

Pre-arbitration conditions: Light coming to a grey area?

By Peter Ashford¹

Multi-tiered dispute resolution clauses are now very popular. It is becoming increasingly clear that arbitral tribunals (and the Courts) will give full effect to such clauses and require the pre-conditions be complied with. The precise jurisprudential justification is less straightforward (especially in arbitration) and the remedy that an arbitral tribunal (or Court) should grant has been confused. Here we try to shed some light on the problems.

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A. Introduction

With the increasing popularity of alternative dispute resolution in recent years, arbitration clauses show a tendency to have multi-tiered escalation clauses. Multi-tiered arbitration clauses may provide for a separate negotiation phase (often itself escalating from management to C-level) and a mediation² phase as pre-condition to arbitration.

One of the main reasons for this tendency is that over the years, arbitration has become more expensive, formalistic and unnecessarily adversarial aping many of the features of litigation procedure.

One of the main legal issues for such clauses revolves around the timing and sequencing of the phases contained in multi-tiered dispute resolution clauses. Attempts have been made to vacate arbitral awards or stay or dismiss arbitral proceedings because the arbitration was commenced before the expiration of the period for mediation.

The consequences of a party's failure to comply with pre-arbitration conditions in multi-tiered arbitration clauses has been addressed extensively by arbitral tribunals. These bodies have considered, *inter alia*, the validity and enforceability of such clauses, whether they constitute mandatory pre-requisites to commencing arbitration proceedings, the consequences of non-compliance as matters either of jurisdiction, procedure or substantive admissibility, and whether the competence to decide on the application of pre-arbitration conditions rests with the courts or the tribunal.

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² This re-arbitration phase(s) is referred to as mediation throughout this paper for simplicity.

The issue also comes before the English Courts. Most recently this occurred in *Ohpen Operations v Invesco*³. Invesco argued that its contract with Ohpen contained a valid, binding and applicable ADR clause that prescribed a mandatory escalation and mediation procedure that had to be adhered to prior to the commencement of proceedings. As a result, Invesco said the court should exercise its discretion to stay the proceedings⁴ Ohpen had commenced, pending referral of the dispute to mediation. It was common ground that, in principle, a dispute resolution clause could create a condition precedent to the commencement of proceedings.

Ohpen opposed the stay. It argued that, as a matter of construction of the contract, the relevant dispute resolution provisions were not applicable outside a certain period or following termination of the contract (the contract having been terminated by both parties purporting to accept the others repudiation).

The judge, O'Farrell J, reviewed a number of authorities and summarised the principles applicable where a party seeks to enforce an ADR provision by means of an order staying proceedings as follows:

“(i) The agreement must create an enforceable obligation requiring the parties to engage in alternative dispute resolution.

(ii) The obligation must be expressed clearly as a condition precedent to court proceedings or arbitration.

(iii) The dispute resolution process to be followed does not have to be formal but must be sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator or determine any other necessary step in the procedure without the requirement for any further agreement by the parties.

(iv) The court has a discretion to stay proceedings commenced in breach of an enforceable dispute resolution agreement. In exercising its discretion, the Court will have regard to the public policy interest in upholding the parties' commercial agreement and furthering the overriding objective in assisting the parties to resolve their disputes.”

Applying those principles to the contract in question, the judge concluded that the proceedings should be stayed. In summary she found:

- On a proper construction of the contract, it contained a dispute resolution provision that was applicable to the dispute between the parties and created an enforceable obligation requiring the parties to engage in mediation. The judge considered the meaning of the words used, as well as their commercial purpose.
- The dispute resolution provision operated as a condition precedent to the commencement of legal proceedings. Although the term “condition precedent” was not used in the clause, the words used were clear that the right to commence proceedings was subject to the failure of the dispute resolution procedure, including the mediation process.
- The mechanism under the clause was sufficiently clear and certain to be enforceable. No further agreement by the parties was required to enable a mediation to proceed.
- It would be appropriate for it to stay the proceedings to enable a mediation to take place.

³ [2019] EWHC 2246 (TCC)

⁴ A dismissal of the claim was not sought.

As to when the court should exercise its discretion to stay proceedings (the fourth principle), the judge also made this general point:

“[58] There is a clear and strong policy in favour of enforcing alternative dispute resolution provisions and in encouraging parties to attempt to resolve disputes prior to litigation. Where a contract contains valid machinery for resolving potential disputes between the parties, it will usually be necessary for the parties to follow that machinery, and the court will not permit an action to be brought in breach of such agreement.

[59] The Court must consider the interests of justice in enforcing the agreed machinery under the [contract]. However, it must also take into account the overriding objective in the Civil Procedure Rules when considering the appropriate order to make.”

This is an eminently sensible decision and, I suggest, uncontroversial. In litigation, at least in non-docketed English proceedings, the Judge is not appointed at the outset and the case may well be allocated to one of many judges. This may militate in favour of a stay rather than dismissal as no advantage arises from premature filing⁵ and costs may be wasted by a dismissal. The judge clearly recognised this in paragraph [59] cited above.

The position is not necessarily the same in arbitration. In *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd (Emirates)*,⁶ the English High Court found that non-compliance with pre-arbitration conditions contained in multi-tiered arbitration agreements are mandatory condition precedent to arbitration and can deprive a tribunal of its jurisdiction. The decision is not without its critics.⁷ However, a close analysis of the relevant case law arguably reveals a greater degree of nuance than the decision in *Emirates* conveys and that the answer to the classification of pre-arbitration conditions and whether non-compliance is a matter of procedure or jurisdiction, or rather admissibility, is not black or white.

Properly analysed, the fulfilment (or otherwise) of pre-arbitration conditions is a matter of admissibility to be decided by the tribunal. Although much has been written about the differences between jurisdiction and admissibility, courts and tribunals frequently disregard the distinction and conflate admissibility with the substance of the claim. But being in a grey area does not mean the issue is, or should be, in a “twilight zone”⁸ where the answer relies on the presumption individual courts or tribunals may wish to make about the intentions of the parties. The specific words of the relevant arbitration clause in its contractual context invariably provide the necessary guidance to the correct classification of pre-arbitration conditions.

Consequently, most of the problems arising from multi-tiered arbitration clauses could be avoided by having clear mediation or other settlement terms in place and by drafting such clauses with considerable care.

⁵ Assuming no limitation defence would otherwise be available

⁶ *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* EWHC [2014] (Comm).

⁷ Louis Flannery and Robert Merkin: “Emirates Trading, good faith, and pre-arbitral ADR clauses: a jurisdictional precondition?” [2015] *Arbitration International*, Volume 31 Number 1.

⁸ Jan Paulsson, “Jurisdiction and Admissibility” in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum* in honour of Robert Briner [2005] [601].

B. Validity and enforceability of the pre-arbitration agreement

The multi-tier arbitration clause under examination in *Emirates* was as follows:

*In case of any dispute or claim arising out of or in connection with or under this [agreement] ... the Parties shall first seek to resolve the dispute or claim by friendly discussion. ... If no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration.*⁹

Teare J found that there was no appellate authority which obliged him to hold that the arbitration agreement in that case was unenforceable.¹⁰

Historically, tribunals and courts applying English law have generally determined that such agreements are invalid and unenforceable following the landmark decision in *Walford v Miles*,¹¹ where it was held that a bare agreement to negotiate was unenforceable due to the lack of certainty. But in *Petromec Inc v Petroleo Brasileiro SA Petrobras*¹², Longmore LJ observed that *Walford v Miles* concerned a case where there was no concluded contract at all and that stood to be contrasted with a case where the putative 'agreement to agree' was a term of an otherwise concluded contract.

This reflects the increasing trend to hold pre-arbitration mediation clauses as enforceable when they have sufficient certainty and are included within an otherwise valid and binding contract. Hildyard J in *Wah v Grant Thornton*¹³ acknowledged that it is necessary to "consider each case on its own terms" and gives a textbook example on how to test whether pre-arbitration conditions are valid and enforceable:

*In the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings the test is whether the provision prescribes, without the need for further agreement, (a) a sufficiently certain and unequivocal commitment to commence a process (b) from which may be discerned what steps each party is required to take to put the process in place and which is (c) sufficiently clearly defined to enable the Court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach.*¹⁴

Consequently, a mere agreement to agree might still not be enforceable but it becomes so when adding certainty of process and further obligations and when embedding it into a contractual framework. These findings are consistent with the conclusion that there cannot be a 'one-size-fits-all' approach.

This also reflects the majority in more recent decisions which tend to hold that pre-conditions with sufficient clarity and detail should usually be upheld. In *Cable & Wireless v IBM*¹⁵ Colman J stated that the obligation to "attempt in good faith" to resolve a dispute through ADR was sufficiently certain to be enforceable because the dispute resolution clause provided additionally that the ADR procedure should be one as recommended by the Centre for Dispute Resolution.¹⁶

⁹ *Emirates Trading v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm)[3].

¹⁰ *Ibid*, para 64.

¹¹ *Waldorf v Miles* [1992] 2 AC 128.

¹² *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2005] AER 209, 120-121.

¹³ *Wah v Grant Thornton* [2012] EWHC 3198 (Ch)

¹⁴ *Wah v Grant Thornton International Limited* [2012] EWHC, 3198, [60].

¹⁵ *Cable & Wireless PLC v IBM United Kingdom Ltd.* [2002] EWHC 2058 (Comm).

¹⁶ Without going into an in depth discussion about the classification of good faith the principle of good faith is a deep-rooted legal principle within most civil law legal systems and the US. See Partial Award in ICC Case No. 6276, 14(1), ICC Ct. Bull. 76, 79 [2003]: "Everything depends on the circumstances and chiefly on good faith of the parties. What matters is that they should have shown their goodwill by seizing every opportunity to try to settle their dispute in amicable manner".

C. Mandatory condition precedent

Another ongoing discussion concerns the question whether pre-arbitration agreements between the parties are of a “procedural nature” constituting a condition precedent and leading to the procedural (in)admissibility of the claim, or if they are rather of a “substantive nature”, so that non-compliance would be a breach of contract with standard contractual remedies.¹⁷

It is clear from *Ohpen* that O’Farrell J regarded the clause as a true condition precedent and the Court will not usually “permit an action to be brought in breach of such an agreement.”¹⁸ In accordance with the approach to the validity of these clauses, the establishment of whether the parties have a mandatory or non-mandatory provision will be dependent on the wording used by the parties. A substantial body of tribunals in commercial and investment-treaty disputes agree that where the parties’ intention is clear, courts and tribunals should and will hold these pre-conditions as mandatory condition precedent. A “shall”¹⁹, “must” or “mandatory” will provide for a mandatory obligation whereas “can” or “may” often point to a non-mandatory direction.

Clauses containing a specific time period or other specifications are more likely to be treated as mandatory requirements because the parties had special conditions and obligations in mind when setting up the agreement. Parties are obliged to attend the pre-arbitration mediation but the parties are free to commence arbitration after the period has expired and they are not required to negotiate during the entire pre-arbitration mediation period.

If valid and enforceable pre-arbitration conditions form a valid part of the arbitration agreement they operate as a pre-condition to arbitration.²⁰

In view of the foregoing, until first-tier settlement obligations have been complied with, an arbitral tribunal should treat the claim as procedurally inadmissible.²¹

D. Jurisdiction, Admissibility and Procedure and effects of the distinction

“Admissibility” is still treated as a half-way house between the safety net of the terms “jurisdiction” and “procedure”. Admittedly, the distinction between the three is not always easy and especially the fine line between jurisdiction and admissibility is sometimes difficult to draw, but it is not a distinction without a difference.

Tribunals and courts have tried to explain the differences between jurisdiction and admissibility. The tribunal in *Hochtief v Argentina* explained: “Jurisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal.”²² In *Enron v. Argentina*, the arbitral tribunal stated that “a successful admissibility objection would normally result in rejecting a claim for reasons connected with the merits”²³, and the tribunal in *Waste Management v United Mexican States* stated: “Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective – whether it is appropriate for the tribunal to hear it. If there is no

¹⁷ Alexander Jolles, *Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement* [2006] 72 Arbitration 329.

¹⁸ *Ibid* para [58]

¹⁹ *Emirates Trading v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm) [25]: “the word ‘shall’ indicates that the obligation is mandatory” and “[s]uch friendly discussions are a condition precedent to the right to refer a claim to arbitration”.

²⁰ I thus differ from the tribunal in *Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) when it held that: “...Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature.” I prefer the tribunal’s reasoning in *Murphy Exploration and Production Company International v Republic of Ecuador* (ICSID Case No. ARB/08/4) when it held that the consultation and negotiation phase: “... constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration ...”. See also *Burlington Resources Inc. v Republic of Ecuador* (ICSID Case No. ARB/08/5): “The purpose of the [6-month negotiation period] is to grant the host State an opportunity to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant deprived the host State of that opportunity. That suffices to defeat jurisdiction.”

²¹ Alexander Jolles, *Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement* [2006] 72 Arbitration 329.

²² *Hochtief AG v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/07/31, para 90.

²³ *Enron Corp. and Ponderosa Assets v. Argentina*, Award, ICISD Case ARB/01/3.

title of jurisdiction, then the tribunal cannot act. If the Claimant's case is inadmissible, the Tribunal has jurisdiction to hear it, but should decline it on grounds relating to the case itself – not relating to the role or powers of the Tribunal.”²⁴

The distinction between the three thus becomes clear: strictly, a “jurisdictional” issue is one that affects the tribunal's constitution.²⁵ Pre-arbitration conditions are typically a question of “admissibility” when the arbitration agreement provides jurisdiction, but the tribunal is not permitted to judge the substantive claims until after the conditions have been fulfilled. This reference to “admissibility” appears often to be referred to as jurisdictional. That is, to a degree, understandable and many Courts and tribunals refer to a lack of jurisdiction but that appears to be shorthand for ‘a properly constituted tribunal has determined that it does not have jurisdiction over the particular claim submitted to it by reason of a failure to comply with a pre-condition’. By contrast, if these requirements are “procedural”, they concern the procedural conduct of the dispute resolution, and the parties’ substantive right to be heard is not affected.²⁶

The first difference is a timing issue. Objections to jurisdiction can be raised at any time during the proceeding. On the other hand, objections to admissibility must be raised before the discussion of the merits is initiated.²⁷ This is applicable procedurally, but with substantive effects because if the objection is not raised within that time limit the objection to admissibility is forfeited.

Second, a lack of jurisdiction cannot be cured in relation to the dispute in question. On the other hand, when a matter is inadmissible the defect can be cured. Especially where a procedural defect renders the claim inadmissible, the commencement of an arbitration reference would itself be admissible and the arbitration can successfully be commenced at a later date once the appropriate procedure is followed.²⁸

Third, even if the parties decide not to raise jurisdictional objections, this will not preclude the tribunal from finding on its own motion that it does not have jurisdiction. Conversely, if the parties do not raise admissibility objections, the tribunal will proceed to hear the case and will not raise the matter *proprio motu*.²⁹

Fourth, decisions on the tribunals’ jurisdiction can be challenged but decisions as to admissibility cannot be reviewed.³⁰

Fifth, in general the principles of consent and good faith are relevant to questions of admissibility in so far as objections to admissibility may be excluded by the operation of either of them. The principle of good faith has the effect of excluding the application of the rule in circumstances such as where the doctrine of estoppel would operate.

Having these distinctions in mind, in most cases pre-arbitration conditions in multi-tier-arbitration clauses are a matter of admissibility. Inserting an arbitration clause into a contract and choosing arbitration as the preferred dispute resolution mechanism after a certain period of mediation indicates on the one hand that the parties did not intend to deprive the tribunal completely of its jurisdiction because in most cases the parties do intend for a “one-stop-shop” dispute resolution mechanism. It goes too far to say that pre-arbitration conditions are a purely procedural issue and parties’

²⁴ *Waste Mgt, Inc. v. United Mexican States*, Dissenting Opinion of Keith Highet in ICSID Case No. ARB(AF)/98/2, para 58.

²⁵ It is unlikely that a jurisdictional issue will arise out of a pre-arbitration condition although it is just about possible to contemplate wording that might do so e.g. the parties shall mediate and if not successful shall arbitrate but no tribunal shall be constituted unless and until a mediation has been taken place and concluded and any issue as to whether or not a mediation has taken place and concluded shall be a matter for the Courts and not the tribunal.

²⁶ See Gary Born, *International Commercial Arbitration* (2014) 935.

²⁷ Chittharanjan F. Amerasinghe, *International Arbitral Jurisdiction (International Litigation in Practice)* [2012] 96.

²⁸ *Hochtief AG v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/07/31, paras 94-95.

²⁹ *Ibid*, paras 94-95.

³⁰ Laurent Gouffès and Melissa Ordonez, “*Jurisdiction and admissibility: are we any closer to a line in the sand?*” [2015] *Arbitration International*, Volume 31 Number 1, 108.

substantive rights to be heard is not affected. If the parties expressly chose a multi-tier arbitration clause, their clear intention must be followed by giving effect to each tier. Therefore, the right way to look at it is to categorize such requirements as a matter of admissibility because it gives effect to the several phases in an agreed multi-tier dispute resolution clause and the clear intention of the parties aiming to settle the dispute amicably.

E. Effects of non-compliance

If, as suggested, the question of pre-arbitration agreements is in most cases one of admissibility, these agreements are subject to the tribunal's substantive jurisdiction. Either way, the question of enforceability and validity of the agreement and its tiers should be for the tribunal to decide in accordance with the Kompetenz-Kompetenz principle.

This goes along with the presumption that parties – even if, or especially for the very reason of setting up a multi-tier dispute resolution clause – wish for an effective and efficient “one-stop-shop” dispute resolution without fearing the risk of diverting decisions of different courts and tribunals.

But if a tribunal finds a request for arbitration is inadmissible because of non-compliance with mediation as condition precedent to arbitration, the question of remedy raises its head. The options are broadly either to (a) stay the proceedings so as to allow the pre-condition to be satisfied or (b) to dismiss the claim (without prejudice to the right to re-file when the pre-condition is satisfied). If the former is adopted the tribunal might define the conditions under which the proceedings will be resumed.³¹

The better option is to dismiss the claim (without prejudice to the right to re-file).³² A stay may needlessly prejudice a respondent who may be deprived, e.g. of a limitation defence or some other tactical advantage. Furthermore, a different tribunal might well be constituted after the conclusion of the pre-arbitration condition and it cannot be right that an applicant can either reserve, conflict or block an arbitrator by an improperly commenced reference.³³

It is appreciated that there may be costs and efficiency arguments in favour of the stay route but such factors must be subservient to legal issue of proper admissibility.³⁴

F. Conclusion

When properly drafted, tribunals and courts are generally willing to enforce multi-tier arbitration clauses, the Ohpen decision is the most recent such example. The trend to enforce these clauses now has considerable momentum. This is the logical consequence of the parties' agreement, doing otherwise would deviate from the parties' intention in writing in a contractual multi-tier dispute resolution clause.

If the pre-arbitration condition is sufficiently certain with a clear intention of the parties, English courts and tribunals will consider the clause not only as enforceable but also as a mandatory condition precedent to arbitration. Non-compliance ought to lead to foreclosing access to arbitral proceedings over the substantial merits of the claim. Properly analysed the classification of conditions precedent

³¹ Alexander Jolles, *Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement* [2006] 72 Arbitration, 337.

³² In this respect I differ from Flannery & Merkin (op. cit.) who encourage tribunals to adjourn to allow the pre-condition to be satisfied. The better route is to dismiss the premature reference.

³³ A party should not be able to commence a reference in the pre-condition phase “to preserve its rights”: Article 13 UNCITRAL Model Law on International Commercial Conciliation.

³⁴ I thus again differ from the tribunal in *Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) when it held that “... it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration ... and require the Claimant ... to consult [and re-submit] ...” albeit it envisaged the claim being re-submitted to the same tribunal.

such as participating in a mediation attempt, ought to pose no problem and especially so if considered as a question of the admissibility of a claim.³⁵

Whether there is a failure to comply with the pre-arbitration obligations is for the tribunal to decide and it is in the tribunal's power to dismiss the reference (without prejudice to the right to re-file) or, perhaps, to instruct the parties to conduct and participate in the mediation.



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³⁵ Paulsson op cit. 616.