latter would be one of admissibility.
>
> (2) Under Hong Kong law (being the Governing law of the arbitration agreement), where a contractual obligation is subject to a condition precedent, there is, prior to occurrence of the condition, no duty to render performance of that obligation. In

relation to a condition precedent to arbitration, until the occurrence of the condition, there is no consent and no duty to arbitrate. An award made by an arbitral tribunal where a condition precedent has not been fulfilled has no validity, and is liable to be set aside for want of jurisdiction.

(3) In the present case, Clause 14.3 clearly imposes a condition precedent to arbitration (as is accepted by D). Hence, if the condition precedent was not fulfilled, it should be concluded that the Tribunal did not have jurisdiction to make the Partial Award.

(4) The distinction between admissibility and jurisdiction takes the matter no further. Once it is accepted (as D does) that Clause 14.3 imposes a condition precedent, then, as a matter of Hong Kong law, the parties have not agreed to arbitrate when the condition precedent has not been fulfilled.

(5) The difference between jurisdiction and admissibility is that the former is "targeted at the tribunal", whereas the latter is "targeted at the claim".

(6) C's objection that a condition precedent to arbitration was not satisfied was "targeted at the tribunal" and must be jurisdictional.

(7) In the premises, the court ought to conduct a *de novo* review of the question whether the condition precedent was satisfied. If it was not, the Partial Award is liable to be set aside under Art 34(2)(a)(iii).

53. The crux of Mr Yu's argument is based on the proposition in §52(2) above. He refers this Court to *Chitty on Contracts* (34th ed), Vol I - General Principles, Chapter 4, §197, where it is stated that: "Where an agreement is subject to a condition precedent, there is, before the occurrence of the condition, no duty on either party to render the principal performance promised by them", and *Chitty on Contracts* (34th ed), Vol II, Chapter 34 (Arbitration), §34-035, where it is stated that: "There will normally be no valid reference to arbitration if the arbitration agreement stipulates that certain facts or events shall be a pre-condition of a reference to arbitration and the pre-condition is not fulfilled. Here, too, the arbitral tribunal may rule whether or not facts or events exist which found its jurisdiction, but the final determination of this question rests with the court. A stipulation that the parties should first strive to settle the dispute amicably, or that the dispute should, in the first place, be submitted for conciliation, is not normally such a pre-condition and may not create an enforceable legal obligation[6]." Mr Yu also places reliance on:

(1) Lewison, *The Interpretation of Contracts* (7th ed), §16.71: "Conditions precedent are normally contingent conditions. In other words unless and until the condition is satisfied, no contract comes into existence, or liability under a contract is suspended."

(2) *Russell on Arbitration* (24th ed) -

(a) §2-022: "Conditions precedent to the operation of an arbitration agreement must be fulfilled before a tribunal will have jurisdiction to determine disputes under it … Where the disputes provision is a multi-tiered clause, the steps to be taken prior to commencing arbitration may constitute conditions precedent in which case they must be complied with."

(b) §2-307: "Many contracts containing arbitration clauses also provide for the parties first to try to settle the matter by negotiation or discussion between senior executives and, if that fails, the dispute must be referred to mediation or some other ADR process. Only when these steps have failed is the matter to be referred to arbitration … Where such preliminary steps are expressed in mandatory terms so as to constitute a condition precedent to the right to arbitrate they must be complied

> with. In many cases however they will not be mandatory and it may then be possible for the claimant to commence arbitration even without complying with them. Generally speaking, an obligation simply to negotiate is not binding. However, this is an area in which the law is currently unsettled in particular as regards a requirement to negotiate before commencing arbitration."
>
> (3) Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd ed), p 114: "Just as an arbitrator cannot make a binding award as to the existence of a contract which, if it does exist, is the source of his authority to act, so also does he lack the power to make a binding decision as to the existence of the facts which are said to found his jurisdiction. Thus, where a building contract provided that an arbitration should not take place until after completion of the works, it was held that the parties were not bound by a decision of the arbitrator that the works had been completed. Similarly, if the jurisdiction of the tribunal depends upon the giving of a notice, the tribunal has no power to decide whether an appropriate notice has been given."

54. Mr Yu also draws the court's attention to *Smith v Martin* [1925] 1 KB 745, where the relevant arbitration clause in a building contract provided that "… in case any dispute or difference shall arise between the employer … and the contractor … then either party shall forthwith give to the other notice of such dispute or difference, and such dispute or difference shall be … referred to arbitration … Such reference, except on the question of certificate, shall not be opened until after the completion or alleged completion of the works …". The builder obtained an award from an arbitrator, which was objected to by the employer on the basis that the whole of the buildings contracted for had not been completed (undisputed), and thus the arbitration was premature. Bankes and Atkin LJJ (constituting the Court of Appeal) allowed the employer's appeal, both with expressed regret. Bankes LJ, following an earlier judgment of the English Court of Appeal in *Pethick Brothers v Metropolitan Water Board* (which held that where a right to go to arbitration depended on the happening of an event, the arbitrator had no jurisdiction to decide whether the event had happened), held that the finding of the arbitrator in the case before him that the works had been completed before the commencement of the arbitration was outside the jurisdiction of the arbitrator, the arbitration was premature, and the arbitrator had no jurisdiction to make the award in question. Atkin LJ agreed, holding that since, admittedly, the whole of the works contracted for had not been completed at the time the arbitration took place, the arbitration was contrary to the provisions of the contract and without authority.

55. Mr Yu submits that since D accepts that the pre-arbitration procedural requirement under Clauses 14.2 is a condition precedent to any reference to arbitration under Clause 14.3, it follows that the Tribunal's decision on whether the requirement had been fulfilled is a decision going to its own jurisdiction, and the court is entitled to conduct a *de novo* review of the correctness of the decision.

56. A similar argument was advanced in *NWA* but was rejected by Calver J, who considered *Smith v Martin* to have been decided long before s 67 of the Arbitration Action 1996 came into force, and distinguishable on the basis that the wording of the arbitration clause in *Smith v Martin* made it clear that there could never be a reference to arbitration until the works were completed (§66). Calver J also held that the outcome of each case depended on the proper construction of the arbitration agreement in issue (§67).

57. In our view, it is an over-simplification to say that where a reference to arbitration is subject to some condition precedent, an arbitral tribunal's decision on whether the condition precedent has been fulfilled must necessarily be a jurisdictional decision, or one which is open to review by the court under Art 34(2)(a)(iii). The true and proper question to ask is whether it is the parties' intention (or agreement) that the question of fulfilment of the condition precedent is to be determined by the arbitral tribunal, and thus falls "within the terms of the submission to arbitration" under Art 34(2)(a)(iii). This is because the scope of the disputes which may be referred to arbitration for resolution is a matter for the parties to decide. As observed by Lord

Hoffmann in *Fiona Trust Corp*, at §5: "Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration." Lord Hoffmann went on to state the following at §9: "There was for some time a view that arbitrators could never have jurisdiction to decide whether a contract was valid. If the contract was invalid, so was the arbitration clause. In *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63 at 66 Evans J said that this rule 'owes as much to logic as it does to authority'. But the logic of the proposition was denied by the Court of Appeal in *Harbour Assurance Co (UK) Ld v Kansa General International Assurance Co Ltd* [1993] 3 All ER 897 …" In our view, just as it is open to parties to decide that all substantive disputes arising out of an agreement may be referred to arbitration, it is equally open to them to decide that any dispute on whether a pre-arbitration procedural requirement has been fulfilled should be resolved by arbitration as well. There is no reason in either principle or logic why such a dispute must necessarily be outside the scope of the arbitration agreement, or be regarded as jurisdictional in nature. The answer to the question depends, ultimately, on the parties' intention, to be ascertained as a matter of true construction of their agreement.

58. In passing, we should mention that Mr Yu also places reliance on the following observation by Lord Hope in *Fiona Trust Corp*, at §34:

> "But, as Longmore LJ said in para 21 of the Court of Appeal's judgment, this case is different from a dispute as to whether there was ever a contract at all. As everyone knows, an arbitral award possesses no binding force except that which is derived from the joint mandate of the contracting parties. Everything depends on their contract, and if there was no contract to go to arbitration at all an arbitrator's award can have no validity…"

59. We do not consider this passage assists C, because it only takes one back to the question of whether it was the parties' intention or agreement that the question of fulfilment of the pre-arbitration procedural requirement under Clauses 14.2 and 14.3 should also be resolved by the arbitral tribunal.

(v) Whether the question of fulfilment of the pre-arbitration procedural requirement is within the terms of the submission to arbitration?

60. Mr Chapman (on behalf of D) suggests that an objection based on an alleged failure to observe pre-arbitration procedural requirements should be *presumed*, unless a clear and unequivocal intention of the parties to the contrary is shown, to be an objection going to the admissibility of the claim, rather than the jurisdiction of the tribunal, and thus judicial intervention of the arbitral tribunal's decision on such objection is excluded. For the purpose of disposing of the present appeal, it is not necessary to consider the merits of the presumptive approach advocated by Mr Chapman, because we consider it to be clear that C's objection in this case goes only to the admissibility of the claim. We agree with the Judge's analysis on this issue at §53 of the Judgment. In particular, we consider it significant that C's objection is not that the substantive claim advanced by D could never be referred to arbitration, or be arbitrated, at all. Its objection is only that the reference to arbitration was premature, in that some pre-arbitration requirements should first be observed or gone through. Viewed in this light, C's objection was targeted "at the claim" instead of "at the tribunal". In the absence of any agreement of the parties to the contrary, C's objection goes only to the admissibility of the claim rather than the jurisdiction of the tribunal, and thus the Partial Award is not subject to review by the court under Art 34(2)(a)(iii).

61. For the sake of completeness, we should mention that we would have reached the same conclusion even if we disregard the distinction between admissibility and jurisdiction, and consider the question simply as a matter of construction and application of Art 34(2)(a)(iii). We consider it to be clear that the dispute between the parties on the question of fulfilment of the pre-arbitration procedural requirement under Clauses 14.2 and 14.3 is a dispute falling within the terms of the submission to arbitration under Art 34(2)(a)(iii). Clause 14.3 provides that

"any" dispute which cannot be resolved amicably within 60 business days … shall be referred by either party for settlement exclusively and finally by arbitration. The disputes which may be settled by arbitration under Clause 14.3 are those referred to in Clause 14.2, namely, "any controversy, dispute or claim [arising] between the Parties out of or in relation to this Agreement, or the breach, interpretation or validity thereof". There is no reason to confine the scope of arbitrable disputes under Clause 14.3 to substantive disputes arising out of or in relation to the Agreement, and exclude from it disputes on whether the pre-arbitration procedural requirement under Clauses 14.2 and 14.3 has been fulfilled.

62. As stated by Lord Hoffmann in *Fiona Trust Corp*, at §13: "… the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at [17]: '[i]f any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.'" In the present case, it was likewise easy for the parties to say that any dispute on the question of fulfilment of the pre-arbitration procedural requirement under Clauses 14.2 and 14.3 was excluded from the arbitral tribunal's jurisdiction, if that was what they truly intended.

63. In our view, the question of whether the pre-arbitration procedural requirement under Clauses 14.2 and 14.3 has been fulfilled is a question intrinsically suitable for determination by an arbitral tribunal, and is best decided 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 chosen by them on account of their neutrality and expertise.

64. In all, we reject C's contention that the Partial Award deals with a dispute not within the terms of the submission to arbitration. Accordingly, the Partial Award is not subject to recourse to the court under Art 34(2)(a)(iii).

65. For all of the above reasons, Ground 1 of the Notice of Appeal is rejected.

GROUND 2: APPLICABILITY OF ART 34(2)(a)(iv)

66. Although this ground was maintained by C, it is fair to say that it was not the focus of Mr Yu's submissions at the hearing of the appeal. This ground can be dealt with briefly because it is essentially based on the same contention advanced under Ground 1, namely, that upon the true construction of the Agreement, the parties intended that the fulfilment of the condition precedent to arbitrate under Clauses 14.2 and 14.3 to bar a party from initiating an arbitration, and render an award given in an arbitration commenced in breach of the condition precedent subject to challenge under Art 34(2)(a)(iv)[7].

67. Under this ground, Mr Yu argues that[8]:

> (1) In the context of Article V(1)(d) of the New York Convention (which provides a ground for challenging an award where the "arbitral procedure was not in accordance with the agreement of the parties"), the phrase "arbitral procedure" can encompass pre-arbitration conditions precedent; and whether a condition precedent to arbitration is part of "arbitral procedure" within the meaning of that article depends on the intention of the parties, in particular whether they intended non-satisfaction of the condition precedent to bar arbitration altogether (Dr Reinmar Wolff, *New York Convention - Article-by-Article Commentary* (2nd ed 2019), at §§324-324a).
>
> (2) The term "arbitral procedure" in Art 34(2)(a)(iv) should be similarly construed because such construction would be in accord with s 3(2)[9] and Article 35 of the Basic Law.

(3) The parties here expressly subjected their consent to arbitration to a condition precedent, and they must have intended the condition precedent to be part of the "arbitral procedure" such that the failure to satisfy the condition precedent is a bar to arbitration and renders the Partial Award liable to be set aside.

68. Assuming, without deciding, that Mr Yu is correct in his submission that the term "arbitral procedure" in Art 34(2)(a)(iv) should be construed in a manner similar to Article V(1)(d) of the New York Convention, since we have come to the conclusion that the parties here intended the question of fulfilment of the pre-arbitration procedural requirement to be determined by arbitration, it follows that it was not their intention that non-satisfaction of such requirement would bar arbitration altogether. Accordingly, Ground 2 of the Notice of Appeal is rejected.

GROUND 3: TRUE CONSTRUCTION OF CLAUSES 14.2 AND 14.3 AND WHETHER THE CONDITION PRECEDENT WAS FULFILLED

69. Having reached the above conclusions, it becomes unnecessary for us to consider Ground 3 of the Notice of Appeal.

DISPOSITION

70. C's Notice of Appeal is dismissed with costs to D, to be taxed if not agreed, with certificate for Solicitor Advocate (if necessary).

(Peter Cheung)	(Maria Yuen)	(Anderson Chow)
Justice of Appeal	Justice of Appeal	Justice of Appeal

Mr Benjamin Yu, SC, Ms Bonnie YK Cheng and Mr Brian Lee, instructed by M/s Baker & McKenzie, for the Plaintiff (Appellant)

Mr Simon Chapman, Solicitor Advocate, of M/s Herbert Smith Freehills, for the Defendant (Respondent)

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[1] Clause 8.2 states as follows: "Material Default by either Party. In the event that either Party believes that the other Party is in material default of its obligations under this Agreement, such Party shall give a written notice to the defaulting Party in writing requiring remedy of the default (the 'Material Default Notice'). If the defaulting Party fails to remedy the default within thirty (30) Business Days of receipt of the Default Notice, the Parties shall resolve the dispute by referring to the procedure set forth at Section 14.2."

[2] See §11 of the Skeleton Submissions for the Appellant dated 29 March 2022.

[3] See §28 of the Skeleton Submissions for the Appellant.

[4] See §30 of the Skeleton Submissions for the Appellant.

[5] See §§12-19 and 27 of the Skeleton Submissions for the Appellant.

[6] It has not been suggested by D that the pre-arbitration procedural requirement to attempt to resolve a dispute by negotiation under Clauses 14.2 and 14.3 of the Agreement does not give rise to a binding legal obligation.

[7] See Ground 2c and d of the Notice of Appeal.

[8] See §§35-37 of the Skeleton Submissions for the Appellant.

[9] Section 3(2)(a) states that the Ordinance is based on, inter alia, the principle "that, subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved".
