Breach of Preconditions to an Arbitration Agreement: A Matter of Jurisdiction or Admissibility?

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Introduction

Multi-tier dispute resolution clauses have increased in prominence, providing for a practical approach to dispute resolution. These clauses typically call for parties to first engage in various forms of negotiation and/or mediation as a precondition to proceeding with arbitration or litigation.

Where a party breaches such a precondition by skipping a tier and proceeds straight to, for instance, arbitration, this may give rise to either an **admissibility** or **jurisdiction** issue. This goes beyond a mere technical or academic point – it has implications for whether an arbitral award may be set aside, given that jurisdiction is one of the limited grounds on which a party can appeal against or set aside an arbitral award in most national courts. In contrast, admissibility issues are generally determined by the tribunal and are not subject to curial review.

This article discusses the position in Vietnam, Singapore and, briefly, in other commonwealth countries as to the effect of non-compliance with a multi-tier dispute resolution clause, and whether it is considered a matter of admissibility or jurisdiction.

Contribution Note: *This article was written with contributions from Linh Dao (Associate, Vietnam) and Sandi Tun (Associate, Singapore).*

Jurisdiction and Admissibility

Jan Paulsson sets out his view of the distinction between jurisdiction and admissibility as follows:

- *If the Tribunal refuses to hear the claim because it could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction.*

- *If the Tribunal refuses to hear the claim because it should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility.*

A breach of preconditions to arbitration, as far as the Paulsson dichotomy goes, relates to whether a claim should be heard and is therefore a matter of admissibility. This dichotomy has been influential in several jurisdictions, as will be seen below.

Position in Vietnam: Untested, but likely admissibility

Vietnamese law does not specifically set out the implications of breaching multi-tier dispute resolution clauses. That said, where the issue has arisen before the Vietnamese courts in setting aside applications, the decisions appear to treat the matter as going to **admissibility**, but without referring to the Paulsson dichotomy.

This largely stems from the absence of clear definition or guidance as to what type of issues go to jurisdiction under the Law on Commercial Arbitration. Throughout the provisions of Vietnam's Law on Commercial Arbitration (including Article 2), "jurisdiction" (or "*thẩm quyền*" in Vietnamese) appears to focus on subject matter arbitrability (arbitrability *ratione materiae*), whereas other matters that are also conventionally regarded as jurisdictional issues in international arbitration (e.g., whether there was a valid arbitration agreement) are regulated and treated as separate issues. This distinction is consistent with the approach of the Vietnamese courts in handling breaches of multi-tier dispute resolution clauses.

In Decision No. 526/2013/KDTM-QD dated 15 May 2013 ("**Decision 526/2013**"), the People's Court of Ho Chi Minh City found that non-compliance with the preconditions for arbitration (in this case, mediation) in the multi-tier dispute resolution clause did not affect the validity of the parties' agreement to arbitrate. The court concluded that the agreed mediation procedure **sat separate** from the tribunal's jurisdiction in respect of the arbitration.

One year later, in Decision No. 10/2014/QD-PQTT dated 28 October 2014, the People's Court of Hanoi set aside an award when it held that the parties' failure to embark on the agreed negotiations was a breach of a precondition to arbitration. However, it did not address whether the matter was one of admissibility or jurisdiction. Instead, the court held that the commencement of arbitration before the preconditions were met was **a breach of the parties' agreement to resolve disputes 'layer by layer' within the meaning of Article 68.2(b) of the Law on Commercial Arbitration**. As Article 68.2(b) refers to non-compliance with the arbitral procedures as agreed by the parties, the court's decision was unusual in that it had effectively regarded these preconditions to be a part of the arbitration itself.

In the more recent Decision No. 02/2020/QD-PQTT ("**Decision 02/2020**") dated 23 April 2020, the same People's Court of Hanoi addressed whether the parties' failure to comply with the preconditions to arbitration (in this case, embarking on the dispute adjudication board and conciliation process prior to arbitration) amounted to grounds to set aside an award. While again the court did not specifically address the distinction between admissibility and jurisdiction, it concluded that it was only empowered to hear matters in which the involved parties did not have an arbitration agreement, the arbitration agreement was invalid or where the arbitration agreement could not be performed (as stipulated in Articles 43 and 44 of Vietnam's Law on Commercial Arbitration). The court concluded that these were not issues before it.

An important takeaway from Decision 02/2020 was that even where parties did not comply with the preconditions to arbitration, it would not necessarily concern whether the arbitration agreement was valid or capable of being performed

(and hence constitute a ground for setting aside an award). These types of issues are typically characterised as jurisdictional ones in international arbitration. As such, while not explicitly stated, Decision 02/2020 seems to lend support to the position that the Vietnamese courts are likely to find non-compliance with the preconditions to arbitration as issues that go to the merits of the dispute (e.g., admissibility).

Position in Singapore: Unclear

The position in Singapore following *International Research Corp v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 ("***International Research***") appears to be that breaches of multi-tier clauses affect the tribunal's jurisdiction. There, the Court of Appeal found that because the preconditions for arbitration in the arbitration clause (in this case, to convene successive internal committees) had not been complied with, the tribunal did not have jurisdiction.

However, two subsequent Court of Appeal cases (namely *BBA and others v BAZ and another appeal* [2020] 2 SLR 453 ("***BBA***") and *BTN and another v BTP and another* [2021] 1 SLR 276 ("***BTN***")) endorsed the Paulsson dichotomy, albeit in matters unrelated to preconditions to arbitration. Those cases dealt with issues of *res judicata* and statutory time bars, and the Court found both related to admissibility and not jurisdiction. The court in *BTN* notably observed of the Paulsson dichotomy that, in Paulsson's view, "*objections regarding preconditions to arbitration…the fulfilment of conditions precedent such as conciliation provisions before arbitration…are matters of admissibility, not jurisdiction*". Neither in *BTN* nor *BBA* did the Court cite *International Research* or attempt to reconcile it with the Paulsson dichotomy, leaving Singapore's position unclear.

While *International Research* remains good law, its proposition that a breach of preconditions to arbitration affects jurisdiction and not admissibility has not been affirmed in subsequent cases. In the face of the Court of Appeal's analysis in *BTN* and *BBA* of the distinction between jurisdiction and admissibility, it remains to be seen whether the Singapore Court will distinguish *International Research* or overturn it entirely.

Position in UK and Hong Kong: Admissibility

In the United Kingdom, the position is that failure to comply with a multi-tier dispute resolution clause is an issue of **admissibility**. In *Republic of Sierra Leone v SL Mining* [2021] EWHC 286 (***"Sierra Leone"***), the English High Court decided that the tribunal did not have jurisdiction as parties failed to comply with a three-month period for amicable settlement. *Sierra Leone* cited *BBA* and *BTN* as unanimous, clear decisions that objections regarding preconditions to arbitration were matters of admissibility and not jurisdiction. *Sierra Leone* was affirmed in *NWA and another v NVF and others* [2021] EWHC 2666, where the English High Court found that it was for the tribunal to decide the consequences of parties' failure to abide by a mandatory mediation procedure.

The position in Hong Kong appears to have similarly been resolved by the Court of Appeal's recent decision in *C v D* [2022] 3 HKLRD 116 ("***C v D***"). Citing *Sierra Leone* and *BBA*, the Court of Appeal applied the Paulsson dichotomy to find that parties had intended for the Tribunal to decide issues relating to preconditions to arbitration, such that the matter went to **admissibility**. The Tribunal found the preconditions had been met, and the Court of Appeal agreed. The Court of Appeal's decision in *C v D* concurs with the High Court's earlier decisions in *C v D* [2021] HKCFI 1474 and *T v B* [2021] HKCFI 3645 on the same point.

The appeal against *C v D* to the Hong Kong Court of Final Appeal was unanimously dismissed, although each of the five judges appeared to have differing views on the jurisdiction-admissibility issue. The starting point appeared to be the interpretation of the preconditions themselves – namely, whether parties intended, per the text of the multi-tier dispute resolution clause, that compliance with such a precondition is amenable to review by the court (*C v D* [2023] HKCFA 16).

Concluding Remarks

Three related issues have significant implications for any appeal on jurisdiction and setting aside arbitral awards: (a) whether a breach of preconditions to arbitration is an issue of jurisdiction or admissibility; (b) the interpretation of the arbitration agreement; and (c) the nature of the breach of the precondition. As examined above, different jurisdictions take different approaches to the first issue. The current positions in the UK and Hong Kong indicate that a breach of preconditions to arbitration will be a matter of admissibility. In Vietnam, the issue has yet to be tested, although Decision 526/2013 and Decision 02/2020 suggest that it will not be considered a jurisdictional issue. The position in Singapore is also unclear – while *International Research* held that it was a jurisdictional issue, the later cases of *BBA* and *BTN* suggest in obiter that it should be a question of admissibility.

In most countries, the jurisdiction/admissibility question will affect whether an arbitral award may be set aside, since jurisdiction is generally one of the limited grounds upon which a party can appeal against or set aside an arbitral award. In Singapore, for example, the Arbitration Act and the International Arbitration Act entitle parties to appeal against a tribunal's ruling on jurisdiction where the jurisdiction and merits stage of an arbitration has been bifurcated. Further, the Arbitration Act sets out the Courts' entitlement to set aside an award and parties' rights to appeal against an award on limited grounds, including where a tribunal acts in excess of its jurisdiction. The International Arbitration Act likewise provides that parties may set aside an award on the limited grounds of natural justice, including issues of the tribunal's jurisdiction. Similarly, Vietnam's Law on Commercial Arbitration enables an award to be set aside on jurisdictional grounds.

In contrast, matters of admissibility are not subject to appeal and are for the Tribunal to determine. There may also be challenges having issues of admissibility determined first (for instance in a bifurcated arbitration) given that objections as to admissibility may be intertwined with the merits of the claim.

To conclude, if a dispute involves a breach of preconditions to arbitration, parties should pay attention as to whether the relevant laws may deem it to be an issue of admissibility or jurisdiction and consider what steps they may wish to take to avoid the corresponding implications in terms of setting aside any resulting award.

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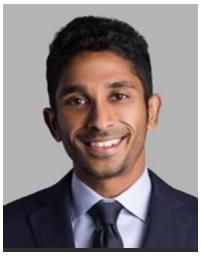

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