# JURISDICTION, ADMISSIBILITY AND ESCALATING DISPUTE RESOLUTION AGREEMENTS

## *C v D*

The distinction between issues of jurisdiction and admissibility has long been a challenge for courts dealing with arbitration agreements. The decision of the Hong Kong Court of Appeal in *C v D*[1] is an important landmark which clarifies that objections based on an alleged failure to complete pre-arbitration steps do not necessarily affect the jurisdiction of a tribunal. Nevertheless, the Court's confusion as to how to distinguish between jurisdiction and admissibility shines a light on the problems that are inherent in that distinction, and shows the difficulties of applying the distinction to any given set of facts.

The underlying dispute between the parties concerned a contract for the procurement and operation of satellites. Clause 14 was a dispute resolution clause which provided:

> [14.2] **Dispute Resolution.** The Parties agree that if any controversy, dispute or claim arises between the Parties out of or in relation to this Agreement, or the breach, interpretation or validity thereof, the Parties shall attempt in good faith promptly to resolve such 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. […]
>
> [14.3] **Arbitration**. If any dispute cannot be resolved amicably within sixty (60) Business days of the date of a Party's request in writing for such negotiation, or such other time period as may be agreed, then such dispute shall be referred by either Party for settlement exclusively and finally by arbitration in Hong Kong at the Hong Kong International Arbitration Centre … in accordance with the UNCITRAL Arbitration Rules in force at the time of commencement of the arbitration […]

A dispute arose concerning the content of transmissions, resulting in written correspondence between the parties. On 24 December 2018, the CEO of D sent a letter to C alleging a breach of the contract and stating its willingness to enter into negotiations. On 7 January 2019, the legal representatives of C responded, but neither party referred the dispute to their respective CEOs for negotiation. D issued a notice referring the dispute to an arbitral tribunal ("the Tribunal"), which found that it had jurisdiction over the dispute notwithstanding the failure to refer the dispute to the parties' CEOs. According to the Tribunal, only the first sentence of cl.14.2 was mandatory, and had been satisfied by the correspondence between the parties. Referring the dispute to the CEOs of the parties for negotiation was considered optional. The Tribunal proceeded to issue a partial award in favour of D.

The issue before the Court of Appeal was the interpretation of s.81 of the Arbitration Ordinance, which incorporates in full Art.34 of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"). Article 34 of the Model Law can be found in arbitration legislation around the world and has influenced legislation in other jurisdictions, including s.67 of the English Arbitration Act 1996. Article 34(2)(a)(iii) of the Model Law provides that an award may be set aside if it "deals with a dispute not

1. [2022] HKCA 729.

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contemplated or not falling within the terms of the submission to arbitration […]". The Hong Kong Court of First Instance had held that C's objection to the Tribunal's award went to the admissibility of the claim rather than the jurisdiction of the Tribunal, and was therefore for the Tribunal alone to determine.[2]

C appealed from the decision of the Court of First Instance on three grounds. First, C argued that the judge erred in holding that C had failed to show that the Tribunal's award had dealt with a dispute which did not fall within the "terms of the submission to arbitration" under Art.34(2)(a)(iii). Under this ground C argued that the distinction between admissibility and jurisdiction ought not to be followed, and in any case that its challenge was jurisdictional in nature. Secondly, C argued that the court below was wrong to understand Art.34(2)(a)(iv) of the UNCITRAL Model Law to refer only to the way in which the arbitration was conducted and not the contractual procedures preceding the arbitration. Thirdly, C argued that the judge below therefore should have determined whether the pre-condition had been fulfilled. The Court of Appeal rejected C's first argument, and found that this made it unnecessary to consider its second and third arguments.

Despite the lack of any reference to a distinction between issues of jurisdiction and admissibility in Art.34-style provisions, the court in *C v D* found this distinction to be highly relevant to the dispute before it. After finding support for the distinction in both academic commentary and case law of leading arbitral jurisdictions,[3] the court found that the distinction informed the "*construction and application*"[4] of the provision. The court offered a number of justifications for its approach, including the jurisprudence of other jurisdictions and the efficient resolution of disputes.[5] The primary justification, however, was the presumption articulated by Lord Hoffmann in the House of Lords decision in *Fiona Trust & Holding Corporation v Privalov* that rational businessmen "are likely to have intended any dispute arising out of their relationship […] to be decided by the same tribunal".[6]

Given the broad acceptance of the distinction between issues of jurisdiction and admissibility, it is hardly surprising that it was followed by the Court of Appeal. However, the attempt to rely on the judgment in *Fiona Trust* in support of the distinction is misplaced. It is admittedly rare to find a judicial decision on arbitration agreements which does not refer to *Fiona Trust*, and reference to the decision can be found in other judgments considering the distinction between jurisdiction and admissibility.[7] However, caution must be exercised to avoid Lord Hoffmann's statement being treated as capable of legitimising any statement relating to modern arbitration law. The Court of Appeal did not explain why the *Fiona Trust* presumption was relevant to its decision, and it is difficult to understand what it had in mind. When making the relevant remark, Lord Hoffmann was discussing the correct way to interpret the substantive scope of arbitration agreements. The presumption

2. *C v D* [2021] HKCFI 1474.
3. *C v D* [2022] HKCA 729, [28–43].
4. *Ibid*, [45] (emphasis in original).
5. *Ibid*, [46].
6. *Ibid*, [46], quoting from *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40; [2008] 1 Lloyd's Rep 254; [2007] Bus LR 1719, [13].
7. *Republic of Sierra Leone v SL Mining* [2021] EWHC 286 (Comm); [2021] Bus LR 704, [20].

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leads to the conclusion that arbitration clauses should be interpreted broadly unless the parties indicate otherwise; and, in the absence of evidence of a contrary intention, ousts the jurisdiction of the court to determine the dispute. The presumption does not relate to the procedural question whether there is a distinction between jurisdiction and admissibility, or purport to offer any guidance as to whether the court or the tribunal should have the final say on such matters. Indeed, the distinction was not mentioned in the judgment in *Fiona Trust* at all. Adopting a broader understanding of the presumption in *Fiona Trust* could have far-reaching consequences not considered in *C v D*. It could, for example, lead to courts adopting a very broad understanding of admissibility, as doing so would reduce the scope for judicial interference with tribunal findings. Further, this broader understanding of the presumption could also result in courts taking an extremely deferential approach to a tribunal's view on jurisdictional issues, or even lead to the conclusion that the courts of the seat have no role in reviewing the jurisdiction of a tribunal at all.

The Court of Appeal then considered C's argument that, in any case, its objection that that the dispute had not been referred to the CEOs of each party went to the jurisdiction of the Tribunal. The nature of similar objections has been the source of disagreement between first instance courts in Model Law jurisdictions, including in the English courts.[8]

The Court of Appeal rejected C's argument, explaining that in its view "[t]he 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".[9] The Court of Appeal found that C's objection went to the admissibility of the claim rather than the jurisdiction of the Tribunal. This, the Court said, was because C's objection was "only that the reference to arbitration was premature" and hence "targeted 'at the claim' instead of 'at the tribunal'".[10] No view was expressed on the argument advanced by D that there should be a presumption that an objection alleging a failure to comply with a pre-arbitration procedural requirement goes to admissibility. The Court also explained that it would have reached the same view even if the distinction between jurisdiction and admissibility was disregarded. Relying again on the "one-stop shop" presumption in *Fiona Trust*, the Court held that the dispute on whether pre-arbitration procedural requirements had been complied with fell within the scope of the arbitration agreement in cl.14.[11]

The Court's reasoning here is notable for four reasons. First, despite heavily emphasising the importance of the arbitration agreement in determining whether an objection relates to jurisdiction or admissibility, the Court's analysis suggests it is possible to resolve the dispute without looking to the arbitration agreement at all. The primary focus of the Court's reasoning is on the nature of C's objection, not on the parties' agreement. The proper construction of the arbitration agreement was considered only as an independent and alternative reason to dismiss C's argument.

Secondly, in emphasising both the importance of the arbitration agreement and the nature of the objection, the Court created two potentially competing visions of

8. Cf *Republic of Sierra Leone v SL Mining* [2021] EWHC 286 (Comm); [2021] Bus LR 704, [20] and *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2014] EWHC 2104 (Comm); [2014] 2 Lloyd's Rep 457; [2015] 1 WLR 1145, [73].
9. *C v D* [2022] HKCA 729, [57].
10. *Ibid*, [60].
11. *Ibid*, [61–63].

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admissibility. Whilst the former is subjective and depends entirely on what the parties have agreed, the latter is objective and depends on the nature of the objection. Whilst these two visions led to the same outcome on the facts of *C v D*, it is possible to envisage circumstances in which they lead to conflicting conclusions. Imagine, for example, that the arbitration clause had stated that the parties "must" refer any dispute to negotiation between their respective CEOs before referring it to arbitration. Following the subjective approach would likely lead to the conclusion that the issue is jurisdictional due to the use of mandatory language, whereas the objective approach would consider the issue to go to admissibility as it relates to the prematurity of the claim rather than the tribunal itself. Yet the Court of Appeal's reasoning gives no way to resolve this conflict. In its judgment the Court of First Instance seems to have favoured the objective view as the default, but subject to an exception where the parties indicate that pre-conditions go to the tribunal's jurisdiction.[12] This seems to be reflected in D's argument that there should be a presumption that such objections relate to admissibility. However, it is unclear whether this approach survives the Court of Appeal's judgment. The initial emphasis on contractual interpretation indicates that the Court of Appeal may not share the view of that courts should follow the objective view as a default.

Thirdly, the reliance on the *Fiona Trust* "one-stop shop" presumption in the Court's "alternative" reasoning is problematic. According to the Court, "[t]he clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction".[13] Yet the question whether an issue is one of jurisdiction or admissibility has no bearing on whether the tribunal may make a finding; indeed, the widely recognised "competence-competence" principle encourages tribunals to make jurisdictional findings.[14] Rather, the question relevant to the distinction between jurisdiction and admissibility is whether *courts* should consider whether a pre-condition has been complied with. As above, it is not clear how *Fiona Trust*, a case concerned with the substantive jurisdiction of tribunals, is relevant to this issue.

Finally, the analysis reveals a potential challenge to the value and coherence of the objective view of jurisdiction and admissibility. As noted by Lord Hoffmann in *Fiona Trust*,[15] the jurisdiction of arbitral tribunals is based on the consent of the parties. Yet compliance with pre-conditions may have an important bearing on a party's consent to arbitration. It is therefore unclear why compliance with such pre-conditions should not also be considered an issue of jurisdiction which is reviewable by the courts. As suggested by the Court of Appeal in its alternative analysis, the issue could be dealt with simply by asking whether compliance with a pre-condition was relevant to a party's consent to arbitration.[16]

*C v D* offered the rare opportunity for an appeal court to grapple with the distinction between issues of jurisdiction and admissibility. Whilst the decision provides some

12. *C v D* [2021] HKCFI 1474, [52(5)].
13. *C v D* [2022] HKCA 729, [62].
14. Lord Collins of Mapesbury (ed.), *Dicey, Morris & Collins on the Conflict of Laws*, 15th edn (London, 2012), [16.014].
15. *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40; [2008] 1 Lloyd's Rep 254, [5].
16. *C v D* [2022] HKCA 729, [61–63].

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certainty to those who are party to a contract containing a similar dispute resolution clause (of which there will be many), it does not satisfactorily deal with a number of broader issues such as the relevance of party agreement. More significantly, the reliance of the decision in *Fiona Trust* shows continuing confusion as scope of the "one-stop shop" presumption.

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## THE LAW GOVERNING WHETHER AN ARBITRATION AGREEMENT BINDS A NON-PARTY

*Lifestyle Equities v Hornby Street*

The question of what law governs the issue of whether someone is a party to an arbitration agreement, whilst controversial amongst commentators, is settled in the case law. *Kabab-ji v Kout Food Group*,[1] confirms that the law that would govern the arbitration agreement if that person were party to it—called the "putative governing law"—applies.

Less clear is the answer to a similar, but conceptually distinct, question. What law governs the issue of whether a non-party is bound by an arbitration agreement? This question arose in *Lifestyle Equities CV v Hornby Street (MCR) Ltd*,[2] where a non-party was alleged to be bound by an arbitration agreement by virtue of having been assigned trademarks that were (allegedly) qualified by the arbitration agreement. It divided the Court of Appeal. The majority (Lewison LJ, with whom Macur LJ agreed) held that a court should apply the law governing the arbitration agreement to determine the issue of whether the non-party was bound. Snowden LJ dissented, reasoning that the law governing the trademarks should apply instead. This comment discusses both approaches. It argues that Snowden LJ's approach is preferable, but proposes a way to defend the majority's conclusion.

The essential facts were these. Two claimants, Lifestyle Equities ("LE") and Lifestyle Licensing ("LL"), sued eight defendants in England. The claimants alleged that the defendants had infringed several English-registered trademarks relating to the Beverly Hills Polo Club logo (the "Trademarks"). The eighth defendant was a Californian entity named Santa Barbara Polo & Racquet Club ("SBPC").

The Trademarks were originally owned by another Californian company, BHPC Marketing. A similar trademark dispute had arisen between SBPC and BHPC Marketing in the 1990s. That dispute resulted in a compromise under a settlement agreement (the "1997 Agreement"). The 1997 Agreement contained:

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1. *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48; [2022] 1 Lloyd's Rep 24 [2021] Bus LR 1717, [27].
2. [2022] EWCA Civ 51; [2022] 2 Lloyd's Rep 68.

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