

# Hong Kong—conditions precedent to arbitration— a question of jurisdiction or admissibility? (C v D)

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**Arbitration analysis:** It is not uncommon that commercial agreements contain conditions precedent to arbitration. In this case, the condition precedent in question was a requirement that the parties attempt to resolve the dispute by negotiation in good faith. If any dispute could not be resolved within 60 business days of the date of a party's request in writing for negotiation, the parties were required to resolve the dispute through arbitration (the condition precedent). Letters were sent between the parties/their lawyers but did not result in any progress in resolving the dispute. The matter was finally adjudicated by an arbitral tribunal appointed under the Hong Kong International Arbitration Centre (HKIAC) Arbitration Rules (the tribunal) which granted an award in favour of the defendant (the award). The plaintiff sought to set aside the award on the basis that the tribunal had no jurisdiction as the defendant had failed to comply with the condition precedent. The defendant argued that the question of compliance with the condition precedent did not go to the jurisdiction of the tribunal, rather it went to whether the claim should be admitted by the tribunal. The Hong Kong court agreed and ruled that the question of compliance with the condition precedent was properly for the tribunal to answer. Written by Andrew Rigden Green, partner, head of International Arbitration, Greater China, Stephenson Harwood, Hong Kong.

C v D [\[2021\] HKCU 2823](#) (subscription to Lexis® Advance required)

## What are the practical implications of this case?

The court took the opportunity to consider and summarise academic works as well as authorities in other common law jurisdictions in respect of the issue of the non-compliance with conditions precedent to arbitration.

Although it was the parties' intention to be bound by the condition precedent, the non-compliance was not a bar for the parties to seek recourse from the tribunal as it was an issue of admissibility rather than jurisdiction; it was a matter for the tribunal to decide not the court. In other words, parties could still commence arbitration as long as the dispute fell within the scope of arbitration agreement (or clauses) even though condition precedent had not been satisfied.

This is an important case as it is the first time in Hong Kong that the court has clearly recognised the distinction between jurisdiction and admissibility when considering the compliance with conditions precedent to arbitration. This decision is consistent with other decisions in the US, Singapore and UK.

Notwithstanding the fact that questions of compliance with conditions precedent do not go to the jurisdiction of a tribunal it remains important to comply with them before commencing any arbitration proceedings as any non-compliance may result in a stay of proceedings to allow for compliance, the adverse consequences of costs sanction, or even dismissal by the arbitral tribunal.

## What was the background?

The case concerned a dispute as to a satellite management agreement which contained the following condition precedent to arbitration:

- parties shall attempt in good faith to resolve the 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 (Clause 14.2), and
- if any dispute cannot be resolved within 60 business days of the date of a party's request in writing for such negotiation, the dispute shall be resolved through arbitration proceedings (Clause 14.3)

Before the defendant resorted to the tribunal to resolve the dispute, it made a request in writing to the plaintiff's board of directors as an attempt to negotiate. No resolution of the dispute came about from the correspondence. The dispute was finally adjudicated by an HKIAC tribunal of three arbitrators which granted the award.

The plaintiff then took out an originating summons before the Hong Kong High Court to set aside the award on the basis that the tribunal had no jurisdiction to grant the award as the defendant had failed to comply with the condition precedent to make a request in writing to their chief executive officer.

The defendant argued that there was no issue as to the tribunal's jurisdiction as the compliance of condition precedent was a matter of admissibility which was within the tribunal's jurisdiction to decide whether to refuse to admit the case for adjudication or not. The court agreed with the view of the defendant.

### What did the court decide?

The issue before the court was whether non-compliance with the condition precedent was a matter of jurisdiction or admissibility.

The question of a tribunal's jurisdiction is one of whether a tribunal has been conferred power to arbitrate a matter by the agreement between the parties. The question of admissibility is one of whether the claim is one that can be brought before the tribunal.

It was the plaintiff's case that the non-compliance of the condition precedent is a question of jurisdiction. As the condition precedent to arbitration had not been complied with, the tribunal should not be formed in the first place and hence the tribunal had no jurisdiction to grant the award which should be set aside pursuant to section 81 of the Arbitration Ordinance (in particular, Articles 34(2)(a)(iii) and (iv) of the UNCITRAL Model Law). Section 34(2)(a)(iii) of the UNCITRAL Model Law provides that an award may be set aside by the court if it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration whereas section 34(2)(a)(iv) provides that an award may be set aside if the arbitral procedural was not in accordance with the agreement of the parties.

The defendant argued that whether the condition precedent had been fulfilled was a question of admissibility but not jurisdiction and so the court should not interfere with the award granted.

In reaching its decision, the court had considered academic works as well as the authorities in other common law jurisdictions.

The court shared the view of the defendant that the question as to whether the condition precedent had been fulfilled or not, was within the tribunal's power and jurisdiction to decide. It was therefore a question of admissibility and the tribunal could deal with the issue of non-compliance of condition precedent as it sees fit. The originating summons was dismissed.

It is worth noting that, as the court recognised in this case, that it is possible for parties to make compliance with pre-arbitration conditions precedent a matter going to the tribunal's jurisdiction, but that such agreement requires clear and unequivocal language (para [52]).

### Case details

- Court: Hong Kong Court of First Instance
- Date of judgment: 24 May 2021

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