Module 6:
Jurisdiction of the Arbitration Tribunal

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1. The Basics of an Arbitration Agreement
2. Grounds for challenging jurisdiction
3. Recent Example

Jurisdiction of The Tribunal

- Jurisdiction of arbitral tribunal is foundation of its mandate and power to decide dispute
- Departure from normal forum for resolving legal disputes
- Crucial that parties have agreed to arbitrate dispute
- Parties confer jurisdiction to tribunal by their arbitration
- agreement and renounce right to litigate in state court
- Courts respect parties' choice to arbitrate and will decline to exercise jurisdiction

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Arbitration Agreement and Choice of Law

- What is an Arbitration Agreement?
  - Art 7 of UNCITRAL Model Law/ Section 19 of Arbitration Ordinance
  - An agreement by parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement
  - Agreement must be in writing (i.e. recorded in a medium in or outside of the contract itself)
  - Can be by exchange of pleading so long as the assertion of an agreement is not denied.
  - S19(3) AO: a reference to a precedent or form containing an arbitration clause which is not part of the contract is binding

Choice of Law

- Severability – Arbitration Agreement separate and independent from the rest of the contract.
- *Kockner Pataplast v Advance Technology HK Co Ltd [2011] 4 HKLRD 262*
- *Seat of Arbitration: Shanghai – No express choice of law by parties*
- *Issue:* **whether an agreement providing that "arbitration proceedings shall be held in accordance with the arbitration rues of the ICC " was a valid clause under the governing law?**
- PRC did not allow ad hoc arbitration with Mainland China – reference to ICC rules not enough under PRC law as sufficient to designate the ICC as the administering body for Arbitration

- Saunders J:

- Where the parties have expressly stipulated the governing law of an arbitration agreement, the court would follow parties' choice.
- Where no express choice has been made – implicitly chosen the law of the seat of arbitration as the governing law of an arbitration agreement.
- Not a matter of course – needs to construe the arbitration agreement in the context of the contract as a whole to discern what law the parties must have intended to govern the arbitration agreement.

- Here, the Court held that it would be odd to assume that PRC law governs – as that would mean that parties intended to the arbitration agreement to be null and void.

- Party autonomy should be the guiding principle.
- There is no presumption that the law governing the substantive contract is the same as law that governs the validity of the arbitration agreement.

Fili Shipping Co Ltd & Others v Premium Nafta Products Ltd & Others [2007] UKHL 40 :

- Lord Hoffman at 40:-

- Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.

- In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. … The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.

- In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The 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." (Emphasis added)

Challenges to Jurisdiction

- 4 usual arguments:-

1. Arbitration agreement is a nullity because parties never agreed to arbitrate in the first place

2. Although parties agreed to arbitrate, the dispute does not fall within the scope of the parties' arbitration agreement

3. Condition precedent not yet met (e.g. negotiation/mediation)

4. Agreement vitiated by mistake/misrep/illegality

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Kompetenz-Kompetenz

- Doctrine borrowed from German courts allowing tribunal to determine its own jurisdiction
- Severed arbitration agreement may still remain valid even if validity or existence of main contract is successfully challenged
- Tribunal has jurisdiction to judge effects of invalidity of main contract
- Challenge to jurisdiction will not be heard by the Hong Kong Court before the Tribunal has a chance to decide – beware of indemnity costs for starting litigation before arbitration
- *A v R (Arbitration: Enforcement)* [2009] 3 HKLRD 389

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Incorporated Owners of Hamden Court v Mega Miles Construction Co Ltd HCCT 32/2014

- To the extent that the earlier decisions of the Courts are based on the premise that an arbitrator cannot make a binding award as to the initial existence of the agreement from which his jurisdiction is said to derive, it is relevant and important to bear in mind the doctrines of ***Kompetenz-Kompetenz*** and separability, given effect by Article 16 (1) of the Model Law and s 34 of the Ordinance. Article 16 (1) provides that the arbitral tribunal may rule on its own jurisdiction, "including any objections with respect to the existence or validity of the arbitration agreement". For that purpose, the arbitration clause which forms part of a contract "shall be treated as an agreement independent of the other terms of the contract", such that a decision that the contract is null and void "shall not entail ipso jure the invalidity of the arbitration clause"

Kompetenz-Kompetenz (cont'd)

- Arbitration proceedings continue while objecting party begins court action to determine tribunal's jurisdiction
- Possible that tribunal will issue its award before court decides whether arbitral tribunal had jurisdiction to make it
- Hong Kong is "pro-arbitration" with limited court intervention

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- Section 20(1) Arbitration Ordinance:-

Article 8 of the UNCITRAL Model Law, the text of which is set out below, has effect—

“Article 8. Arbitration agreement and substantive claim before court

(1)A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2)Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.”.

- The usual approach is for the court to stay the litigation pending arbitration unless the court finds that the arbitration agreement is null, void, inoperative or incapable of being performed

- Section 34(1) of Arbitration Ordinance:-

Article 16 of UNCITRAL Model Law (Competence of arbitral tribunal to rule on its jurisdiction)

(1)Article 16 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(5)—

“Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1)The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2)A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3)The arbitral dtribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.”.

- Two approach to review:-

1. A Complete Re-Hearing with New Evidence; or

2. A review of the Tribunal's reasoning on the material placed before it to see whether the decision is one that no reasonable tribunal could have reached

- Makes more sense to conduct a re-hearing where the allegation is that the arbitration agreement is a nullity because parties never intended to arbitrate, this is because in this situation the tribunal's ruling carries no weight on the Court

- In all other situation (i.e. scope of dispute, condition precedent not met and agreement vitiated), a review approach is better because parties all accept that an agreement to arbitrate exists, and have thereby agreed to live by the tribunal's reasoning

C v D [2021] HKCFI 1474

- Admissibility of claim vs Jurisdiction of arbitral tribunal
- Fact:
- Companies C and D have a dispute arising from satellites operations
- A partial award on jurisdiction was made on 21 April 2020. C applied to the HK Court for declaration that the partial award was made without jurisdiction

- Parties entered into an agreement for development and building of a satellite, which contains an arbitration agreement:-

"Material Default by either Party. In the event that either Party believes that the other Party is in material default of its obligations under this Agreement, such Party shall give a written notice to the defaulting Party in writing requiring remedy of the default (the 'Material Default Notice'). If defaulting Party fails to remedy the default within thirty (30) Business Days of receipt of the Default Notice, the Parties shall resolve the dispute by referring to the procedure set forth at Section 14.2."

- "SECTION 14
- GOVERNING LAW AND DISPUTE RESOLUTION

14.1 Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of Hong Kong, without regard to the principles of conflicts of law of any jurisdiction.

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 depute 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. The Chief Executive Officers (or their authorized representatives) shall meet at a mutually acceptable time and place within ten (10) Business Days of the date of such request in writing, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute through negotiation.

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 ('HKIAC') in accordance with the UNCITRAL Arbitration Rules in force at the time of commencement of the arbitration (the 'Rules').

(a) There shall be three (3) arbitrators. Each Party shall appoint one arbitrator and the arbitrators thus appointed shall appoint the third arbitrator who shall act as the Chairman.

...

(c) The arbitration shall be conducted in English. The arbitrators shall decide any such dispute or claim strictly in accordance with the governing law specified in Section 14.1. Judgment upon any arbitral award rendered hereunder may be entered in any court having jurisdiction, or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be.

...

(e) Any award made by the arbitration tribunal shall be final and binding on each of the Parties that were parties to the dispute. To the extent permissible under the relevant laws, the Parties agree to waive any right of appeal against the arbitration award."

- Dispute arose, CEO of Company D issued a letter to the board of Company C. the letter did not strictly comply with Clause 14.2 (letter was not addressed to the C.E.O).

- Company D issued a notice of arbitration on 18 April 2019. Company C contends that the tribunal has had no jurisdiction because of the absence of a request for negotiations under Clause 14.2 and 14.3.

- Despite lack of request, parties negotiated on a WP basis

- Tribunal was convened and decided to deal with the dispute to jurisdiction together with liability in one award.

- the Tribunal held that the first sentence in clause 14.2 of the Agreement mandatorily requires the parties to attempt in good faith to resolve any disputes by negotiation, but the reference of disputes to the respective CEOs mentioned in the second sentence of clause 14.2 is optional. It held that the condition in clause 14.3 that the dispute cannot be resolved within 60 business days of a party's request in writing for such negotiation refers to a request for negotiation under the first sentence of clause 14.2, and that the condition had been fulfilled by Company D's letter of 24 December 2018. The tribunal therefore rejected Company C's objection, and proceeded to find that Company C had breached clause 4.7 of the Agreement and had to pay damages in an amount to be determined in the second phase of the arbitration.

- It is common ground that a request for negotiation has to be made and arbitration should start if the dispute is not resolved within 60 days.

- Company C contends that the condition refers to the giving of a written notice to have the dispute referred to the CEOs for resolution, as referred to in the second sentence of clause 14.2.

- Company D, in contrast, contends that the condition is satisfied by a written request to negotiate in good faith, as referred to in the first sentence of clause 14.2, and that it had given the requisite request by its letter of 24 December 2018.

- Company D contends that the question of whether the condition precedent had been fulfilled is a question of "admissibility" rather than "jurisdiction", and as such the court should not interfere with the arbitral tribunal's decision on that question.

(1) The primary issue is: Is the question whether Company D complied with the dispute resolution procedure set out in the Agreement a question of the admissibility of the claim, or a question of the tribunal's jurisdiction, and does that question fall within section 81 of the Ordinance?

(2) Only if the primary question is answered in Company C's favour do the following two questions arise: What is the condition precedent to arbitration on the proper construction of the Agreement? And was the condition fulfilled by Company D's letter of 24 December 2018?

Section 81 of Arbitration Ordinance in summary:

Court can only set aside an award if

(1) A party was under some incapacity, or the agreement is not valid under the law to which the parties have subjected it;

(2) Lack of proper notice of arbitration;

(3) Matter beyond the scope of the agreement;

(4) Composition of tribunal beyond the agreement

- Company D's objection (i.e. Section 14 procedure not followed) is a question of admissibility. It is not a question for the Court under Section 81 of the AO and the Tribunal has exclusive jurisdiction to deal with the question.

Para 30 of the Judgment:

Mills, Arbitral Jurisdiction, in Oxford Handbook on International Arbitration (OUP 2018), the author states:

" … the question of jurisdiction concerns the power of the tribunal. The question of admissibility is related to the claim, rather than the tribunal, and asks whether this is a claim which can be properly brought. In particular, it considers the question of whether there are any conditions attached to the exercise of the right to arbitrate which have not been fulfilled. Those conditions might be, for example, a limitation period applicable to the right to commence arbitration, or a requirement to mediate and/or negotiate before arbitral proceedings may be commenced.

The most important consequence of the distinction between issues of jurisdiction and admissibility is that the latter are usually considered not to provide a challenge to the general authority of the parties' agreement to arbitrate. As a result, while a tribunal's decision on jurisdiction cannot be decisive concerning whether such jurisdiction exists …, The determination of a tribunal on questions of admissibility should generally be considered decisive … As a further consequence of this, the general approach is that … an arbitral tribunal should be considered to have the exclusive authority to consider questions of admissibility — that these are questions which fall within the purview of the agreement to arbitrate, whose validity is itself not in question, and should not be addressed by a court."

Born, International Commercial Arbitration (pg 999-1000)

The rationale for this presumption is that requirements for cooling off, negotiation or mediation inherently involve aspects of the arbitral procedure, often requiring interpretation and application of institutional arbitration rules or procedural provisions of the arbitration agreement. Equally important, the remedies for breach of these requirements necessarily involve procedural issues concerning the timing and conduct of the arbitration. In both cases, these issues are best suited for resolution by arbitral tribunal, subject to minimal judicial review, like other procedural decisions.

- Similarly, parties can be assumed to desire a single, centralised forum (a 'one-stop shop') for resolution of their disputes, particularly those disputes regarding the procedural aspects of their dispute resolution mechanism. Fragmenting resolution of procedural issues between national courts and the arbitral tribunal produces the risk of multiple proceedings, delays and expense, inconsistent decisions, judicial interference in the arbitral process and the like. The more objective, efficient and fair result, which the parties should be regarded as having presumptively intended, is for a single, neutral arbitral tribunal to resolve all questions regarding the procedural requirements and conduct of the parties' dispute resolution mechanism."

- The Singapore Court of Appeal in *BBA & Others v BAZ* [2020] SGCA 53 , approving the views of Paulsson, Merkin and Flannery (among others) as referred to above, considered that the "tribunal versus claim" test underpinned by a consent-based analysis should apply for purposes of distinguishing whether an issue goes towards jurisdiction or admissibility. This test "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*)". The court concluded that a plea of statutory time-bar goes towards admissibility as it attacks the claim (see §§73-80). In BTN & Another v BTP & Another [2020] SGCA 105 , it was held, following *BBA*, that an arbitral decision on an objection based on the doctrine of res judicata should likewise be treated as a decision on admissibility, not jurisdiction (see §§68-71).

Para 42

Although, as pointed out in *Born* at p 998, the characterisation of contractual procedural requirements varies among different legal systems, it appears 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: *The Republic of Sierra Leone v SL Mining Ltd*, at §16; see also *Williams & Kawharu on Arbitration* (2nd ed 2017), p 246.

- The fact that a condition is regarded as going to admissibility rather than jurisdiction does not mean it is unimportant. What it does mean is that the arbitral tribunal has jurisdiction and may deal with the question as it sees fit. If it comes to the view that the earlier stages in a multi-tier dispute resolution clause have not been fulfilled, it can give effect to the contractual requirement by, for example, ordering a stay of the arbitral proceedings in whole or in part pending compliance with the clause, imposing costs sanctions, or even dismissing the claim outright as inadmissible. This approach has considerable advantages, for these clauses can be complex in their operation and the arbitral tribunal chosen by the parties' agreed mechanism will usually be well-placed to consider and determine what needs to be done having regard to commercial realities and practicalities including whether it would be futile to compel the parties to go through the motions.

Para 51

One of the objects of the Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense: section 3(1). Multi-tiered dispute resolution mechanisms are not uncommon. It would not be conducive to swift dispute resolution if controversies regarding procedural conditions such as that in the present case are regarded as jurisdictional questions, opening the way for duplicated arguments in court proceedings.

- On Company C's proposition that the arbitral procedure was not in accordance with the agreement of the parties:

Per Prof van den Berg wrote in The New York Arbitration Convention of 1958 at p 323:

" As far as the agreement on the arbitral procedure is concerned, which agreement is usually embodied in Arbitration Rules of a specific arbitral institution, such an agreement generally affords wide discretionary powers to arbitrators as to the conduct of the arbitral procedure. It therefore rarely happens that the arbitral procedure has not been conducted in accordance with the agreement of the parties."

- Challenge dismissed, indemnity costs awarded.

Duties and Powers of the Tribunal

Duties

- Mandatory obligations arbitrators are required to achieve
- Duties may come from:
  - Arbitration clause
  - Submission of an existing dispute to arbitration
  - Arbitration rules adopted by parties
  - Hong Kong Arbitration Ordinance

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Duties and Powers of the Tribunal (cont'd)

- Statutory duties in Hong Kong Arbitration Ordinance (S.46):
  - Parties must be treated with equality
  - Tribunal must be independent
  - Tribunal must act fairly and impartially and give parties reasonable opportunity to present their case
  - Tribunal must use appropriate measure to avoid unnecessary delay or expense
- Duties are mandatory and cannot be excluded by parties

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Duties and Powers of the Tribunal (cont'd)

- Powers
- Tools given to arbitrators for use in exercising their duties
- General powers accorded to arbitral tribunal in Arbitration Ordinance (S.56):
  - Ordering security for costs
  - Directing production of documents
  - Directing inspection and taking of samples from property
  - Directing that evidence be taken by affidavit
  - Ordering measures to inspect, preserve, sample property

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Duties and Powers of the Tribunal (cont'd)

- Arbitration Ordinance describes arbitrator's power to act as mediator even after proceedings have commenced (S.33)
- Information disclosed by parties during mediation is confidential, but if it fails to produce settlement, arbitrator must disclose to parties information deemed material to arbitration
- Fact that arbitrator has mediated cannot be grounds for removal if mediation fails (S.33(5))

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Q&A

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