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Non-satisfaction of pre-arbitration requirements: Moving away from conditions precedent towards the admissibility of a claim – NWA v NVF

Darius CHAN
Singapore Management University, dariuschan@smu.edu.sg

Joel SOON
Singapore Management University, joel.soon.2018@law.smu.edu.sg

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NON-SATISFACTION OF PRE-ARBITRATION REQUIREMENTS: MOVING AWAY FROM CONDITIONS PRECEDENT TOWARDS THE ADMISSIBILITY OF A CLAIM

NWA v NVF

Darius **Chan**[*] & Joel **Soon**[**]

In earlier cases, the non-satisfaction of pre-arbitration requirements has been analysed by the Singapore and English courts by reference to the issue of conditions precedent. It was assumed without argument that, if a requirement was construed as a condition precedent, the failure to satisfy that requirement would deprive the tribunal of jurisdiction. More recently, English and Hong Kong case law has focused on a different issue, asking whether the failure to meet the pre-arbitration requirement affects the tribunal's jurisdiction or the admissibility of the claim. This case note analyses whether the Singapore courts should follow suit.

I. Introduction

Anecdotally, arbitration agreements are increasingly multi-tiered in nature, in that they provide for arbitration only after contractually-prescribed procedures or requirements (such as amicable discussions or mediation) have been attempted.[1] When there is a failure by a party to comply with a requirement of the arbitration agreement that the parties should first seek to mediate the dispute or engage in amicable discussions, and the arbitral tribunal has made a ruling on the consequences of that failure, to what extent is that ruling susceptible to review by the courts?

The orthodox position in England and Singapore was that any such failure to comply with a pre-arbitration requirement is to be treated as a potential jurisdictional

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[*] Associate Professor of Law (Practice), Singapore Management University; Arbitrator and Advocate, Fountain Court Chambers; Director, Breakpoint LLC. The author acknowledges and is grateful for the support of the Singapore International Dispute Resolution Academy BRI Program.

[**] LLB (*Summa Cum Laude*) (Singapore Management University).

[1] Gary Born, *International Commercial Arbitration*, 3d ed (The Netherlands: Kluwer Law International, 2021) [Born, *International Commercial Arbitration*] at 305. See also Argumedo Piñeiro, "Multi-Step Dispute Resolution Clauses" in Bernardo María Cremades, Miguel Angel Fernández-Ballesteros & David Arias, eds, *Liber Amicorum* (Spain: La Ley, 2010) at 733; Gary Born, *International Arbitration and Forum Selection Agreements, Drafting and Enforcing*, 4th ed (The Netherlands: Kluwer Law International, 2013) at 101–104; Alexander Jolles, "Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement" (2006) 72(4) Arbitration 329; Michael Pryles, "Multi-Tiered Dispute Resolution Clauses" (2001) 18(2) J Intl Arb 159.

defect on the part of the tribunal. On that premise, the tribunal's ruling is susceptible to review. This is legislatively provided for in Singapore under the International Arbitration Act 1994 ("the IAA"),[2] read with Articles 16(3) and 34 of the Model Law,[3] and in England under section 67 of the Arbitration Act 1996 (UK).[4] As part of the exercise of reviewing whether a tribunal has jurisdiction, the English courts in *Emirates Trading Agency LLC v Prime Minister Exports Pte Ltd* ("***Emirates***")[5] and *Tang v Grant Thornton International Limited* ("***Tang***"),[6] and the Singapore Court of Appeal in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* ("***IRC***")[7] considered whether the pre-arbitration requirements constituted conditions precedent, whether they were sufficiently certain to be enforceable, and whether substantial compliance is sufficient. The result of these deliberations has been differing approaches between the English and Singapore courts.

However, the approach has now shifted under English and Hong Kong law. Absent clear and specific contractual text to the contrary, a tribunal's ruling on the consequences of a party's failure to comply with pre-arbitration requirements is generally not susceptible to review by the courts. This was the holding in recent English decisions such as *The Republic of Sierra Leone v SL Mining Ltd* ("***SL Mining***")[8] and *NWA v NVF* ("***NWA***"),[9] and in Hong Kong decisions such as *C v D*,[10] and *Kinli Civil Engineering Ltd vs Geotech Engineering Ltd* ("***Kinli***").[11] While the Singapore courts have yet to reconsider this matter in the nine years since *IRC*, the authors suggest that Singapore law should generally adopt an approach that is similar to the approach presently adopted in England and Hong Kong. Specifically, the Singapore courts should first construe the dispute resolution clause in question. In the absence of language or evidence to the contrary, the Singapore courts should presume that commercial parties have intended the arbitral tribunal (as the final tier in the dispute resolution clause) to be a one-stop shop to resolve all disputes leading up to the arbitration itself, including disputes over whether the pre-arbitration requirements have been fulfilled. On that basis, the tribunal's decision over such disputes is not susceptible to curial review.

II. The old paradigm: enforceability and compliance with conditions precedent to arbitration

The twin cases of *Tang* and *Emirates* illustrate how the English courts stood divided on the enforceability of pre-arbitration requirements. Even though the decisions

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2 (No 23 of 1994, Sing) [*IAA*].
3 UNCITRAL Model Law on International Commercial Arbitration.
4 Arbitration Act 1996 (c 23) (UK).
5 [2015] 1 WLR 1145 [*Emirates*].
6 [2013] 1 All ER 1226 [*Tang*].
7 [2014] 1 SLR 130 (CA) [*IRC*].
8 [2021] EWHC 286 [*SL Mining*].
9 [2021] EWHC 2666 [*NWA v NVF*].
10 [2022] HKCA 729 [*C v D (HKCA)*]
11 [2021] HKCFI 2503 [*Kinli*].

differed, both cases focused on the issue of conditions precedent, indicating what a breach of those requirements would entail.

In *Tang*, the relevant clauses required amicable discussions and the formation of a dispute resolution panel before either party could commence LCIA arbitration. Hildyard J framed the issue as whether the clauses in question had enforceable contractual effect and operated as a condition precedent such that the tribunal could not have had jurisdiction, and was wrong in its determination that it had.[12] This turned on whether the content of the clauses was sufficiently precise and certain to be enforced.[13]

As a starting point under English law, the orthodox position was that agreements to negotiate in good faith are (without more) generally unenforceable for lack of certainty.[14] In this case where the clauses contained positive obligations to attempt to resolve a dispute amicably before arbitration, the test was whether the clauses prescribed a sufficiently certain and unequivocal commitment to commence a process, from which may be discerned what steps each party must take to put the process in place.[15] This should be clear enough to enable the court to determine objectively what a party must minimally do, and when or how the process will be exhausted.[16] Hildyard J found that the relevant clauses were too equivocal in terms of the process required and too nebulous in terms of the content of the parties' obligations to constitute an enforceable condition precedent to arbitration.[17] The omission to provide guidance as to the quality or nature of the attempts to be made to resolve the dispute prevented the court from being able to determine or direct compliance.[18] As the relevant clauses were insufficiently certain to constitute enforceable conditions precedent to the commencement of arbitration, the court confirmed that the tribunal did have jurisdiction.[19]

Tang can be contrasted to the subsequent decision of *Emirates*. In this case, Teare J overruled the tribunal's decision that the relevant pre-arbitration requirements were not enforceable.[20] Teare J found that the relevant clause, which required parties to first seek to resolve a dispute by friendly discussions in good faith and within a limited period of time before the dispute could be referred to arbitration, constituted an enforceable condition precedent to arbitration.[21] As those requirements were met, Teare J held that the tribunal did have jurisdiction.[22]

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12 *Tang*, *supra* note 6 at [4].
13 *Ibid* at [5].
14 *Ibid* at [57].
15 *Ibid* at [60].
16 *Ibid* at [60].
17 *Ibid* at [72].
18 *Ibid* at [72]
19 *Ibid* at [82]. See also *Children's Ark Partnerships Limited v Kajima Construction Europe (UK) Limited* [2022] EWHC 1595 (TCC) finding that, although the court should be slow to deny enforceability, the relevant provisions in that case did not create an enforceable obligation to commence or participate in an amicable process to resolve disputes prior to court litigation. In that case, the English High Court accepted the submissions of both parties that "cases dealing with ADR provisions prior to arbitration" were not directly applicable to cases which involved ADR provisions prior to court litigation.
20 *Emirates*, *supra* note 5 at [6].
21 *Ibid* at [63].
22 *Ibid* at [73].

Teare J echoed the views of Allsop P in *United Group Rail Services v Rail Corporation New South Wales*[23] in reasoning that the relevant clause was neither incomplete nor uncertain – an obligation to seek resolution of a dispute by friendly discussions in good faith meant fair, honest, and genuine discussions.[24] Enforcement of such a requirement when found as part of a dispute resolution clause was in the public interest because commercial men expected the court to enforce obligations freely undertaken, the object of which is to avoid expensive and time-consuming arbitration.[25]

In coming to this conclusion, Teare J first distinguished both *Walford v Miles*[26] and *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA*,[27] and found that there was no precedent which obliged him to hold that the relevant clause was unenforceable.[28] Secondly, contrary to Hildyard J's suggestion in *Tang* that good faith was too open-ended a concept, Teare J relied on case law from ICSID and Singapore, in which obligations to seek to resolve disputes by negotiation in good faith had been found to be enforceable.[29]

Notwithstanding the different conclusions of these two English cases, both cases showcase how a failure to comply with pre-arbitration requirements was treated, without contrary argument, as a potential jurisdictional defect on the part of the tribunal that was subject to review by the English courts under section 67 of the English Arbitration Act.

The same position was adopted in Singapore. In *IRC*, the Singapore High Court first considered an application under section 10 of the IAA to review the tribunal's ruling on jurisdiction.[30] Similar to the position in England, non-compliance with conditions precedent to arbitration was treated as a potential jurisdictional defect under Singapore law. By comparison, however, the Singapore courts have not faced as much dissonance as the English courts in respect of the issue of enforceability of clauses requiring parties to negotiate in good faith. Relying on the Singapore Court of Appeal's decision in *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd*,[31] the High Court in *IRC* ruled that (i) a clause requiring parties to negotiate in good faith was enforceable; and (ii) it was a condition precedent to arbitration (which had been satisfied).[32] Whilst the High Court's decision was overturned by the Court of Appeal, as described below,[33] the apex court did not disturb the High Court's ruling that a clause requiring parties to negotiate in good faith was enforceable under Singapore law.[34]

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23 [2009] NSWCA 177.
24 *Emirates*, *supra* note 5 at [64].
25 *Ibid* at [64].
26 [1992] 2 AC 128.
27 [2013] 1 WLR 102.
28 *Emirates*, *supra* note 5 at [59]-[60].
29 *Ibid* at [53]–[57]; *International Research Corp. PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] 1 SLR 973 (HC); *Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey* (ICSID Case No ARB/11/28) (5 March 2013) at [56]–[72].
30 *IRC*, *supra* note 7 at [11].
31 [2012] 4 SLR 738.
32 *IRC*, *supra* note 7 at [14].
33 *Ibid* at [63].
34 *Ibid* at [54].

More critically, *IRC* is instructive in elucidating the level of compliance required for pre-arbitration requirements. Influenced by the notion that the "object" of the clause in question had been met, the High Court held that the conditions precedent to arbitration had been satisfied, *ie*, substantial compliance was sufficient.[35] The Court of Appeal reversed, clarifying that actual compliance and not substantial compliance is required.[36] As there was no actual compliance with the conditions precedent to arbitration, the agreement to arbitrate could not be invoked, and, on that basis, the tribunal did not have jurisdiction. As the court focused on the issue of conditions precedent throughout its analysis, holding that actual (rather than substantial) compliance with a condition precedent is needed, this is understandable. It illustrates how the focus of juridical analysis regarding pre-arbitration requirements will have a significant effect on case outcomes.

III. The New Paradigm? Jurisdiction Versus Admissibility

It is apparent from the foregoing discussion that English and Singapore decisions looking at pre-arbitration requirements had focused on the issue of conditions precedent, but the precise origin and rationale for that focus is not clear. In *Tang* and *Emirates*, parties had framed their cases, from the outset, along the lines of whether the pre-arbitration requirements operated as conditions precedent such that the tribunal could not have had jurisdiction.

In 2018, an alternative issue was drawn out for the first time, *ie*, a distinction between a challenge that a claim was not admissible versus a challenge that the tribunal has no jurisdiction.[37] In a case involving the enforcement of an investment arbitration award in *PAO Tatneft v Ukraine*, Ukraine argued before the English courts that the award was not enforceable because, among other reasons, it was an abuse of rights by the investor to bring the claim in question.[38] Butcher J accepted the investor's argument that the issue is not jurisdictional, but is instead a matter going to admissibility, and it is one for the tribunal to decide.[39] In 2019, the jurisdiction versus admissibility distinction was held to be crucial in another case involving the setting aside of an investment arbitration award before Butcher J in *Republic of Korea v Dayyani*.[40] This time, Butcher J held that a dispute over whether the investor in question is distinct from the company which directly owns the investment goes towards the admissibility of the claim, rather than the jurisdiction of the tribunal.[41]

The crucial nature of the jurisdiction versus admissibility distinction has become apparent recently in England, Singapore and Hong Kong not only in the investment arbitration sphere but also in the commercial arbitration sphere.

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35 *Ibid* at [56]–[59].
36 *Ibid* at [56]–[62].
37 *PAO Tatneft v Ukraine* [2018] EWHC 1797 at [8].
38 *Ibid* at [95].
39 *Ibid* at [97]–[99].
40 [2019] EWHC 3580 (Comm).
41 *Ibid* at [83].

In particular, in relation to pre-arbitration requirements, the English and Hong Kong courts have moved away from the traditional approach of asking whether they constitute conditions precedent to arbitration. Instead, the English and Hong Kong courts have held that unless there is clear contractual text to the contrary, a tribunal's finding on the consequences of a party's non-compliance with pre-arbitration requirements is generally not reviewable by the courts in the first place. This is because those are issues affecting the admissibility of the claim rather than the jurisdiction of the tribunal.

Specifically, the English High Court in *SL Mining* observed that there exists a distinction between a challenge that a claim was not admissible before the tribunal (admissibility), and a challenge that the tribunal had no jurisdiction to hear a claim (jurisdiction).[42] Only the latter challenge is available to a party under section 67 of the Arbitration Act (UK), which would render the tribunal's finding susceptible to curial review.[43]

In *SL Mining*, the relevant clauses provided that parties can commence ICC arbitration after 3 months have elapsed from a written notice of dispute seeking amicable settlement. The claimant in the underlying arbitration in that case filed for arbitration before the 3-month timeframe elapsed. The question was whether the premature nature of the Request for Arbitration was a challenge to the substantive jurisdiction of the tribunal under section 67. Notably, the English High Court rejected any reliance on *Emirates* and *Tang* on the basis that, in those earlier cases, the difference between jurisdiction and admissibility had not been canvassed.[44] Apart from commentators and international authorities which were "plainly overwhelmingly in support of a case that a challenge such as the present does not go to jurisdiction", Sir Michael Burton also cited the Singapore Court of Appeal decision of *BBA v BAZ*,[45] and agreed that:

> if the issue relates to whether a claim could not be brought to arbitration, the issue is ordinarily one of jurisdiction … 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, [and] the tribunal decision is final.[46]

In *SL Mining*, the court, citing *Fiona Trust v Privalov*,[47] reasoned that, since the contention was about whether the claim was presented too early, the tribunal was in the best position to decide such an issue,[48] and that would in turn give effect to the choice of the parties. The court concurred with the tribunal's conclusion that "*if reaching the end of the settlement period is to be viewed as a condition precedent at all … it could therefore only be a matter of procedure, that is, a question of admissibility of the claim, and not a matter of jurisdiction*" [emphasis in original].[49]

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42 *SL Mining*, *supra* note 8 at [8].
43 *Ibid* at [8].
44 *Ibid* at [13].
45 [2020] 2 SLR 453 (CA) [*BBA v BAZ*].
46 *SL Mining*, *supra* note 8 at [18].
47 *Ibid* at [20]; [2007] 1 AER 951.
48 *SL Mining*, *ibid* at [18].
49 *Ibid* at [21].

After *SL Mining*, the English High Court in *NWA* was confronted with the issue whether non-compliance with the requirement for prior mediation precluded subsequent access to LCIA arbitration.[50] In that case, the relevant agreement provided that, in the event of a dispute, the parties should first seek settlement by mediation, and if the dispute were not settled by mediation, the dispute should be referred to LCIA arbitration. When a dispute arose, one party commenced LCIA arbitration, and thereafter made repeated proposals that the parties go for mediation. The counterparty did not accept the proposals for mediation. Eventually the LCIA tribunal proceeded to issue a decision affirming its jurisdiction to proceed notwithstanding the parties' failure to mediate the dispute. The tribunal's decision was the subject of challenge in *NWA*.

Relying on ordinary principles of contractual interpretation,[51] and principles specific to arbitration clauses,[52] Calver J held that it was clear "that what the parties as rational businessmen consensually agreed and intended was that *any* dispute arising out of or in connection with their agreement should be referred to arbitration" [emphasis in original in italics, emphasis added in bold italics].[53] That there was no intention for disputes to be litigated was buttressed by the parties' express waiver of any right of recourse to national courts.[54]

On the failure to comply with the mediation procedure, Calver J observed, that:

> [if] Party A refuses to mediate with Party B … I do not consider that there is any obligation upon Party B … to continue to seek settlement of the dispute by mediation … [i]t cannot be the case that in these circumstances the tribunal does not have jurisdiction … That would be absurd and would not give the clause business common sense; nor would it give it a construction that rational businessmen would have intended.[55]

Calver J concluded that the relevant clause should be construed in light of the objective intention of the parties, which was to obtain a swift and final determination of their dispute.[56] In concurring with *SL Mining*, Calver J held that the objection that parties have not yet sought to settle the dispute by mediation concerns the admissibility of the claim, rather than whether the arbitrator has jurisdiction to determine the claim at all.[57] Consequently, it is for the arbitrator to determine the consequences of any alleged breach of the pre-arbitration requirement.[58]

Under this new approach, it is not the case that discussion about whether particular terms of an agreement are too vague to be enforceable, or about whether they constitute conditions precedent which must be fulfilled, is no longer relevant. Rather, it is the tribunal that, must decide the issue, and the tribunal's decision is not

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50 *NWA v NVF*, *supra* note 9 at [28].
51 *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Limited* [2018] EWHC 163 (Comm).
52 *Premium Nafta Products Limited & others v Fili Shipping Company Limited* [2007] UKHL 40.
53 *NWA v NVF*, *supra* note 9 at [34].
54 *Ibid* at [34].
55 *Ibid* at [40].
56 *Ibid* at [47].
57 *Ibid* at [45]–[47].
58 *Ibid* at [55]–[57].

susceptible to review by the courts on the basis that these issues go towards "admissibility" of the claim, rather than the tribunal's jurisdiction.[59]

The Hong Kong courts have followed suit. In *C v D*, the Hong Kong Court of First Instance had to ascertain the effect of alleged non-compliance with the relevant pre-arbitration requirement, which required the parties to attempt in good faith to resolve any disputes by negotiation and provided the option of referring disputes to the respective Chief Executive Officers.[60] The court analysed the issue using the admissibility versus jurisdiction distinction.[61] After surveying leading academic works and cases from England, Singapore, and the United States, the court cited *SL Mining* and opined that the "*generally held view of international tribunals and national courts is 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*" [emphasis added].[62] The court gave two reasons for accepting this position as part of Hong Kong law.

First, although the pre-arbitration requirement is regarded as going to admissibility and not jurisdiction, it does not mean it is denied contractual force or rendered unimportant.[63] Rather, the tribunal has jurisdiction and may deal with the question as it sees fit; for instance, by ordering a stay of the arbitral proceedings pending compliance with the pre-arbitration requirement. As multi-tiered dispute resolution clauses are potentially complex in their operation, according to the court the tribunal chosen by the parties will typically be better placed to consider and determine what must be done procedurally – including whether it would be futile to compel parties to "go through the motions" – having regard to commercial realities and practicalities.[64]

Secondly, this approach would be "entirely consistent with the policy in Hong Kong law which respects the parties' autonomy in choosing arbitration as the means to resolve their disputes with its incident of speed and finality as well as privacy".[65] Accordingly, under Hong Kong law, questions of the construction and fulfilment of pre-arbitration requirements should be left to be decided by the arbitral tribunal, without *de novo* review by the courts.[66]

In another Hong Kong Court of First Instance decision in *Kinli*, the relevant clause provided that arbitration shall not be conducted before either the completion of the main contract or the determination of the subcontract, unless otherwise agreed by both parties.[67] The court also held that such questions relating to whether the requirements as to the exercise of the right to arbitration had been satisfied are for the tribunal to decide; the court has no role in deciding such questions.[68]

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59 *BBA v BAZ*, *supra* note 45 at [73]; *BTN v BTP* [2021] 1 SLR 276 [*BTN v BTP*] at [68].
60 *C v D* [2021] HKCFI 1474 [*C v D (HKCFI)*] at [21].
61 *Ibid* at [26].
62 *Ibid* at [42], citing *SL Mining* at [16].
63 *Ibid* at [48]–[49].
64 *Ibid* at [49].
65 *Ibid* at [50], citing *China International Fund Ltd v Dennis Lau & Ng Chun Man Architects & Engineers (HK) Ltd* [2015] 4 HKLRD 609.
66 *C v D (HKCFI)*, *ibid* at [48]–[54].
67 *Kinli*, *supra* note 11 at [3].
68 *Ibid* at [33].

C v D went on appeal. The appellant argued that the award should be set aside under Articles 34(2)(a)(iii) and (iv) of the Model Law. In dismissing the appeal, the Hong Kong Court of Appeal confirmed after a comparative review of case law and academic writing that the distinction between jurisdiction and admissibility was well-established.[69] The appellant first argued that the distinction should not be adopted because it is not borne out in the text of the Model Law itself.[70] However, the court opined that it did not mean that the distinction was irrelevant.[71] The court agreed with the Hong Kong Court of First Instance that:

> the distinction between jurisdiction and admissibility is … a concept rooted in the nature of arbitration itself, and may properly be relied upon to inform the *construction and application* of [Article 34 of the Model Law] even though the Ordinance does not in terms draw such a distinction [emphasis in original].[72]

The court opined that recognising the distinction would (i) likely give effect to the agreement of parties, who as rational businessmen are likely to intend that any dispute arising out of their relationship would be decided by the same tribunal; (ii) be in line with the general trend of minimizing judicial interference; (iii) further the object of the Hong Kong Arbitration Ordinance to facilitate the fair and speedy resolution of disputes without unnecessary expense; and (iv) ensure that Hong Kong does not fall out of line with major arbitration centres such as London or Singapore.[73]

Further, the appellant argued that even if the distinction exists, the objection was jurisdictional in nature because the relevant pre-arbitration requirement was a condition precedent.[74] However, the Hong Kong Court of Appeal held that:

> it [was] 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).[75]

In this connection, the respondent argued 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

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69 *C v D (HKCA)*, *supra* note 10 at [28]–[43].
70 *Ibid* at [44].
71 *Ibid* at [45].
72 *Ibid* at [45].
73 *Ibid* at [46].
74 *Ibid* at [52].
75 *Ibid* at [61].

tribunal, and thus judicial intervention in the arbitral tribunal's decision on such objection is excluded. The court held that it was not necessary to consider the merits of the presumptive approach that was advanced but considered it significant that the appellant's objection was not that the substantive claim could never be referred to arbitration or be arbitrated at all.[76]

The Hong Kong Court of Appeal also held, for the sake of completeness, that even if the distinction between jurisdiction and admissibility were to be disregarded, the court would still reach the same conclusion that the question of the fulfilment of the pre-arbitration procedural requirement was a dispute falling within the terms of the submission to arbitration. The court reasoned that the scope of the arbitration clause in question was drafted very widely and there was no reason to exclude disputes on whether pre-arbitration procedural requirements have been met.[77] In the Hong Kong Court of Appeal's view, the question of whether pre-arbitration procedural requirements have 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.[78]

IV. Should Singapore follow the same approach?

The court in *SL Mining* had cited the Singapore Court of Appeal in *BBA v BAZ* for the distinction between jurisdiction and admissibility.[79] In *BBA v BAZ*, the Court of Appeal also endorsed the "tribunal versus claim" test, which asks "whether the objection is 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 is defective and *should not be raised at all*)".[80]

The admissibility versus jurisdiction distinction, which had initially featured in the Singapore Court of Appeal's decision of *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho*,[81] an investor-state case concerning the exhaustion of local remedies, has since been applied in Singapore to non-investor state cases concerning time bars,[82] *res judicata*,[83] and subject matter arbitrability.[84] Indeed in *BBA v BAZ*, the Singapore High Court explained as follows:[85]

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76 *Ibid* at [60].
77 *Ibid* at [61].
78 *Ibid* at [63].
79 *SL Mining*, *supra* note 8 at [18]. See also *C v D (HKCFI)*, *supra* note 61 at [37]–[38].
80 *BBA v BAZ*, *supra* note 45 at [77].
81 [2019] 1 SLR 263 [*Swissbourgh*] at [207].
82 *BBA v BAZ*, *supra* note 45 at [74].
83 *BTN v BTP*, *supra* note 59 at [68].
84 *Westbridge Ventures II Investment Holdings v Anupam Mittal* [2021] SGHC 244 at [39].
85 *BBA v BAZ* [2018] SGHC 275 at [128].

> In determining what is considered a jurisdictional challenge under Art 34 of the Model Law, it is instructive to have regard to the difference between the concepts of jurisdiction of tribunal and admissibility of claim. The distinction is often considered in the context of investment treaty arbitration, but the concept of admissibility is found outside the International Centre for the Settlement of Investment Disputes Convention, and is relevant to non-investment treaty arbitrations as well…

To the extent that the recent approach in England and Hong Kong is adopted in Singapore, a case like *IRC* would likely be decided differently, in that the failure to comply with procedural requirements to arbitration would affect the admissibility of the claim, and not the jurisdiction of the tribunal. This is because the objecting party is fundamentally not asserting that the tribunal has no jurisdiction at all; instead, the objecting party is asserting that certain procedural requirements (such as amicable discussions or mediation) should have been complied with before the claim was brought. Applying the "tribunal versus claim" test, such a contention goes towards admissibility, and not jurisdiction, because the argument is not that the claim could not be brought to the particular forum seized, but rather that the claim should not be heard yet.[86] On that basis, a tribunal's ruling on the consequences of a party's failure to comply with such conditions is final, and would not be susceptible to *de novo* review by the courts.

This, however, should not be taken to mean that the admissibility versus jurisdiction divide is always clear or easy to draw.[87] For instance, while the failure of a claimant to exhaust local remedies has traditionally been regarded as a matter that renders the claim inadmissible,[88] the Singapore Court of Appeal in *Swissbourgh Diamond Mines v Kingdom of Lesotho* found in that case that the exhaustion of local remedies was a jurisdictional requirement because it was a pre-condition for the state's consent to arbitration.[89] The difficulty in distinguishing between jurisdiction and admissibility in certain cases has unsurprisingly led to commentators suggesting eradication of the divide, and shifting the focus to whether an objection is jurisdictional or non-jurisdictional. Specifically, Hwang and Lim have suggested that the jurisdictional versus admissibility distinction does not tell one *how* to ascertain whether a pre-arbitration requirement goes towards jurisdiction or admissibility. In their view, instead of asking whether a pre-arbitration requirement is procedural, aspirational, or mandatory, one should interpret the dispute resolution clause in

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[86] Jan Paulsson, "Jurisdiction and Admissibility" in Gerald Aksen *et al*, eds, *Global Reflections on International Law, Commerce and Dispute Resolution* (France: ICC Publishing, 2005) at 616–617.

[87] *Ibid* at 603, citing *Methanex Corporation v United States of America,* Partial Award on Jurisdiction and Admissibility, 7 August 2002, 7 ICSID Reports 239 at 271; see also Harshal Morwale & Mohamed Elnaggar, "The Curious Case of Annulment of Jurisdictional Award in the UAE: Jurisdiction, Admissibility and Practical Considerations" (2022) 2 NUJS Journal on Dispute Resolution 36.

[88] *Swissbourgh*, *supra* note 81 at [206], citing Chittaranjan Felix Amerasinghe, *Local Remedies in International Law*, 2d ed (United Kingdom: Cambridge University Press, 2004) at 294; *The Panevezys-Saldutiskis Railway Case (Estonia v Lithuania)* [1939] PCIJ (ser A/B) No 76 at 22; *Interhandel Case (Switzerland v United States of America)* Preliminary Objections [1959] ICJ 6 at 27. See also *RosInvestCO UK Ltd v The Russian Federation* SCC Case No V079/2005, Award on Jurisdiction (1 October 2007) at [153].

[89] *Swissbourgh*, *ibid* at [209].

question, looking at, *inter alia*, the ordinary meaning of the clause in light of its context, object and purpose.[90]

It is agreed that the starting point of analysis must be to undertake a proper construction of the dispute resolution clause in question. Accordingly, if the clause expressly provides that failure to abide by a pre-arbitration requirement means that the tribunal does not have jurisdiction, the agreement of the parties should be respected. The difficulty, however, is that most clauses often do not state the importance or consequences of a failure to meet any pre-arbitration requirement, and there is typically little negotiation over the clause in question. The task of contractual interpretation is therefore a formidable challenge.

It is suggested here that, as a practical approach, in the absence of language or evidence that parties intended non-fulfilment of a pre-arbitration requirement to negate the tribunal's jurisdiction, the Singapore courts should not automatically assume that to be the case (as appears to have done in *IRC*). Instead, in interpreting the dispute resolution clause in question, the Singapore courts should (as the respondent in *C v D* argued) presume that, in the absence of language or evidence to the contrary, parties have intended pre-arbitration requirements to be part of the overall dispute resolution procedure culminating with arbitration as the "final" tier. These requirements typically involve issues concerning timing of the arbitration, such as cases involving (i) a claim that has been submitted for arbitration before a "cooling off" period has fully elapsed (*SL Mining*); or (ii) a claim that has been submitted for arbitration before amicable discussions or mediation take place (*NWA*; *C v D*). In the absence of language or evidence to the contrary, the Singapore courts should presume that commercial parties have intended the arbitral tribunal (as the final tier in the dispute resolution clause) to be a one-stop shop to resolve all disputes leading up to the arbitration itself.[91] In the absence of language or evidence to the contrary, one should presume that issues concerning the non-fulfilment of pre-arbitration requirements should be decided by the arbitral tribunal.

In this connection, the practical guidance that can be gleaned from *NWA* is noteworthy. If a tribunal is faced with a dispute in which a party has not complied with certain requirements to arbitration, and the non-compliance can be overcome, a tribunal could consider granting a stay of the arbitration to enable the parties to comply with those requirements.[92] In the court's view, this finds support in section 9(2) of the Arbitration Act 1996 (UK), which provides that "[a]n application [to stay legal proceedings in favour of arbitration where the parties have agreed to arbitrate] may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures".[93] What section 9(2) evinces is that the English courts will enforce the parties' intention to have disputes

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[90] Michael Hwang & Si Cheng Lim, "Chapter 16: The Chimera of Admissibility in International Arbitration" in Neil Kaplan & Michael J. Moser, eds, *Jurisdiction, Admissibility and Choice of Law in International Arbitration* (The Netherlands: Kluwer Law International, 2018) at 265–288.

[91] See *SL Mining*, *supra* note 8 at [14].

[92] *NWA v NVF*, *supra* note 9 at [51], citing Chartered Institute of Arbitrators, "Jurisdictional Challenges" (International Arbitration Practice Guideline, 2015) <https://www.ciarb.org/media/4192/guideline-3-jurisdictional-challenges-2015.pdf>. See also Morwale & Elnaggar, *supra* note 87 at 40.

[93] *NWA v NVF*, *ibid* at [58], citing Arbitration Act 1996 (c 23) (UK).

referred to arbitration even though they have also agreed that another dispute resolution mechanism, such as mediation, should first be exhausted.[94]

In the Singapore context, whilst there is no equivalent of section 9(2) of the Arbitration Act 1996 (UK), section 6(2) of the IAA allows the court to grant a stay upon such terms or conditions as it thinks fit. The guidance in *NWA* that a court or tribunal could consider granting a stay (as the case may be) can be applied to a case like *Heartronics Corporation v EPI Life Pte Ltd*.[95] In that case, the Singapore High Court refused to grant a stay of court proceedings in favour of arbitration because, in its view, the first defendant had committed a repudiatory breach of the arbitration agreement by conveying that it had no interest in performing its obligation under the relevant med-arb clause to participate in mediation.[96] The first defendant delayed matters, failed to pay the relevant fees for mediation, and alleged that it had cash-flow issues which were not substantiated. Under those circumstances, the court held that the first defendant's repudiatory breach was accepted by the plaintiff, thereby rendering the med-arb clause inoperative.[97]

However, *Heartronics* could arguably have been handled differently. In the face of an apparent failure by the first defendant to satisfy a pre-arbitration requirement, the court could have granted a stay of court proceedings *simpliciter*, and let the *tribunal* decide the consequences of the first defendant's failure to participate in mediation.

That a stay in favour of arbitration should be ordered was the outcome of a recent New South Wales Supreme Court decision in *WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (No 2)*.[98] In that case, the multi-tiered dispute resolution clause required negotiation, then expert determination, then arbitration. The court held that failure to complete preliminary steps in a multi-tiered dispute resolution clause did not make the clause "inoperative" for the purposes of Article 8 of the New South Wales Commercial Arbitration Act 2010 (which is *in pari materia* to Article 8 of the Model Law). The court explained that finding the clause "inoperative" would undermine the object of the New South Wales Commercial Arbitration Act, depart from the interpretation of the term "inoperative" more widely, and enable a party to bypass their contractual bargain to submit their disputes to arbitration by commencing proceedings before all preliminary steps have been completed. Accordingly, a stay in favour of arbitration was granted by the court.[99]

Even though the case of *Heartronics* featured a plaintiff that itself had tried to comply with the pre-arbitration requirements (as distinct from a case where the plaintiff sought to bypass those requirements), it is arguable that the consequences of the defendant's refusal to participate in the pre-arbitration mediation process should have been referred to arbitration. After all, there was no evidence that the defendant was not prepared to *arbitrate* the dispute. The tribunal, in turn, could

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94 *NWA v NVF*, *ibid* at [58].
95 [2017] SGHCR 17.
96 *Ibid* at [153]–[169].
97 *Ibid* at [168]–[169].
98 [2022] NSWSC 505.
99 *Ibid* at [146].

have ordered a stay of the arbitration for the parties to attempt mediation first. Alternatively, the court could have granted a stay of the court proceedings on the condition that the defendant seeking the stay participate in mediation (followed by arbitration if mediation is unsuccessful). Such an approach arguably better gives effect to the objective intention of the parties in choosing arbitration as part of the arb-med clause to resolve their dispute, instead of finding that the clause in question was inoperative.[100]

[100] *NWA v NVF*, *supra* note 9 at [34]. See also Born, *International Commercial Arbitration*, *supra* note 1 at 306 ("Even where an agreement provides for arbitration only after a lengthy process of other dispute resolution mechanisms, it still remains an arbitration agreement. Arbitration delayed is not, so to speak, not arbitration.").