

Hong Kong—arbitration—set aside of award—multi-tiered arbitration agreement (T v B)

10/01/2022

Arbitration analysis: An arbitration provision contained conditions precedent to the commencement of arbitration. These conditions were not met and arbitration was commenced in any event. The jurisdiction of the tribunal was challenged and the tribunal ruled that it did not have jurisdiction. The plaintiff (T) applied to the Hong Kong court to set aside the award under section 81 of the Hong Kong Arbitration Ordinance Cap 609 (AO) (which incorporates article 34 of the United Nations Commission on International Trade Law Model Law (the Model Law)). The defendant (T) also commenced a fresh action before the Hong Kong court for the same dispute as referred to arbitration. B defended the set-aside action and applied for a stay of the court action. The Hong Kong court refused the application to set aside the award and granted a stay of the court action in favour of arbitration. The court affirmed the principle set out in *C v D and Kinli Civil Engineering Ltd v Geotech Engineering Ltd*, that non-compliance with pre-arbitration procedures or conditions goes to admissibility of the claim not to the jurisdiction of the tribunal, Written by Andrew Rigden Green, partner, head of International Arbitration in Great China, at Stephenson Harwood, Hong Kong.

T v B [\[2021\] HKCU 6361](#) (subscription to Lexis+ US required)

What are the practical implications of this case?

- multi-tiered arbitration agreements have long been accepted as valid by the court. If a condition precedent raises a time bar issue this does not defeat the tribunal's jurisdiction to hear the claim. It only provides a defence to a claim
- failure to follow the steps set out in multi-tiered arbitration agreements or conditions precedent to arbitration will not normally invalidate the jurisdiction of the arbitration tribunal. Questions of compliance with such steps are questions that go to the admissibility of the dispute before the tribunal
- parties may agree that pre-arbitral procedural requirements go to the tribunal's jurisdiction but to do so will require clear and unequivocal language
- a tribunal's decision on parties' compliance or non-compliance with pre-arbitration procedures or conditions is final and not subject to the court's review

What was the background?

On 25 April 2018 B, as the main contractor engaged for certain reclamation and advance works, entered into a sub-contract ('Sub-contract') with T for part of the works. The main contract and Sub-contract were 'back-to-back', with the same completion date of 28 July 2024 and with an arbitration clause requiring the presentation of a completion certificate before arbitration could be commenced.

T claimed monetary damages under the Sub-contract and sought to refer the dispute to arbitration. B challenged the jurisdiction of the tribunal on the basis that the completion certificate had not been issued. The tribunal decided that: (1) the commencement of arbitration was premature; and, (2) it did not have jurisdiction.

On 29 January 2021, T applied to set aside the arbitration award under AO, s 81 ('Set Aside Application'). [Article 34](#) permits challenges to arbitration awards on the basis (among others) of the validity of the arbitration agreement. On 2 February 2021, T commenced an action in the Hong Kong court in respect of the same breaches brought in the arbitration. The defendant applied to stay the court action in favour of arbitration ('Stay Application').

What did the court decide?

The two key issues in the overlapping Set Aside and Stay Applications were:

- the nature of the determination made by the tribunal—was it the determination of admissibility or of jurisdiction, and
- whether the condition precedent to arbitration (the presentation of the completion certificate which could not practically happen before the end of the statutory limitation period) was such to deny parties their constitutional right to have their disputes heard, which would render the arbitration agreement null and void

Admissibility or jurisdiction

The Hong Kong court applied the reasoning in *C v D* [2021] HKCFI 1474 (not reported by LexisNexis®UK) and *Kinli* [2021] HKCFI 2503 (not reported by LexisNexis®UK) and concluded that the decision as to the fulfilment of the conditions precedent to the commencement of arbitration was a decision as to admissibility, whether or not it had been called a jurisdiction challenge by the parties and the tribunal.

The Hong Kong court considered that this: (1) made conceptual sense; (2) respected party autonomy; (3) demonstrated judicial restraint in interfering with arbitration agreements; (4) served the object of the AO in fair and speedy resolution of disputes by arbitration; and (5) aligned with other international arbitration communities. Awards as to the admissibility of actions are not open to challenge under s81 of the AO. The Set Aside Application was dismissed.

Limitation

The Hong Kong court held that a limitation defence is just that—a defence, it does not preclude the bringing of an action and the parties constitutional rights were not contravened. Therefore, the arbitration agreement was valid and the Stay Application was granted.

Case details

- Court: Hong Kong Court of First Instance
- Judge: Honourable Judge Coleman
- Date of judgment: 29 December 2021

Andrew Rigden Green is a partner, head of International Arbitration in Great China, at Stephenson Harwood, Hong Kong. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysiscommissioning@lexisnexis.co.uk.