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CHAMBERS

NWA v NVF [2021] EWHC 2666 (Comm): breach of an ADR condition precedent to arbitration does not affect an arbitral tribunal's jurisdiction

In an important decision handed down on 8 October 2021, ***NWA v NVF*** [2021] EWHC 2666 (Comm), the Commercial Court (Calver J) has confirmed that the failure of a party to comply with a contractual term requiring mediation before a dispute is referred to arbitration is not a matter which affects the jurisdiction of an arbitral tribunal and, instead, is only relevant to the admissibility of the dispute.

In doing so, the Court declined to follow the approach previously taken 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, in both of which judgments it was assumed that the failure to comply with contractual ADR conditions precedent to arbitration were matters relevant to the jurisdiction of an arbitral tribunal (although in both cases the challenges to jurisdiction failed on the facts/construction of the clauses in question).

Instead, the Court in ***NWA v NVF*** has applied the reasoning of Sir Michael Burton in ***Sierra Leone v SL Mining Limited*** [2021] EWHC 286 (Comm), in which the distinction between jurisdiction and admissibility was outlined for the first time by an English Court in a commercial arbitration context (the distinction has long existed in the investment treaty arbitration field) and in which the Court concluded that the issue of whether an arbitration had been brought before the expiry of a contractual time period for good faith attempts to settle was only a procedural matter relevant to the admissibility of a claim (and therefore was a matter for the arbitrators) and did not affect jurisdiction (i.e., the Court should not review the decision of the arbitrators). The clause under consideration by the Court in ***Sierra Leone*** was not, on its true construction, a condition precedent to arbitration, but *obiter* comments were made to the effect that even if it had been a condition precedent, compliance or otherwise with the clause would still have been a matter for the arbitrator

In ***NWA v NVF***, the line between jurisdiction and admissibility has been drawn even more distinctly. The relevant clause provided:

> *"10.2 Disputes*
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> *(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…."*

It was common ground that there had been no commencement of mediation or even any attempt to contact the defendants regarding the dispute before it was referred to arbitration.

The Court held that the questions of whether the clause amounted to a condition precedent and whether it had been breached were solely matters of admissibility which should be resolved by an arbitral tribunal and that the arbitral tribunal's decision was not susceptible to challenge under section 67 of the Arbitration Act 1996.

The decision in ***NWA v NWF*** is likely to be of considerable interest to the international arbitration community. It has now been firmly established as a matter of English law that contractual ADR conditions precedent to arbitration, however clear, certain and enforceable they might be as a matter of general English contract law, are unlikely to affect the jurisdiction of an arbitral tribunal unless the parties have expressly stated that they intend for jurisdiction to be affected. The scope for challenging an arbitral tribunal's jurisdiction on this basis, previously entertained by the English Courts, is now likely to be much more limited.

Alexander Goold and Lara Kuehl appeared for the First and Second Claimants respectively.