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Non-compliance with requirement to mediate prior to arbitration is matter of admissibility, not jurisdiction

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In its decision in *NWA v NVF*,[(1)] the High Court confirmed that alleged non-compliance with the provisions of a multi-tiered dispute resolution clause (in particular, the submission of claims to mediation before arbitration) is exclusively a matter of admissibility for the arbitral tribunal, and cannot be the basis of a jurisdictional challenge under section 67 of the Arbitration Act 1996. Consistent with another recent decision of the High Court, this judgment provides reassurance for parties to arbitration agreements that non-compliance by one or more parties with preconditions to arbitration will not deprive a tribunal of its jurisdiction over a dispute.

Background

Parties to an arbitration seated in England and Wales may apply to the courts under section 67 of the Arbitration Act to challenge an award of an arbitral tribunal on the ground that the tribunal lacked substantive jurisdiction. Such a challenge can result in the setting aside of the award if the tribunal is held to have lacked jurisdiction. As such, the threshold for successful challenges is necessarily burdensome and applications are rarely brought (and even fewer are successful).

Section 30(1) of the Arbitration Act provides the basis for a tribunal's jurisdiction in a London-seated arbitration, stating that:

> *(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, 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.*

Prior to the February 2021 High Court judgment in *Sierra Leone v SL Mining Ltd*,[(2)] the English authorities were somewhat unclear as to the effect that an obligation to enter into negotiations prior to arbitration has on the jurisdiction of a tribunal over the matters submitted to arbitration. In *SL Mining*, one party had submitted claims to arbitration prior to the end of a prescribed period of negotiation. In its judgment, the Court confirmed that alleged non-compliance with the provisions of a multi-tiered dispute resolution clause is exclusively a matter of procedure and admissibility for the arbitral tribunal, and it cannot lead to a successful jurisdictional challenge under section 67 of the Arbitration Act. The Court couched its analysis in the wider context of the "hands off" approach to arbitration evidenced in the House of Lords (now the Supreme Court) decision in *Fiona Trust*[(3)] (for further details please see "Compliance with preconditions to arbitration a matter of admissibility, not jurisdiction").

Facts

The agreement between the parties in *NWA* contained the following dispute resolution mechanism:

> *10.2 Disputes*
>
> *(a) In the event of a dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity, termination, interpretation or effect,* ***the relevant parties to the dispute shall first seek settlement of that dispute by mediation in accordance with the London Court of International Arbitration ("LCIA") Mediation Procedure****, which Procedure is deemed to be incorporated by reference into this clause insofar as they do not conflict with its express provisions. Any mediation shall take place in London.*
>
> *(b)* ***If the dispute is not settled by mediation within 30 days of the commencement of the mediation or such further period as the relevant parties to the dispute shall agree in writing, the dispute shall be referred to and finally resolved by arbitration*** *under the LCIA Rules from time to time in force ("the Rules"), which Rules are deemed to be incorporated by reference into this Agreement insofar as they do not conflict with its express provisions.* (Emphasis added.)

In April 2019, NVF, RWX and KLB (the defendants) submitted a request for London Court of International Arbitration (LCIA) arbitration against NWA and FSY (the claimants), calling for an immediate stay of proceedings to allow the parties to enter into mediation. Between April 2019 and February 2020, the defendants repeatedly sought, in vain, to engage the claimants in mediation.

In September 2020, the arbitrator issued a partial award, ruling that pursuant to section 30(1) of the Arbitration Act, he did have jurisdiction, notwithstanding the parties' failure to engage in mediation.[(4)]

Despite having refused to engage in mediation, the claimants issued a challenge to the partial award pursuant to section 67 of the Arbitration Act. The claimants contended that, by requesting mediation at the same time as commencing arbitration and proposing that the arbitration be stayed for 30 days, the defendants did not "first seek settlement by mediation", and that this deprived the tribunal of their jurisdiction.[(5)]

Decision

Justice Calver rejected the claimants' section 67 challenge. In doing so, he considered a number of issues.

Was non-compliance with requirement for mediation an issue of admissibility or jurisdiction?

Clause 10.2 of the parties' agreement clearly stipulated that any dispute "shall be" referred to and finally resolved by arbitration. The short, 30-day window for mediation before arbitration was, in the judge's view, purposely brief in order to facilitate the resolution of any dispute by a tribunal.[(6)]

The judge held that the obligation to enter into mediation was imposed on all of the parties.[(7)] If one party refused to engage, the 30-day period for mediation prescribed by clause 10.2(b) of the agreement would not be triggered. Calver held that it would be "absurd" and would not give the clause "business common sense" for such circumstances to deprive a tribunal of jurisdiction, where the parties had agreed to arbitration. Clause 10.2 had to be construed in light of the parties' intention to obtain a swift and final determination of their dispute; if it could not be settled by LCIA mediation, by way of an expedited LCIA arbitration.[(8)]

The judge also noted a provision in the agreement giving the tribunal power to consolidate multiple disputes that arose between the parties, regardless of whether all of those disputes had been referred to mediation.[(9)] This, the judge held, made it clear that the issue of whether a dispute must first be referred to mediation was a procedural matter for the tribunal. In addition, the fact that the parties had agreed at clause 10.2 that the LCIA Court would have oversight of both the mediation and arbitration procedures further reinforced a conclusion that the mediation was part of a procedure that ultimately was a matter for the tribunal.[(10)]

In reaching his decision, Calver considered the judgments in *Sierra Leone v SL Mining* and *Fiona Trust*, together with academic commentaries on pre-arbitral requirements. These supported the finding that an arbitration clause such as the one in the case at hand should be given a "commercial construction". In most cases, if parties are unable to settle a dispute through a 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 agree to submit to arbitration".[(11)]

Was the arbitration agreement valid?

The judge rejected the claimants' argument that the arbitration agreement was "inoperative" because of the failure to comply with the mediation provision, and that, as such, there was no "valid" arbitration agreement for the purposes of section 30(1)(a) of the Arbitration Act.[(12)]

While section 30(1)(a) did not define what is meant by "valid", the claimants referenced section 9(4) of the Arbitration Act, which permits the court to stay proceedings brought in breach of an arbitration agreement – unless the court is satisfied that the agreement is null and void, inoperative or incapable of being performed. The judge held that sections 9(4) and 30(1)(a) did not necessarily have the same scope, and that caution should be exercised when reading section 9 criteria in section 30(1). Ultimately, failure to comply with a procedural condition of the type in this case did not mean that the agreement was invalid or inoperative.[(13)]

What matters had been submitted to arbitration in accordance with the arbitration agreement?

The claimants argued that the parties' failure to engage in mediation meant that no matters had been submitted to arbitration in accordance with the arbitration agreement, for the purposes of section 30(1)(c) of the Arbitration Act.[(14)]

The judge held that section 30(1)(c) concerned which of the matters referred to arbitration were within the scope of an arbitration agreement, and he agreed with the analysis in *Sierra Leone v SL Mining* that section 30(1)(c) should not be engaged with in respect of a challenge that a claim is presented to a tribunal "too early". Whether the procedural requirements of an arbitration agreement had been met was an issue of admissibility for the tribunal to decide and not within the scope of section 30(1)(c).[(15)]

As such, section 30(1) was not engaged and, accordingly, neither was the court's supervisory function under section 67 of the Arbitration Act.

The judge was not obligated to determine whether the requirement to enter into mediation was a legally enforceable condition precedent; however, he noted that he would have found that the claimants were in breach of that alleged condition and they would not have been able to rely on that breach to contend that the defendants had failed to comply.

Comment

The Court's confirmation again that issues of admissibility (including the treatment of pre-arbitral contractual requirements) lie exclusively within the remit of an arbitral tribunal will be welcomed by parties agreeing to arbitrate their disputes in England and Wales. The Court was clear that to deprive one party of a right to refer a dispute to arbitration because of another's failure to comply with a pre-condition would deprive the arbitration agreement of business common sense. While the Court found that issues of admissibility are issues for a tribunal rather than the court, parties should note that a tribunal may:

- deem a claim inadmissible for failure to comply with relevant preconditions in a multi-tiered dispute resolution clause;
- stay the proceedings for the prescribed negotiation period; or
- apply cost penalties.

For further information on this topic please contact Marie Berard or Benjamin Barrat at Clifford Chance LLP by telephone (+44 20 7006 1000) or email (marie.berard@cliffordchance.com or benjamin.barrat@cliffordchance.com). The Clifford Chance LLP website can be accessed at www.cliffordchance.com.

Endnotes

(1) *NWA v NVF* [2021] EWHC 2666 (Comm).

(2) *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm).

(3) *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951, [2007] 10 WLUK 415.

(4) *NWA v NVF* [2021] EWHC 2666 (Comm) at [27].

(5) *Id* at [26].

(6) *Id* at [34] and [35].

(7) *Id* at [39] and [40].

(8) *Id* at [40] and [47].

(9) *Id* at [57].

(10) *Id* at [55].

(11) *Id* at [54].

(12) *Id* at [61].

(13) *Id* at [64].

(14) *Id* at [70].

(15) *Id* at [73] to [77].

Alex Szlezinger, trainee solicitor, assisted in the preparation of this article.