Neutral Citation Number: [2021] EWHC 2666 (Comm)

Case No: CL-2020-000649

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2021

Before:

THE HONOURABLE MR JUSTICE CALVER

- -

Between:

(1) NWA
(2) FSY

Claimants

-and-

(1) NVF
(2) RWX
(3) KLB

Defendants

- -
- -

Alexander Goold (Direct Access Counsel) for the **First Claimant**
Lara Kuehl (Direct Access Counsel) for the **Second Claimant**
Jonathan D. C. Turner (Direct Access Counsel) for the **Defendants**

Hearing dates: Wednesday 29 September 2021

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 8 October 2021 at 10:30 am.

Mr Justice Calver :

The Issue before the court

1. This case raises the interesting question of whether the failure of a party to comply with a term of an arbitration agreement that the parties should first seek to mediate a settlement of their dispute before referring the dispute to arbitration results in the arbitral tribunal not having *jurisdiction* to hear the dispute at all (so as to be susceptible to challenge under section 67 of the Arbitration Act 1996 ("the Act")) or concerns only a challenge to the *admissibility* of the dispute, on which the tribunal's decision is final (and which does not fall within the scope of section 67 of the Act).

The relevant statutory provisions

2. The Claimants challenge, pursuant to section 67(1)(a) of the Act, the partial award of the sole arbitrator, Colm Ó hOisín SC ("Mr Ó hOisín SC") delivered on 7 September 2020 ("the Award"), and made in an arbitration between the parties, administered by the London Court of International Arbitration ("LCIA"), No. 194292 ("the Arbitration").

3. In the Award, Mr Ó hOisín SC decided that the agreement between the parties did not make mediation under the LCIA Mediation Procedure ("LCIA Mediation") a condition precedent to the commencement of an arbitration. He determined that failure to have done so in advance of the Arbitration did not go to jurisdiction; the clause requiring it was not sufficiently clear and certain to make it enforceable; and, in any event, it was arguable that the Defendants (Claimants in the Arbitration), were not in breach of it. He concluded that he had substantive jurisdiction, pursuant to his power to rule on that in Section 30(1) of the Act.

4. Before this court, the Claimants seek the setting aside and variation of the Award in whole or in part pursuant to sections 67(3)(b) and (c) of the Act.

Statutory framework

5. The applicable statutory framework is as follows:

   i) Section 82 of the Act defines 'substantive jurisdiction' as follows:

   > *"'substantive jurisdiction', in relation to an arbitral tribunal, refers to the matters specified in section 30(1)(a) to (c), and references to a tribunal exceeding its substantive jurisdiction shall be construed accordingly."*

   ii) Section 67 of the Act enables a renewed challenge to be made to the court of an arbitral tribunal's decision as to its own substantive jurisdiction (in the exercise

of its supervisory role over English-seated arbitrations in the international context):[1]

> *"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court-*
>
> *(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction;*
> *…*
> *(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order-*
>
> *(a) confirm the award,*
> *(b) vary the award, or*
> *(c) set aside the award in whole or in part."*

iii) Section 30 of the Act empowers, in the first instance, an arbitral tribunal to determine its own substantive jurisdiction:

> *"(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.*
> *…"*

iv) Section 1(c) of the Act provides that:

> *"(c) in matters governed by this Part the court should not intervene except as provided by this Part."*

Background to the dispute

6. The factual background to this dispute is as follows.

The Agreement

7. The dispute resolution clause applicable between the parties is contained in a written agreement dated 25 June 2007 ("The Agreement"). Although the Agreement was expressed to be a heads of agreement, at clause 1.2(a) it is provided that it is intended to be a legally binding agreement between the parties. The Second Claimant, the First Defendant and the Third Defendant were not stated to be parties to the Agreement (the latter two were only to be incorporated subsequently). Whether any of them became so or became liable thereunder, will be issues for the Arbitration, if it continues.

[1] Which is by way of re-hearing: *GPF GP S.a.r.l v The Republic of Poland* [2018] EWHC 409 (Comm), at [7] per Bryan J.

8. Pursuant to the terms of the Agreement, the parties to it were to reorganise their existing business dealings concerning patents and pending applications for patents of intellectual property developed, principally, by the First Claimant, but also the Second Defendant and others, for the display of life size, high resolution, 3D video holograms which are capable of seeming to appear on a stage and with which real people are able to appear to interact. The applications are various, from entertainment to commercial product launches to politics.

Dispute resolution clause

9. Clause 10.2 of the Agreement provided, in particular, as follows:

> *"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.*
> *…"*

10. Despite the submission of Mr Jonathan Turner for the Defendants that the relevant LCIA Mediation Procedure referred to in clause 10.2(a) is the Procedure effective 1 October 1999 ("the 1999 Mediation Procedure"), I consider that the relevant Procedure is in fact the LCIA Mediation Procedure effective 1 July 2012 ("the 2012 Mediation Procedure"). That is because the 1999 Mediation Procedure, which was the relevant Procedure in force when the Agreement was concluded on 25 June 2007, provides in its opening paragraph as follows:

> "*Where any agreement provides for mediation of existing or future disputes under the procedure or rules of the LCIA, the parties shall be taken to have agreed that the mediation shall be conducted in accordance with the following procedure (the "Procedure")* <u>*or such amended procedure as the LCIA may have adopted hereafter to take effect before the commencement of the mediation.*</u>*"* (emphasis added)

11. The 2012 Mediation Procedure is the amended procedure which the LCIA had adopted to take effect before the commencement of the mediation in this case, and accordingly that Procedure applies. For present purposes, the relevant provisions of that Procedure are as follows:

> ***"Article 1***

Commencing Mediation – prior existing agreements to mediate

1.1 Where there is a prior existing agreement to mediate under the Rules (a "Prior Agreement"), any party or parties wishing to commence a mediation shall send to the Registrar of the LCIA Court ("the Registrar") a written request for mediation (the "Request for Mediation"), which shall briefly state the nature of the dispute and the value of the claim, and should include, or be accompanied by a copy of the Prior Agreement, the names, addresses, telephone, facsimile, telex numbers and e-mail addresses (if known) of the parties to the mediation, and of their legal representatives (if known) and of the mediator proposed (if any) by the party or parties requesting mediation.

1.2 If the Request for Mediation is not made jointly by all parties to the Prior Agreement, the party requesting mediation shall, at the same time, send a copy of the Request for Mediation to the other party or parties.

1.3 The Request for Mediation shall be accompanied by the registration fee prescribed in the Schedule, without which the Request for Mediation shall not be registered.

1.4 Where there is a Prior Agreement, the date of commencement of the mediation shall be the date of receipt by the Registrar of the Request for Mediation and the registration fee.

1.5 The LCIA Court shall appoint a mediator as soon as practicable after the commencement of the mediation, with due regard for any nomination, or method or criteria of selection agreed in writing by the parties, and subject always to Article 8 of the Rules."

Request for arbitration

12. On 18 April 2019, the solicitors then acting for the Defendants sent to the LCIA a Request for Arbitration ("RFA"). In it, the Defendants' solicitors stated as follows:

> *"As set out in paragraph 5 of the request, the [Defendants] wish to commence the Arbitration as a matter of urgency and so request that this matter be expedited.*
>
> *Further the [Defendants] request that this Arbitration, once commenced, is immediately stayed prior to the constitution of the arbitral tribunal, to allow the parties to seek settlement of this dispute by mediation in accordance with the LCIA Mediation Procedure as required by clause 10.2(a) of the arbitration Agreement. The Claimants have accordingly requested the respondents' agreement to mediate on this basis."*

13. The RFA likewise, at paragraph 5.2, requested that once the Arbitration had been commenced, it was immediately stayed, prior to the constitution of a tribunal, to allow the parties to seek settlement of the dispute by LCIA Mediation as required by clause 10.2(b).

14. The terms of the Defendants' solicitors' letter to the Claimants of the same date, together with a further copy of the RFA, were to substantially similar effect as follows:

> ***"Request for Arbitration***
>
> *We enclose, by way of service upon you copies of the following, which we have today filed with the LCIA Registrar together with the registration fee:*
>
> *1. Copy covering letter to the LCIA Registrar;*
> *2. Request for Arbitration; and*
> *3. Bundle of Annexures A to F.*
>
> *Please acknowledge safe receipt.*
>
> ***Proposed mediation***
>
> *The Claimants wish to seek to settle this dispute by mediation in accordance with the LCIA Mediation Procedure as required by clause 10.2 (a) of the […] Agreement. We are therefore instructed to invite you to confirm by return that you are prepared to enter into a mediation to take place as soon as practicable and in any event within the next 30 days.*
>
> *As you will see from our covering letter to the LCIA Registrar, we have proposed that this arbitration is stayed to allow the proposed mediation to take place (assuming you are prepared to engage in such a mediation). In the event that you are not prepared to engage in mediation and/or the parties have not been able to settle their dispute by mediation, we intend to notify the LCIA Registrar after 30 days from the date of this letter that the stay should be lifted and that the Arbitral Tribunal should then be appointed in order that this arbitration may then proceed."*

15. By paragraph 17 of its letter to the parties of 25 April 2019, the LCIA invited the Claimants' comments on this proposal. This elicited no response from them.

16. It would appear that by around 20 June 2019, NWA had received the documents referred to in paragraph 14 above. FSY's evidence contained in paragraph 33 of her witness statement is that she was not served with them until 19 August 2019. That is disputed by the Defendants. However, whenever received, neither of the Claimants responded to the Defendants' offer, nor to the LCIA in response to its invitation to respond to the Defendants' proposal of mediation.

17. The LCIA sent a further letter dated 13 June 2019 with enclosures by courier and email to the parties, notifying them of the appointment on 12 June 2019 of Mark Vanhegan QC as the Sole Arbitrator in respect of the dispute. Again, FSY maintains that she did not receive this.

18. By email of 19 June 2019 addressed to Mark Vanhegan QC and copied to the LCIA and NWA, the Defendants stated that they intended to write to NWA and FSY in order to re-open the offer of mediation. The Defendants sent a further email to NWA on 20 June 2019 inviting him again to settle the dispute by mediation and stating that if he and FSY were prepared to engage in mediation, the Defendants would write to the Arbitrator requesting a stay for 30 days.

19. NWA responded by email dated 20 June 2019 by stating in particular that:

> *"With regards to the Mediation, given that Limitation*[2] *has passed, I do not feel that I should be part of the proceedings, nor do I accept that they are in any way valid. In the interests of being cooperative I'm willing to talk to the [Defendants], however I do not waive in any way my right to dispute Limitation and the validity of this case. I maintain that this Arbitration should not proceed on the bas[i]s of Limitation and I do not waive my right to defend myself on that bas[i]s…Kindly confirm that my legal right to raise a Limitation defence will not be compromised by agreeing to the Claimants' request for a stay to explore mediation."*

20. The First Defendant's in-house solicitor replied on the same date by email, and she stated:

> *"In relation to the offer of mediation, we confirm the offer was made in respect of Arbitration No 194292 only, which is the arbitration stated above, in respect of which the Arbitrator was recently appointed (on 12th June 2019). It is not for us to comment on the defences that you are able to raise."*

NWA thereafter refused to engage in any way with the proposal to mediate the dispute.

21. By email of 8 August 2019 addressed to the LCIA and copied to NWA, FSY and FSY's solicitor, the Defendants proposed mediation beginning on a date between 24 and 27 September 2019 at the International Dispute Resolution Centre rooms in London. FSY's solicitor replied by email dated 16 August 2019, by contending that FSY was not a party to the Agreement and was not bound by any of its clauses including the obligation to participate in any mediation.

22. The Defendants sent a further email of 18 August 2019 addressed to FSY's solicitor and copied to NWA and the LCIA, attaching copies of the letter to the LCIA of 18 April 2019 and the RFA. FSY accepts that she received this on 19 August 2019.

23. On 30 September 2019 Mr Ó hOisín SC was appointed as arbitrator in the LCIA Arbitration in place of Mr Vanhegan QC.

24. The Defendants offered mediation again through their counsel at a hearing before the Arbitrator on 28 February 2020. NWA and FSY did not respond to the offer.

25. It follows that the Defendants have repeatedly sought mediation in respect of the claims made in this Arbitration, but NWA and FSY have failed to engage with the proposal of mediation. NWA maintains that he has a limitation defence and accordingly refuses to mediate; FSY maintains that she has no obligation to participate in any such mediation at all by reason (she contends) of her not being a party to the Agreement. Ms Kuehl, counsel for FSY, realistically accepted in submissions that since FSY's contention has always been that she is not a party to the Agreement at all and is not a party to the dispute, she would never have agreed to mediate the dispute.

26. Despite their having no intention of seeking to resolve the dispute by mediation over the course of some two years now, the Claimants now contend that because the Defendants requested mediation at the same time as requesting arbitration and proposed that the Arbitration be stayed for 30 days before appointment of an arbitrator to allow

[2] This was a reference to an alleged defence that the claim as a whole is time barred.

the parties to seek to resolve the dispute by mediation, they did not "first seek settlement of the dispute by mediation", and so Mr Ó hOisín SC has no jurisdiction to hear the dispute at all. This is a highly unattractive stance to adopt. However, if it is correct as a matter of the proper construction of the arbitration agreement contained within clause 10.2 of the Agreement, the Claimants are nonetheless entitled to adopt it.

The tribunal's analysis

27. The tribunal's findings in relation to its own jurisdiction are at paragraph 162 of its Partial Award of Jurisdiction, made on 7 September 2020. The tribunal's detailed reasoning is at paragraph 120 and following, and can be summarised as:

    i) Clause 10.2(a) was not sufficiently clear and certain to be enforceable as a condition precedent (paragraphs 128-135 and 152-154).

    ii) In any event, the Claimants were arguably not in breach of clause 10.2(a) because they had made efforts (including by sending a covering letter concurrently with the RFA) to seek settlement by mediation (paragraphs 157-161).

    iii) To give "business efficacy" to clause 10.2(b), it should not be read literally (paragraphs 136-138 and 179-180). Clause 10.2(b) also did not contain a negative stipulation or injunction preventing a reference to arbitration until 30 days following commencement of mediation. Even if it did contain such a negative stipulation, and the period of time was sufficiently defined, it would not have been enforceable. Clause 10.2(b) could not be enforced if clause 10.2(a) was insufficiently clear to be enforced (paragraph 156).

Issues on this section 67 application

28. The first and central question for this court, as it appears to me, is whether the Defendants' alleged non-compliance with the requirement for prior LCIA Mediation is a matter merely affecting the admissibility of the claim or goes to the tribunal's substantive jurisdiction to determine the claim at all.

29. If the latter (i.e. it goes to the tribunal's substantive jurisdiction), then the court must determine the following further questions:

    i) Is the provision in the dispute resolution clause requiring prior LCIA Mediation (a) sufficiently certain to be enforced and/or (b) a condition precedent to any agreement to arbitrate?

    ii) If so, did the Defendants comply with those provisions or not?

    iii) If the Defendants did not so comply, what is the appropriate remedy for non-compliance?

30. If the former (i.e. it only affects the admissibility of the claim), then the issues set out in paragraph 29(i)-(iii) above will be matters for the arbitrator, and not the court to determine pursuant to section 67 of the Act.

Jurisdiction or admissibility?

31. It follows that, contrary to the Claimants' submissions, the appropriate course is for the court first to determine whether the Defendants' non-compliance with the requirement for prior LCIA Mediation is a matter merely affecting the admissibility of the claim or one going to the tribunal's substantive jurisdiction to determine the claim at all.

32. In interpreting the Agreement including clause 10.2, ordinary principles of contractual interpretation apply. The principles are, of course, well known and were succinctly summarised by Popplewell J in *Lukoil Asia Pacific Pte Limited v Ocean Tankers (Pte) Limited* [2018] EWHC 163 (Comm) at [8]:

> *"The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."*

33. Additionally, when interpreting an arbitration clause, particularly in the context of international commercial arbitration, Lord Hoffmann's observations in *Premium Nafta Products Limited & others v Fili Shipping Company Limited* [2007] UKHL 40 at [5] to [8], (the 'Fiona Trust' case) should be kept firmly in mind:

> *"…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.*

> *6. In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. 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.*
>
> *7. If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. …one would need to find very clear language before deciding that they must have had such an intention.*
>
> *8. A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause. …"*

34. In the case of the Agreement, it is 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. The wording of clause 10.2(b) makes that clear; "the dispute shall be referred to and finally resolved by arbitration" (emphasis added). They agreed upon LCIA arbitration in London. They did not intend that their disputes should be litigated, in whole or in part. Indeed, by clause 10.2(g) they even waived "any right of recourse to national courts in order to challenge or appeal against any arbitral award."

35. They also intended that their disputes should be resolved swiftly by arbitration. Thus, a short, 30 day window for mediation before arbitration was provided for in clause 10.2(b); and by clause 10.2(e) and (f), the parties agreed that the arbitral proceedings should be concluded within three months of the LCIA's receipt of the written request for arbitration, with an award made within 30 days thereafter.

36. The parties also agreed that they would first seek settlement of their dispute by mediation in accordance with the LCIA Mediation Procedure; but to ensure that this did not delay the progress of the Arbitration, there would only be a 30 day window for an attempt to resolve the dispute in this way.

37. The question therefore arises as to what the consequences might be of the failure to utilise the mediation procedure before referring the dispute to arbitration.

38. The Claimants maintain that this failure affects the tribunal's substantive jurisdiction in the sense described in sections 30(1)(a) and (c) of the Act. In her eloquent submissions on behalf of FSY, Ms Lara Kuehl submitted that this failure goes to the question of jurisdiction, and so it is not open to the arbitrator to stay the Arbitration in order to

allow for mediation as the Defendants suggested in their RFA dated 18 April 2019, because if there is no jurisdiction there would be no jurisdiction to stay: The claim should simply be rejected as outside the jurisdiction of the arbitrators.

39. However, the consequence of Ms Kuehl's submission would be that in a case where, as here, one party simply refused to mediate, the tribunal would never gain jurisdiction over the dispute, despite the parties clearly having agreed to arbitrate their disputes. That is because clause 10.2(a) provides that "the relevant parties" shall first seek settlement of the dispute by mediation in accordance with the LCIA Mediation Procedure. Although it is true that under that procedure the mediation can be commenced, procedurally, by one or all of the parties sending the LCIA Court a written request for mediation, the contractual obligation to first seek settlement by mediation is one imposed upon all parties to the dispute. They must all seek settlement of the dispute by mediation. Consistently with this interpretation, clause 10.2(h) of the Agreement also refers in its last line to the obligations of "the parties" to refer disputes to mediation.

40. If Party A refuses to mediate with Party B under clause 10.2(a), then I do not consider that there is any obligation upon Party B nonetheless pointlessly to continue to seek settlement of the dispute by mediation under the LCIA Mediation Procedure. Mediation is a consensual process and if Party A refuses to mediate, it is not possible for the terms of clause 10.2(a) to be satisfied. This also has the result that the first part of clause 10.2(b) will not be triggered because no mediation has ever "commenced"[3]. It cannot be the case that in these circumstances the tribunal does not have jurisdiction to resolve a dispute which arises out of or in connection with the Agreement. 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.

41. The dispute in the present case is clearly an arbitrable dispute; the contention of the Claimants is that it is not yet arbitrable, because the parties have not yet sought to settle the dispute by mediation (within 30 days of the commencement of any mediation). But that contention concerns the *admissibility* of the claim, rather than whether the arbitrator has jurisdiction to determine the claim at all.

42. At the time when Mr Ó hOisín SC made his Partial Award On Jurisdiction, Sir Michael Burton GBE had not yet handed down his judgment in *Sierra Leone v SL Mining Limited* [2021] EWHC 286 (Comm) in which he addressed a very similar issue to the issue which arises in this case.

43. In *Sierra Leone*, the relevant clause read as follows:

> *"6.9 Interpretation and Arbitration*
>
> *a) Except as may be otherwise herein expressly provided, this Agreement shall be construed, and the rights of [the Claimant and the Defendant] hereunder shall be determined, according to the Laws of Sierra Leone.*

[3] Under paragraph 1.4 of the LCIA Mediation Procedure, referred to in paragraph 11 above, the date of commencement of the mediation is the date of receipt by the Registrar of the Request for Mediation and the registration fee.

> *b) The parties shall in good faith endeavour to reach an amicable settlement of all differences of opinion or disputes which may arise between them in respect to the execution performance and interpretation or termination of this Agreement, and in respect of the rights and obligations of the parties deriving therefrom.*
>
> *c) In the event that the parties shall be unable to reach an amicable settlement within a period of 3 (three) months from a written notice by one party to the other specifying the nature of the dispute and seeking an amicable settlement, either party may submit the matter to the exclusive jurisdiction of a Board of 3 (three) Arbitrators who shall be appointed to carry out their mission in accordance with the International Rules of Conciliation and Arbitration of the… ICC. ……*
> *d) In the event of any notified dispute hereunder, both parties agree to continue to perform their respective obligations hereunder until the dispute has been resolved in the manner described above."*

44. The relevant Notice of Dispute was served by the Defendant on 14 July 2019, and the Request For Arbitration was served on 30 August 2019. The Claimants' challenge, rejected by the Arbitrators, after written submissions and a hearing on 10 January 2020, was that no arbitration proceedings could be commenced before 14 October 2019 (three months from the Notice of Dispute) and so the Arbitrators were without jurisdiction. The first issue before Sir Michael Burton was whether the challenge to the alleged prematurity of the Request for Arbitration was one to the jurisdiction of the Arbitrators and thus within section 67 of the Act (the jurisdiction/admissibility issue).

45. Sir Michael held that the challenge concerned the admissibility of the claim, rather than jurisdiction. He observed that this conclusion was fully supported by extensive citation of the work of leading academic writers to the effect that tribunals' decisions on objections regarding preconditions to arbitration, such as time limits or the fulfilment of conditions precedent such as conciliation provisions before arbitration may be pursued, are matters of admissibility, not jurisdiction. He then considered whether section 30(1)(c) of the Act dictated a different conclusion to the academic writings, and concluded that it did not. He accordingly agreed with the arbitrators in that case 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."

46. I agree with Sir Michael's analysis.

47. In the present case, the objective intention of the parties was clearly 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. In those circumstances, clause 10.2 should be construed in the light of that intention. A construction which allows one or other party to frustrate that intention should be avoided. This favours an "admissibility" construction rather than a "jurisdiction" construction so far as the requirement to submit to mediation is concerned.

48. As the authors of *International Commercial Arbitration*, Born, (3rd Edn, 2021), paragraph 5.08 at p. 975, state:

> *"The disputes and uncertainties resulting from pre-arbitration procedural requirements are inconsistent with the fundamental objectives and aspirations of the arbitral process, and of multi-tiered arbitration agreements themselves. They are also inconsistent with the parties' desire, in virtually all cases, to ensure access to prompt, binding and neutral means of resolving their disputes - which is the fundamental object of international arbitration agreements.*
>
> *As discussed below, the validity, character and content of pre-arbitration procedural requirements, and the consequences of non-compliance with their terms, are ultimately matters of contractual interpretation of individual agreements. Unsurprisingly, both courts and arbitral tribunals have reached widely differing conclusions about pre-arbitration procedural requirements contained in different agreements.*
>
> *Nonetheless, as discussed below, absent clear contrary contractual text, the following generalizations should apply: (a) negotiation and mediation provisions should generally be regarded as unenforceable (like agreements to agree), imposing only limited, non-mandatory obligations; (b) non-compliance with pre-arbitration procedural requirements should ordinarily be capable of being excused; (c) pre-arbitration procedural requirements should be characterized as procedural or substantive (not jurisdictional) and the consequences of non-compliance should be non-jurisdictional; (d) the interpretation and application of pre-arbitration procedural requirements should be matters for arbitral tribunals, not national courts; and (e) arbitral tribunals' rulings on the application of pre-arbitration procedural hearings should be subject to deferential judicial review in annulment and recognition proceedings*."

49. And at paragraph 5.08 at p. 1000, in a passage also cited by Sir Michael Burton in *Sierra Leone*:

> *"In interpreting the parties' arbitration agreement, the better approach is to presume, absent contrary evidence, that pre-arbitration procedural requirements are not "jurisdictional". As a consequence, in most legal systems, these requirements would presumptively be both capable of resolution by the arbitrators and required to be submitted to the arbitrators (as opposed to a national court) for their initial decision. Similarly, the arbitral tribunal's resolution of such issues would generally be subject to only minimal judicial review in subsequent annulment or recognition proceedings.*
>
> *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."*

50. Consistent with this, *Merkin & Flannery on the Arbitration Act 1996* (6th edn 2019) at paragraph 30.13.2, state as follows:

> *"In practice, therefore, we would encourage tribunals such as that in Emirates Trading (who reacted correctly by rejecting the challenge to its jurisdiction), if faced with a complaint based on any period for negotiation not having expired, or based on any term requiring friendly discussions or negotiations not having been complied with, to consider immediately whether to adjourn the proceedings for the stipulated period (if any), in order to allow that period to pass (and give the parties the opportunity to negotiate a settlement of the dispute). And the tribunal should also make clear that it treats non-compliance as an issue of admissibility, not jurisdiction. Either way, a tribunal in such circumstances may well be justified in not ordering any such stay, e.g. if satisfied that the claimant has discharged the burden of proving that any such further stay would be futile. But whatever decision is made, it is with respect not a matter for the court, at any time. On the contrary, it is a purely case management decision for the tribunal, considering all the circumstances, and not one that in any way calls into question its jurisdictional footing."*

51. Likewise, the International Arbitration Practice Guideline issued by the Chartered Institute of Arbitrators, Jurisdictional Challenges, states at paragraphs 6 and 8 at pp. 3-4:

> "*6. When considering challenges, arbitrators should take care to distinguish between challenges to the arbitrators' jurisdiction and challenges to the admissibility of claims. For example, a challenge on the basis that a claim, or part of claim, is time-barred or prohibited until some precondition has been fulfilled, is a challenge to the admissibility of that claim at that time, i.e. whether the arbitrators can hear the claim because it may be defective and/or procedurally inadmissible. It is not a challenge to the arbitrators' jurisdiction to decide the claim itself. ...*
>
> *8. If the reason for any inadmissibility can be overcome, the arbitrators should consider whether it is appropriate to stay the proceedings for the missing admissibility requirements to be satisfied. For example, if a mandatory requirement for mediation before the commencement of arbitration has not been complied with, the arbitrators may consider it appropriate to stay the arbitration pending compliance*."

52. And in "Jurisdiction and Admissibility*"* (2005, republished by University of Miami School of Law in the *Miami Law Research Paper Series*) at pp. 614-617, Professor Jan Paulsson suggests that:

> *"To understand whether a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds:*
>
> *If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse.*
>
> *If the reason would be that the claim should not be heard at all (or at least not yet) the issue is ordinarily one of admissibility and the tribunal's decision is final.*

> *… Once it is established that the parties have consented to the jurisdiction of a particular tribunal, there is a powerful policy reason … to recognise its authority to dispose conclusively of other threshold issues. Those are matters of admissibility, alleged impediments to consideration of the merits of the dispute which do not put into question the investiture of the tribunal as such."*

53. Professor Paulsson suggests that a simple question may be asked which will make it easier to classify objections in all cases (what he terms his "lodestar"), namely "*is the objecting party taking aim at the tribunal or at the claim"*? Conditions precedent such as participating in a conciliation attempt, he suggests, then pose no problem – they go to admissibility. He refers to a clause which reads "any arbitration must be initiated within thirty days after it was agreed that the difference or dispute cannot be resolved by negotiation", and asks whether the thirty day deadline was intended to be a limitation on the tribunal or on the claim. If the former, it is jurisdictional; if the latter, it concerns admissibility. He points out that the question could better be posed thus: in the event the thirty day limitation was exceeded, was it the parties' intention that the relevant claim should no longer be arbitrated by ICC arbitration but rather in some other forum, or was it that the claim could no longer be raised at all? It clearly is not the former and so it is not a jurisdictional question.

54. I consider that the approach advocated in these academic commentaries is consistent with, and gives effect to, the commercial purpose of arbitration clauses, as explained by Lord Hoffmann in *Fiona Trust* (described in paragraph 33 above). To give an arbitration clause such as this a commercial construction so that pre-arbitration procedural requirements are not jurisdictional is appropriate because, in most cases, if a dispute is not settled in the 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 agreed to submit to arbitration.

55. I therefore consider that the correct analysis in this case is as follows. The present dispute is one which has been validly submitted to arbitration under clause 10.2 as it is a dispute arising out of or in connection with the Agreement. Clause 10.2 also contains a procedural requirement to first seek settlement of the dispute by mediation. It is for the arbitrator to determine the consequences of any alleged breach of that procedural condition. The fact that the parties have agreed that both the mediation and the Arbitration shall be controlled by the LCIA Court reinforces the conclusion that LCIA Mediation is part of the procedure which must be followed in respect of the LCIA arbitral reference, which is a matter for the tribunal.

56. This conclusion is strongly supported by clause 10.2(h) of the Agreement which provides that:

> *"If a dispute arises under this Agreement or the Existing Agreements or any other agreement between the parties … then the arbitrator may consolidate those disputes in accordance with this clause 10.2. If arbitration proceedings are at hand and the arbitrator decides to consolidate those proceedings with other disputes or proceedings in accordance with this clause, there shall be no obligation on the parties to first refer those disputes to mediation before they are so consolidated."*

57. This makes clear that the issue of whether the dispute must first be referred to mediation is a procedural issue for the arbitrator to determine. But furthermore, if the Claimants'

argument were correct and if there has not first been a mediation such that the reference to arbitration is invalid, under this clause the arbitrator would be consolidating a dispute over which he necessarily had no jurisdiction. That clearly cannot be correct, and it demonstrates that the Claimants' jurisdiction argument cannot be correct.

58. This conclusion is also supported by section 9(2) of the Act, to which Ms Kuehl referred in support of her submissions, whereas in fact I consider that it supports the Defendants' submissions. That section provides that "An 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". In other words, because the parties have chosen to refer their dispute to arbitration, the courts will enforce that promise even though they have also agreed that another dispute resolution procedure, such as mediation, should first be exhausted. Non-compliance with the pre-arbitration mediation procedure does not affect whether it is a dispute *of the kind* which the parties agreed to submit to arbitration.

59. As Sir Michael Burton considered, I do not consider that the proper approach to this question should be influenced in any way by either of the court's judgments in *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2015] 1 WLR 1145 and *Tang v Grant Thornton International Limited* [2013] 1 All ER (Comm) 1226, both of which the Claimants relied upon before me. Those were two judgments in which a challenge by reference to a time condition precedent was accepted as appropriate pursuant to section 67 (although in both cases failing). As the court explained, in both of those cases the point was not argued, and section 67 jurisdiction was simply assumed without argument. The judgments are not binding on this court and the decision in *Emirates* has come in for considerable academic criticism for dealing with the issue as a matter of jurisdiction under section 67, as is pointed out in paragraph 13 of the court's judgment in *Sierra Leone*.

60. It is next necessary to consider the Claimants' submission that section 30(1) of the Act dictates a different conclusion to that contained in paragraph 55 above. In my judgment it does not.

Section 30(1)(a) of the Act: Is there a valid arbitration agreement?

61. Ms Kuehl for FSY and Mr Goold for NWA both argued that the arbitration agreement in the present case is "inoperative" by reason of the failure to comply with the mediation provision and accordingly there is not a "valid" arbitration agreement for the purposes of section 30(1)(a) of the Act.

62. They advanced that submission by suggesting that guidance as to what would make an arbitration agreement "invalid" for the purposes of section 30(1)(a) might be derived from the situations identified in section 9(4) of the Act, i.e., whether the arbitration agreement is (a) null and void; (b) inoperative; or (c) incapable of being performed. They particularly relied upon section 9(4)(b).

63. Section 30(1)(a) contains no definition as to what is meant by "valid". Section 9 is of course dealing with a different situation to section 30. It is dealing with a situation where the court is being asked to uphold the parties' bargain to arbitrate which it will do unless the agreement is null and void, inoperative or incapable of being performed.

This is intended to give the court jurisdiction to enforce the parties' arbitration agreement in the widest possible circumstances – essentially unless the arbitration agreement is a dead letter. Section 30 on the other hand is dealing with the arbitrator's power to rule on his own jurisdiction, and whether that ruling is open to challenge before the court. Thus, under section 30 an arbitration agreement could be valid (giving the arbitrator jurisdiction over the dispute under section 30(1)(a) of the Act), but nonetheless have become inoperative by reason of particular circumstances, allowing court proceedings to be brought under section 9(4) of the Act. It follows that one should be cautious in reading the section 9(4) criteria across into section 30(1)(a), as the sections do not necessarily have the same scope.

64. In my judgment, the failure to conduct the mediation in this case does not mean that there was not a "valid" arbitration agreement or that the agreement to arbitrate is "inoperative". The arbitration agreement itself is plainly valid. The failure to comply with a procedural condition of this type within the arbitration agreement does not affect its validity or make the arbitration agreement itself inoperative. The arbitration agreement has not been repudiated. It has not ceased to have legal effect.

65. Ms Kuehl referred me to a decision of the Singaporean High Court in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2012] SGHC 226 at paragraph101 in which it was stated:

> "*Where an agreement is subject to a condition precedent, there is, before the occurrence of the condition, no duty on either party to render the principal performance under the agreement: Chitty at paragraph 2-150. A dispute resolution clause, which may be multi-tiered in nature, should be construed like any other commercial agreement. … Therefore, until the condition precedent to the commencement of arbitration is fulfilled, neither party to the arbitration agreement is obliged to participate in the arbitration. In the same vein, an arbitral tribunal would not have jurisdiction before the condition precedent is fulfilled: see Smith v Martin [1925] 1 KB 745*" (emphasis added).

66. I do not agree with the last sentence of this passage which is an over-generalisation. *Smith v Martin* was obviously decided long before section 67 of the Act came into force and in any event the wording of the clause was very different in that case, as it provided that: "Such reference, except on the question of certificate, *shall not be opened until after the completion or alleged completion of the works,* unless with the written consent of the employer or architect and the contractor" (emphasis added). It follows that there could never be a reference to arbitration until the works were completed. Here, in contrast, there is a dispute which can be referred to arbitration in accordance with clause 10.2 but which is subject to a procedural condition that the parties should first seek to settle the dispute by mediation.

67. The outcome of each case depends on the proper construction of the arbitration agreement at issue, which is why I do not get any assistance from the authorities cited by Ms Kuehl in paragraphs 42-51 of her skeleton argument. In the case of Clause 10.2 in the present case, for the reasons I have given, I consider that the dispute as to whether the duty to mediate amounts to a condition precedent and if so whether it has been breached, are matters which should be resolved by the arbitral tribunal as relating to the admissibility of the dispute.

68. This case is also very different from *Laker Vent Engineering v Jacobs* [2014] EWHC 1058, which was relied upon by Ms Kuehl (in particulars the passage in the judgment of Ramsay J at 127-129). That was a case where the parties failed to agree upon an arbitrator at all within a specified time frame, such that the Judge held that the arbitration agreement became inoperative. However, in that case the contract expressly provided that if the parties did not agree on the arbitrator, the dispute would be settled in accordance with the provisions of the main contract, under which disputes were settled by court proceedings. So where the parties had not agreed and could not agree on the arbitrator, the Judge unsurprisingly concluded, upon the proper construction of the contract, that the dispute should be resolved by Court proceedings and that these should not be stayed: see paragraphs 113-129 of the Judgment. I do not consider that the different facts of that case assist me in determining the issue in this case.

69. Since section 30(1)(a) is not engaged, it also follows that the tribunal was properly constituted, and section 30(1)(b) is of no application.

Section 30(1)(c) of the Act: What matters have been submitted to arbitration in accordance with the arbitration agreement?

70. The Claimants also contend that the tribunal, in concluding in paragraph 162 of the Award that it has jurisdiction under section 30(1) implicitly must have decided that all matters submitted in the Arbitration had been submitted in accordance with the arbitration agreement. The Claimants challenge that finding owing to the alleged failure to comply with the mediation condition precedent. They submit that *no* matters were submitted to arbitration in accordance with the arbitration agreement.

71. I do not accept this argument.

72. I agree with the approach adopt by Butcher J in *Obrascon v Qatar Foundation for Education, Science and Community Development* [2020] EWHC 1643 at [19], where he held as follows:

> "*…Section 67 concerns only challenges to substantive jurisdiction. It is right that those challenges can therefore relate to whether matters 'have been submitted to arbitration in accordance with the arbitration agreement'. It has been held in the decisions I have mentioned that in the Arbitration Act this phrase applies only to issues as to whether there was a reference to arbitration of the issue in accordance with the terms of the arbitration agreement, i.e. to identify what matters have been submitted to arbitration. I am not persuaded that those decisions are wrong, and I will follow them. I consider that that construction is the most natural one of the words used in s. 30(1)(c), even if another construction might have been possible. Furthermore, the construction adopted in those authorities, and which I too favour, appears to me, as it appeared to Eder J, to be in accordance with the general principles in s.1 of the Arbitration Act."* (emphasis added)

73. The issue covered by section 30(1)(c) of the Act concerns which of the matters referred to arbitration are within the scope of the arbitration agreement, not whether the procedure laid down by the arbitration agreement for matters validly referred has been followed. There was a valid reference to arbitration of a dispute arising out of or in connection with the Agreement. The arbitrator did not have to determine what matters

had been submitted to arbitration in accordance with the arbitration agreement. The matters which have been referred to arbitration are not in dispute; the only question is whether it is appropriate for the arbitrator to resolve the dispute before the parties have first sought settlement of it by mediation. In other words, if the mediation provision is a condition precedent, is the dispute procedurally inadmissible or has the condition been satisfied? That is a question for the arbitrator to resolve, as it goes to the admissibility of the claim.

74. In *Sierra Leone* Sir Michael Burton rejected the suggestion that section 30(1)(c) was engaged in respect of a challenge that the claim was made prematurely to the Arbitrators. I agree with his analysis in this respect. He considered that:

"to accord with the views of Paulsson, as approved in the Singapore Court of Appeal (at [77] of BBA v BAZ [2020] 2 SLR 453), if the issue relates to whether a claim could not be brought to arbitration, the issue is ordinarily one of jurisdiction and subject to further recourse under s 67 of the 1996 Act, 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, the tribunal decision is final and s30 (1) (c) does not apply. The short passage in [BBA v BAZ] is useful: "Jurisdiction [and so susceptibility to a s 67 challenge] is commonly defined to refer to "the power of the tribunal to hear a case", whereas admissibility refers to "whether it is appropriate for the tribunal to hear it". The issue for (c) is, in my judgment, whether an issue is arbitrable. The issue here is not whether the claim is arbitrable, or whether there is another forum rather than arbitration in which it should be decided, but whether it has been presented too early. That is best decided by the Arbitrators."

75. I agree with this analysis and in my judgment the same analysis applies in this case.

76. Ms Kuehl sought to distinguish *Sierra Leone* in this regard. She submitted that in *Sierra Leone*, the objection to the tribunal's jurisdiction was due to the fact that the claim had been brought too early, rather than that it should not have been brought to arbitration at all – i.e., the objection was targeted at the claim and not the tribunal. There was no defect in the parties' consent to arbitration. There was therefore no question of the matters submitted to the tribunal not being arbitrable for the purposes of section 30(1)(c). By contrast she submits, FSY's challenge to the jurisdiction in this case is on the basis that: (i) there is no valid arbitration agreement (a matter which, by definition, is always jurisdictional); and/or (ii) that no matters were submitted to arbitration in accordance with the arbitration agreement. The claim should not have been brought to arbitration at all, i.e., that due to a defect in the parties' consent to arbitration (the primary obligations to arbitrate not yet having accrued), the claim is not arbitrable. She submits that the tribunal has no power, not that it should not exercise that power. Mr Goold adopted these submissions on behalf of NWA.

77. In my judgment this is a distinction without substance. The claim was properly brought to arbitration in this case. The issue is whether, as part of the arbitration procedure, it is necessary for the Defendants to first seek settlement of their claim by mediation, before seeking to resolve their dispute by arbitration, in circumstances where the other parties refuse to mediate. In *Sierra Leone*, Sir Michael Burton said that "The issue here is not whether the claim is arbitrable, or whether there is another forum rather than arbitration in which it should be decided, but whether it has been presented too early. That is best decided by the Arbitrators." The position is no different here: The dispute is an

arbitrable dispute, but the issue is whether it is *not yet* arbitrable because of the mediation clause. The issue is whether the arbitrator should exercise the power that he has to determine the dispute, where mediation has not yet taken place. The arbitrator is not having to determine what matters have been submitted to arbitration in accordance with the arbitration agreement.

78. It follows that section 30(1) of the Act is not engaged, so as to engage the court's supervisory jurisdiction over arbitration in section 67 of the Act. There is no basis for any challenge to the arbitrator's award under section 67.

79. In the light of my conclusion, it is not necessary, or indeed appropriate, for the court to second-guess the arbitrator's rulings on whether clause 10.2(a) is sufficiently certain and capable of enforcement; whether it contains a condition precedent to arbitration; or whether the Defendants in any event complied with the clause.

80. All that I would add is that even if clause 10.2(a) contains a legally enforceable condition precedent, I have no doubt that (and I would have found that) by reason of the matters set out in paragraphs 12-26 above, the Claimants are in breach of the alleged condition precedent by failing to first seek settlement of the dispute by way of mediation and they cannot rely upon their own breach to now contend that the Defendants have failed to comply with it; alternatively, compliance with the alleged condition precedent was waived by the parties. Accordingly, I would have found that Mr Ó hOisín SC has jurisdiction to resolve this dispute even if, contrary to my conclusion, the requirement to first mediate the parties' dispute concerns the arbitrator's jurisdiction to hear the dispute rather than the admissibility of the claim.

81. Finally, I would like to record that all three counsel in this case, instructed as direct access counsel, conducted the hearing with exemplary skill and economy and I am very grateful to them for their assistance.