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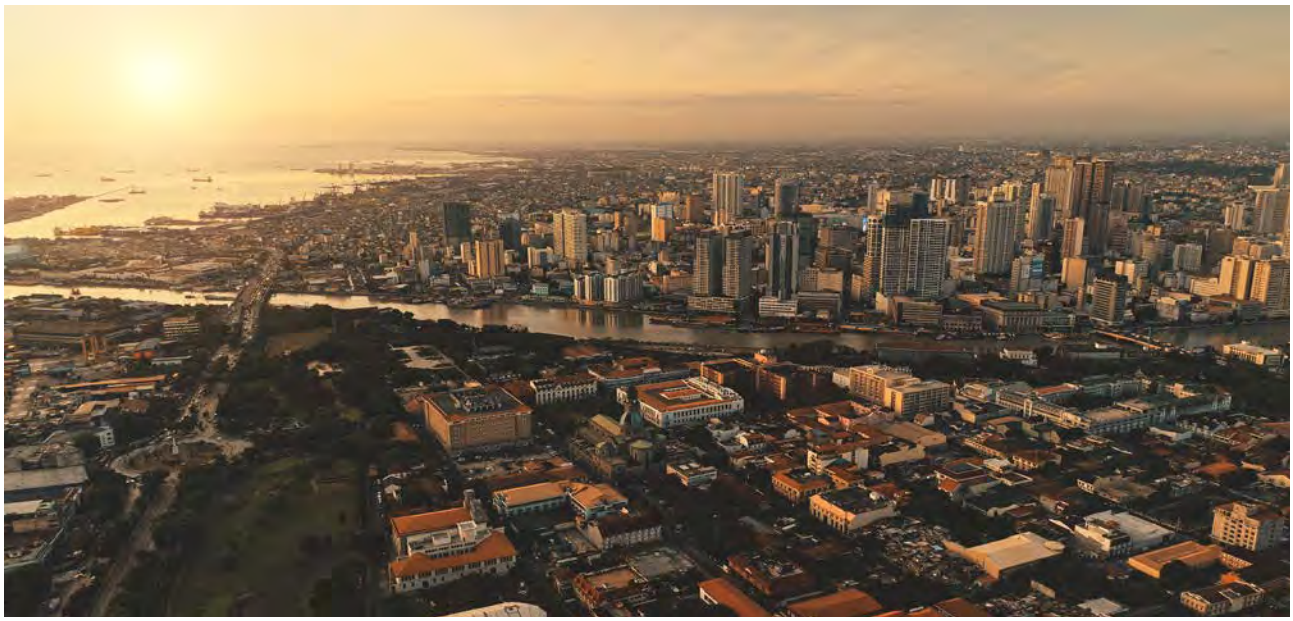
NEWSLETTER



INTERVIEW WITH ATTY. PATRICIA-ANN T. PRODIGALIDAD, ACCRALAW

by Thara Rubini Gopalan of TSMP Law Corporation

1. What attracted you to the practice of international arbitration?

To be candid, initially, international arbitration had a certain mystique. As there were few known Philippine arbitrators and assignments to arbitration matters were more of an exception, my curiosity about the practice was piqued. Eventually, after having personally experienced the length of time court litigation takes, the expedited character of the arbitration process was very attractive. And of course, knowing that we could select arbitrators with the relevant expertise and skillset was a bonus.

2. What do you enjoy most about being an arbitrator and what do you enjoy least?

Other than being able to render decisions in a dispute, of course, the thing I enjoy the most as an arbitrator is the freedom from the constraints set up by court procedure in ferreting out the truth. Though procedural rules are ultimately founded on the need to guarantee due process, there are occasions when, as a litigator, the application of these rules seemed to do more harm than good.

What I enjoy least follows from what I enjoy the most. As an arbitrator, I have witnessed parties and lawyers who take steps to make the arbitration process mirror litigation, whether purposeful or not. Seeing that arbitration was designed not to be a proxy for litigation, these attempts will test any arbitrator's patience.

3. How do you manage stress in the profession and particularly during the current COVID-19 crisis?

The legal profession is, in my opinion, innately stressful. How can it not be when we take our clients' problems off their shoulders and willingly assume them as our own. So, managing stress is crucial to a lawyer's sustainability. On my part, I manage my stress by ensuring there are hours within a day and days within a week that are devoted to my favorite personal activities such as talking to friends and family, watching TV, reading a good book, or, yes, retail therapy. This did not change during the COVID-19 crisis. I just had to convert from physical meet-ups to virtual ones and from going to the mall

Patricia-Ann T. Prodigalidad

to online shopping. Also, throughout the pandemic when lawyers in our Firm were encouraged to work from home, I made sure I followed a schedule. I dressed up in the morning as if I were headed for work (yes, complete with shoes), even if the only place I was headed to was in front of my computer. When my work time was over (e.g., my last meeting for the day was done), I would change into house clothes and slippers. I believe this practice helped me delineate between work and play, office and home.

4. What 3 tips would you give to young practitioners from the Philippines trying to break into the field of international arbitration?

The popularity of international arbitration in the Philippines is rising, which automatically means competition in the market is likewise increasing. The three (3) tips I would like to share, culled from my personal experience, are:

First, invest in yourself, both in terms of time and money. Be sure to further your knowledge about international arbitration by attending seminars and conferences on the subject. Take the time to attend accreditation courses and be sure to pass them, of course.

Second, join and be active in established networks. To break into the field of international arbitration, you must be known by those already active in the practice. And you find these individuals in organized

networks – associations of arbitrators and arbitration practitioners whether in the Philippines or outside or even practice groups focused on ADR or arbitration in lawyers' associations. Becoming a member is not enough. You must remember to be active. If possible, find a mentor who will be willing to take you under his or her wing.

Third, make yourself available for, and accept, any form of appointment or task related to the arbitration process. Of note, several arbitral panels appoint file counsels or tribunal secretaries even in the Philippines. By making future arbitrators know that you are interested to be appointed to these roles, you get yourself introduced not just to the members of the panel but also the parties, their respective counsels, and the arbitral institution if any. That you get an opportunity to be familiar with the arbitration process is also an added benefit.

5. What do you think is the biggest challenge faced by arbitration practitioners in the Philippines at present, and what steps can practitioners take to overcome this?

I think the biggest challenge faced by arbitration practitioners in the Philippines is the continuing, albeit mistaken, impression that the arbitration process is expensive, which bolsters the resistance of some to shift from court litigation. This challenge fundamentally rests on the lack of accurate information. In addition to the information campaign being driven by the arbitration institutions in the Philippines, arbitration practitioners can help by themselves recommending to their clients to shift from the standard dispute resolution process of litigation to arbitration and, more importantly, explaining all the benefits including those that arise from an expedited process and the limited means to assail an arbitral award. More importantly, practitioners should ensure that, when they are appointed as arbitrators, file counsel, or tribunal secretaries, they perform their roles exceptionally well and without any possible taint of irregularity. By doing this, we practitioners create an environment that leads to users gaining confidence in the process. And, when this is achieved, cost becomes a side issue.

6. How do you suggest that arbitration practitioners help with the growth and development of arbitration in the Philippines?

To this day and despite the rise in popularity of arbitration, it is still not well understood. Also, there is not much in terms of incentives for corporations and/or individuals to make the shift from typical court litigation to ADR. Thus, for the arbitration practice in the Philippines to thrive, the practitioners should take advantage of their roles in society to address these points. If they happen to be in the academe, they should ensure that they teach the basics of arbitration to students. Being introduced to arbitration before entering the workforce would guarantee a pipeline of potential users who will embrace arbitration. For those with connections to the legislative or executive departments, exert efforts to provide incentives (such as tax breaks) to users of ADR processes especially arbitration as well as to arbitration practitioners themselves. For those who are lawyers, convince clients to insert arbitration agreements in their contracts instead of litigation. And of course, for arbitrators, perform your tasks in a manner that is beyond reproach. For it is only when the users have a good experience in an arbitration that they will want to repeat it. And, on the flip side, one bad experience in an arbitration process may provide a convenient excuse to avoid it in the future. And the cumulative bad experience of users would undo all the goodwill that those who have come before us have built.

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CIAC'S JURISDICTION AND THE SCOPE FOR INTERNATIONAL ARBITRATION

by Roanna Kwong of Allen & Overy and Jess Raymund M. Lopez of Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)

Introduction

The Philippines' Executive Order 1008 dated 4 February 1985 (**EO 1008**) confers '*exclusive and original*' jurisdiction upon the Construction Industry Arbitration Commission (**CIAC**) when parties to a contract involving 'construction' in the Philippines agree to resolve their dispute by '*voluntary arbitration*'. Philippine case law interprets CIAC's jurisdiction under EO 1008 widely. Nonetheless, parties are not precluded from opting for international arbitration. This article explores, in the context of construction disputes in Philippines, the dynamics between EO 1008 and the parties' choice of a foreign arbitration forum in their arbitration agreements.

CIAC's broad mandate under EO 1008

Pursuant to Section 4 of EO 1008, CIAC has '*original and exclusive jurisdiction*' over construction-related disputes in the Philippines when the parties agree to '*voluntary arbitration*'. The CIAC Revised Rules of Procedure Governing Construction Arbitration further clarifies when CIAC's jurisdiction will attach. Section 4.1 provides that an arbitration clause in a construction contract is '*deemed*' an agreement to submit the dispute to the jurisdiction of CIAC '*notwithstanding the reference to a different arbitration institution or arbitration body in such contract*'.

The scope of CIAC's jurisdiction has been considered and further clarified by the Philippine Supreme Court, whose decisions form binding judicial precedent under Philippine law. The Supreme Court has ruled that pursuant to EO 1008, CIAC will have jurisdiction over construction disputes in the Philippines notwithstanding the parties' choice of other arbitral institutions *(China Chang Jiang Energy Corp. v. Rosal Infrastructures Builders* GR No. 125706, 30 September 1996). In other words, the CIAC is deemed an alternate arbitral institution to which a construction dispute may be referred, even where another arbitral institution was specified in the arbitration agreement. The Philippine Supreme Court has also ruled that CIAC may exercise and assume jurisdiction over a dispute notwithstanding the parties' non-compliance with agreed pre-conditions to arbitrate (*Hutama-RSEA Joint Operations Inc v. Citra Metro Manila Tollways Corporation* GR No. 180650, 24 April 2009).

There can therefore be no doubt that CIAC's jurisdiction is far-reaching when construction disputes in the Philippines are concerned.

Implications for International Arbitration

The extensive jurisdiction of CIAC naturally calls into question the role of international arbitration in the resolution of construction disputes in the Philippines. Whilst international parties engaging in construction projects in the Philippines may want to opt for an arbitration agreement with a neutral seat, EO 1008 has the potential to frustrate the parties' carefully designed dispute resolution mechanism.

However, the tension is sometimes overstated. EO 1008 does not render the parties' choice of institution void, and the decisions of the Philippine Supreme Court on EO 1008 ruled on challenges to CIAC's jurisdiction after it had already seized jurisdiction. The issue of which dispute resolution mechanism will prevail if a dispute is submitted to CIAC, on the one hand, and the parties' institution of choice, on the other hand, therefore remains an open question as a matter of Philippine law.

Furthermore, the Philippines Supreme Court has not yet determined the reach of CIAC's jurisdiction where the parties have agreed for the seat of arbitration to be outside of the Philippines. In such circumstances, it may be argued that Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (which has been ratified by the Philippines) creates an obligation on the Philippines to give effect to the parties' international arbitration agreement.

In one case where Allen & Overy and C&G Law acted together, we were successful in resisting an application to CIAC for an anti-arbitration injunction. In that case, the counterparty sought to restrain a Singapore seated ICC arbitration that was commenced in accordance with the parties' agreement, and the CIAC ultimately ruled in favour of upholding the terms of the arbitration agreement. Once constituted, the ICC tribunal also confirmed that it had jurisdiction to hear the case. Notably, the parties' arbitration agreement in that case expressly opted out of CIAC's jurisdiction, and it was primarily on that basis that the tribunals ruled that it was the parties' agreed forum, and not CIAC, that had jurisdiction to hear the case.

Whilst our experience shows there is scope for international arbitration despite the existence of mandatory dispute resolution procedures for construction disputes in the Philippines, absent further guidance from the Philippine Supreme Court, the precise ambit of CIAC's jurisdiction over construction disputes in the Philippines remains unsettled. In light of the uncertainty, strategic planning and a swift response to any challenges to the parties' choice of dispute resolution forum may be crucial to ensuring that the parties' agreed mechanism is respected.

In appropriate cases and where actions of the State have caused losses to foreign investors in connection with a construction project, parties may also consider the availability of investment treaty arbitration. Where the jurisdictional basis is found in the relevant investment treaty rather than the commercial contract, parties may avoid the operation of EO 1008, albeit this is subject, of course, to identifying an applicable investment treaty and satisfying its jurisdictional requirements.

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CONSIDERATIONS IN THE RECOGNITION AND ENFORCEMENT OF FOREIGN SUMMARY ARBITRAL AWARDS IN THE PHILIPPINES

by Joshua Gilbert F. Paraiso; Fidel T. Valeros, Jr.; Sergio Ildefonso O. Pinlac; Ranielle Marie G. Cagang of PJS Law and Melvin See of Dentons Rodyk & Davidson LLP

In the Philippines, the government has actively promoted alternative modes of dispute resolution ("**ADR**") systems, such as mediation and arbitration, within its institutional framework. The goal is to provide speedy and impartial justice and for the de-clogging of court dockets. Specifically, this is prescribed in Philippine Law through the promulgation of Republic Act No. 876, otherwise known as *The Arbitration Law* ("**RA 876**") and Republic Act No. 9285, otherwise known as the *Alternative Dispute Resolution Act of 2004* ("**RA 9285**"). The Philippine Supreme Court likewise promulgated A.M. No. 07-11-08-SC or the *Special Rules of Court on Alternative Dispute Resolution* ("**Special ADR Rules**") pursuant to the said laws.

In *BF Corp v. Court of Appeals*,[1] the Supreme Court emphatically declared that arbitration is now rightfully vaunted as "*the wave of the future*" in international relations. In fact, the Supreme Court has often promoted the use of various modes of ADR and respect party autonomy or the freedom of the parties to make their own arrangements in the resolution of disputes with the greatest cooperation of and the least intervention from the Courts.[2] Further, it has been constantly held that Courts shall only intervene in the cases allowed by law or the Special ADR Rules.[3]

Summary Dispositions in Arbitral Tribunals in the Philippines

There are two (2) arbitration institutions in the Philippines who have adopted provisions relevant to summary dispositions or early dismissals in their own rules of procedure. These are the Philippine Dispute Resolution Center Inc. ("**PDRCI**") and the Philippine International Center for Conflict Resolution ("**PICCR**").

As provided in the 2021 PDRCI Arbitration Rules which recently took effect last 01 October 2021, Section 35 thereof discusses summary dispositions of claims wherein no later than fifteen (15) days from the last submission of the relevant claims or defenses, any party may apply to the arbitral tribunal for the summary disposition of one or more claims, counterclaims, or defenses that are manifestly without merit. The arbitral tribunal retains discretion to refuse the application or allow it to proceed, provided that in the event the application is allowed to proceed, the other parties shall have an opportunity to repond to such application. The arbitral tribunal may adopt procedural measures it considers appropriate, such as, but not limited to, hearing the parties on the application and the presentation of evidence based on justifiable grounds. Thereafter, the arbitral tribunal shall make its summary disposition within sixty (60) days from the granting of the application which may be in the form of an order or award.

Meanwhile, the PICCR has also adopted a procedure on early dismissal of claims and defenses under its 2019 Arbitration Rules. More particularly, Article 28 on the Early Dismissal of Claims and Defenses provides that a party may apply to the arbitral tribunal for the early dismissal of claims or defenses on the basis that a claim or defense is manifestly without legal merit, or a claim or defense is manifestly outside the jurisdiction of the arbitral tribunal. The arbitral tribunal may allow such application to proceed after giving the parties an opportunity to be heard. The arbitral tribunal shall make an order or award on the application, which may be summary in nature, within sixty (60) days from the date of the filing of the application.

From the foregoing, it may be inferred that the grounds for summary dispositions are as follows: (1) whether the claim is manifestly without merit; or (2) where the claim is outside the jurisdiction of the tribunal.

[1] G.R. No. 120105, 27 March 1998; See also Heirs of Salas, Jr. v. Laperal Realty Corp., G.R. No. 135362, 13 December 1999.
[2] Special ADR Rules, Rule 2.1.
[3] Fruehauf Electronics Philippines Corp. v. Technology Electronics Assembly and Management Pacific Corp., G.R. No. 204197, 23 November 2016, citing the Special ADR Rules.

Notably, the grounds for summary dispositions and early dismissals in arbitration in the Philippines are also grounds in (i) Rule 29 on Early Dismissal of Claims and Defenses in the Singapore International Arbitration Centre (SIAC) Rules 2016; (ii) Article 22.1(viii) of the London Court of International Arbitration Arbitration Rules; and (iii) Article 43 on Early Determination Procedure in the Hong Kong International Arbitration Center 2018 Administered Arbitration Rules.

Recognition and Enforcement of Foreign Arbitral Awards

Being a state party to the Convention on the Recognition and Enforcement of Arbitral Awards (the "**New York Convention**"), the Philippines has adopted the grounds for refusal to recognize and enforce a foreign arbitral award, as provided in Article V of the New York Convention. Specifically, this has been reflected in Rule 13 of the Special ADR Rules, which begins with the filing of a petition[4] in the proper Regional Trial Court.[5] However, the provision of the Special ADR Rules on recognition and enforcement of foreign arbitral awards only allows for recognition and enforcement of foreign arbitral awards,[6] and not orders. Such distinction is notable considering the definitions of "award" and "foreign arbitral award" under the Special ADR Rules and RA 9285.

As defined, an "award" is any partial or final decision by an arbitrator in resolving the issue in a controversy.[7] Meanwhile, a "foreign arbitral award" is an award made in a country other than the Philippines.[8]

Further, under Article 4.31 of the Implementing Rules and Regulations of RA 9285 ("**RA 9285 IRR**"), an award shall be made in writing and shall be signed by the arbitrator/s. In the event that the arbitral tribunal is not a sole arbitrator, a majority of the signatures of the members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms.[9] From this definition, any other document shall be considered only as *written communication*.

From the foregoing, the first consideration in petitions for recognition and enforcement of foreign summary arbitral orders is the possibility that losing parties may oppose the petition on the ground that it is a mere order and ***not*** a foreign arbitral award contemplated under the Special ADR Rules. More particularly, the losing party may argue that the Special ADR Rules must be construed strictly to exclude any enforcement of foreign summary arbitral orders. Thus, to avoid any potential issues in a proceeding

[4] Special ADR Rules, Rule 13.2.
[5] The petition to recognize and enforce a foreign arbitral award shall be filed, at the option of the petitioner, with the Regional Trial Court (a) where the assets to be attached or levied upon is located, (b) where the act to be enjoined is being performed, (c) in the principal place of business in the Philippines of any of the parties, (d) if any of the parties is an individual, where any of those individuals resides, or (e) in the National Capital Judicial Region.
[6] Special ADR Rules, Rule 13.1.
[7] RA 9285, Section 3(f).
[8] Special ADR Rules, Rule 1.11.
[9] RA 9285 IRR, Article 4.31 (b).

for recognition and enforcement of a foreign arbitral award, it may be prudent and advisable for a party availing of summary dispositions or early dismissals in foreign arbitral proceedings to ensure that the ruling of the arbitral tribunal be issued in the form of an award.

Take for example Rule 29.4 of the SIAC Arbitration Rules 2016, wherein the grant of an application for early dismissal of a claim or defense may take the form of either an order or award. Thus, if the tribunal issues an order instead of an award, this may pose a potential challenge when such an order is later the subject of a petition for recognition and enforcement in Philippine courts.

In the Philippines, procedural rules, such as that of the Special ADR Rules, are generally construed liberally in order to accord litigants ample opportunity to prove their respective claims and in order to avoid a possible denial of substantial justice due to technicalities.[10] However, the Philippine Supreme Court has consistently ruled that:

> "[p]rocedural rules do not exist for the convenience of the litigants. Rules of Procedure exist for a purpose, and to disregard such rules in the guise of liberal construction would be to defeat such purpose. Procedural rules were established primarily to provide order to and enhance the efficiency of our judicial system."[11]

Hence, enforcing a foreign arbitral order may pose a challenge should the courts decide to adhere to the strict definition of what can be enforced in the Philippines.

The second consideration for petitions for recognition and enforcement of foreign summary arbitral awards is that the losing party may also oppose the petition on the ground that it was unable to present its case.

Under Rule 13.4 of the Special ADR Rules, one of the grounds to refuse recognition and enforcement of the foreign arbitral award is when there is proof that the party was unable to present its case.[12]

In addition thereto, the losing party may likewise argue that the failure or inability to present their case is a matter of public policy and under the Special ADR Rules, matters of public policy may be a ground to refuse recognition and enforcement of a foreign summary arbitral award.[13]

Under Philippine jurisprudence, public policy is defined as that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against public good.[14]

In the case of *Mabuhay Holdings Corporation v. Sembcorp Logistics Limited*,[15] the Philippine Supreme Court discussed that the threshold for a violation of public policy is the following:

> *"The illegality or immorality of the award must reach a certain threshold such that, enforcement of the same would be against Our State's fundamental tenets of justice and morality, or would blatantly be injurious to the public, or the interests of the society."*

It is thus possible that a losing party may contest that a foreign summary arbitral award is a violation of due process here in the Philippines due to public policy considerations due to the manner the summary award was arrived at. Different approaches are adopted. For example, Article 43.5 of the HKIAC Administered Arbitration Rules provides that the tribunal shall decide after providing all parties with an opportunity to submit comments on the request for early determination. Rule 29.34 of the SIAC Arbitration Rules 2016 provides that the tribunal shall, after giving parties the opportunity to be heard, decide whether to grant the application for early dismissal.

[10] Agbayani v. People of the Philippines, G.R. No. 215121, 23 June 2021.
[11] Heirs of Mejos v. Spouses Orais, G.R. No. 245347, 3 July 2019.
[12] Special ADR Rules, Rule 13.4.
[13] Special ADR Rules, Rule 3.14(b)(ii).
[14] Government Service Insurance System Board of Trustees v. Court of Appeals G.R. No. 230953, 20 June 2018.
[15] G.R. No. 212734, 5 December 2018.

Conclusion

While Arbitration in the Philippines is becoming a more prevalent form of dispute resolution, certain provisions of the Special ADR Rules might be used as a way for litigants to oppose the recognition and enforceability of such foreign summary arbitral awards here in the Philippines. To aid recognition and enforcement, the summary decision is preferably issued as an Award and parties are given as many opportunities as possible to present their case within the confines of a summary determination application. As arbitration becomes more accepted in the Philippines as an alternative mode of dispute resolution, Philippine courts will hopefully gain more experience and these potential issues will be addressed.

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YSIAC WRITING COMPETITION 2021: THE WINNING SUBMISSIONS

TOPIC: THIS HOUSE BELIEVES THAT CONTRACTUAL PRECONDITIONS TO ARBITRATION SHOULD BE REGARDED AS IMPEDIMENTS TO THE TRIBUNAL'S JURISDICTION

by In Hyuk Hwang of Bae Kim & Lee LLC South Korea

Proposition - In Favour of the Motion

Distinguished members of the panel, my esteemed colleague in opposition of today's motion, ladies and gentlemen. Imagine with me that a man meets a woman. It's love at first sight. Immediately, he asks for her hand in marriage. She replies, "*I will marry you if you go on 100 dates with me*." Stop. Now, are the two engaged to be married as soon as these words are spoken, the only remaining question being *when* they will marry? That is, did the woman already agree to marry the man? The answer, for a disturbing number of jurists, would apparently be yes. For them, conditions, like the one that the man and the woman must first go on 100 dates, are irrelevant to the question of consent because her answer was fundamentally a yes, her condition notwithstanding. Frankly, I submit that it is high time for us to recognize that consent does not come only in yeses and nos.

We are here to debate whether this House believes that contractual preconditions to arbitration should be regarded as impediments to the tribunal's jurisdiction. And I firmly stand in proposition of this motion. In support, (1) first, I will establish the simple proposition that parties *can* use contractual preconditions to limit the scope of their consent to arbitration, thereby impeding the tribunal's jurisdiction if the condition has not been satisfied; (2) second, I will show that this interpretation not only follows from the objective manifestation of the parties' intent in most contractual preconditions, but that it is, at least for multi-tier arbitration clauses, the result under a widely-accepted test for determining the parties' intent; (3) third, while recognizing that many have adopted the view in opposition of today's motion, I will submit that they have only done so because of a faulty assumption about the parties' intent, and (4) finally, I will end with a word of caution: if contractual preconditions are *not* regarded as impediments to the tribunal's jurisdiction, the unchecked power that will be afforded to tribunals will threaten the very legitimacy of arbitration.

To begin my **first point**, I submit that parties *can* use contractual preconditions to impede the tribunal's jurisdiction. As a preliminary matter, I think we can all agree that a tribunal has jurisdiction only to the extent that the parties granted jurisdiction by their arbitration agreement.[1] This follows from the fact that the power of a tribunal arises purely from the parties' autonomous decision to submit themselves to arbitration.[2] I think we can all agree too, that parties can and often do limit the scope of their consent and thus the scope of the tribunal's jurisdiction. For instance, under virtually all arbitration agreements, including the SIAC Model Clause, parties routinely agree to arbitrate only disputes that "*arise out of or in connection with*" the underlying contract.[3] My next, perhaps more controversial submission is this: setting contractual preconditions that must happen before a party can submit a dispute to arbitration is one way in which the parties can manifest their intent to limit the scope of their consent.

In this regard, I submit that many parties are already doing this on a day-to-day basis. That is, parties are essentially agreeing to arbitrate future disputes between them *on the condition that* the dispute "*arises out of or in connection with*" the underlying contract. In fact, it seems a rather basic proposition that the parties manifest their intent to limit the scope

[1] See J. Brian Casey, Chapter 5: The Arbitral Tribunal's Jurisdiction in Arbitration Law of Canada: Practice and Procedure, Section 5.1.1 ("There is no 'inherent' jurisdiction in an arbitral tribunal. The arbitral tribunal takes its jurisdiction to decide a particular dispute from the agreement between the parties."); Jason Rotstein, Before Ending the Case: Disassembling Jurisdiction and Admissibility in BG v. Argentina, 51 Geo. J. Int'l L. 81, 95 (2019) ("The arbitral tribunal gets its power, jurisdiction, from the parties; that power comes from the consent or agreement to arbitrate.").

[2] See Alan Scott Rau & Andrea K. Bjoklund, BG Group and "Conditions" to Arbitral Jurisdiction, 43 Pepp. L. Rev. 577, 579 (2016) ("[T]he arbitral process, as a 'matter of contract,' must rest on a core finding of 'consent'. . . ."). See also First Options of Chicago, Inc., v. Kaplan, 514 U.S. 938, 943 (1995) ("[Arbitration] is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration."); Steelworkers v. Warrior & gulf Nav. Co., 363 U.S. 574, 582 (1960) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

[3] See Singapore International Arbitration Centre, SIAC Model Clause, at https://www.siac.org.sg/model-clauses/siac-model-clause.

of their consent to arbitration by words that narrow the circumstances in which the parties can refer a dispute to arbitration. When parties set preconditions to arbitration, such as that the parties must first mediate their dispute, the parties are consenting only to a specific and narrow type of arbitration, which in this case is *arbitration after mediation*. That is, I am submitting that the parties that agree to arbitration with contractual preconditions are not agreeing to arbitrate in general; they are agreeing to arbitrate if and only if the condition is met. In this sense, what exactly the parties intended to agree on is of exclusive importance for our debate today.[4]

The idea that contractual preconditions limit the scope of the parties' consent and thus the tribunal's jurisdiction is one that even Professor Jan Paulsson—one of the leading scholars on the topic of today's debate, who has been cited with approval in recent and prominent cases that have dealt with the issue[5] and is a staunch advocate of the view that preconditions are merely issues of admissibility—admits is a logical one. He wrote, in the context of a time-bar precondition to arbitration:

> *"Could the stubborn objector nevertheless insist … that the consent to arbitration applies to timely claims and not others? … <u>It would be wrong—and pointless—to deny that this argument has a defensible logic</u>".*[6]

Indeed, the proposition that contractual preconditions are a matter of a tribunal's jurisdiction because it goes to the scope of the parties' consent has also found support from renowned jurists at the bench[7] out of recognition of what is at stake here: when the parties' consent is in question, it is necessary to be able to refer the matter to a court (which, of course, is possible only when the matter is considered one concerning jurisdiction) to avoid the risk of forcing parties to arbitrate a matter that they did not agree to arbitrate.[8]

Moving to my **<u>second point</u>**, that contractual preconditions should be regarded as a matter of jurisdiction is the natural conclusion of the parties' objective intent as gleaned from contractual preconditions and, at least for multi-tier arbitration clauses, the result under a widely-accepted test for determining the parties' intent. Starting again with common ground, there seems to be a general consensus that, ultimately, whether contractual preconditions should be considered impediments to the tribunal's jurisdiction depends on the parties' intent.[9] I submit to you that the language of conditions generally plainly communicates the intent to limit the scope of an arbitration agreement. Take, for example, the following hypothetical clause:

> *"Any dispute arising out of or in connection with this contract shall be referred to arbitration administered by the Singapore International Arbitration Centre in accordance with the Arbitration Rules of the Singapore International Arbitration Centre, <u>if the parties have first attempted to settle the dispute through mediation under Clause X.</u>"*

Here, the word "*if*" that starts off the condition to mediate should be read as signaling that something must first happen before the parties submit their dispute before an arbitrator (put another way, before the parties give a tribunal the power and jurisdiction to settle their dispute).[10] Reading the clause any other way would be a forced result that would rob the contractual precondition of most, if not all, practical use, which should be discouraged both as a matter of policy and of sound contract interpretation.

Moreover, for multi-tier arbitration clauses like the one above, this is the only possible conclusion. Setting aside holdings from courts that have simply held that contractual preconditions clearly present an issue of jurisdiction, even courts with the opposite view employed a logic that, when followed, lead to the conclusion that parties that agree to multi-tier

[4] See Alan Scott Rau & Andrea K. Bjorklund, BG Group and "Conditions" to Arbitral Jurisdiction, 43 Pepp. L. Rev. 577, 579-80 (2016) (In the context of today's debate, writing that "[T]he inquiry … must, in the end, turn on the scope of consent—everything rests on an assessment of the parties' contractual understanding.").

[5] For example, he was cited with approval from the following courts that upheld the view in opposition of today's motion and my submission: C v. D [2021] HKCFI 1474 from Hong Kong; Republic of Sierra Leone v. SL Mining Ltd. [2021] EWHC 286 (Comm) from England; and BBA v. BAZ [2020] SGCA 53 from Singapore.

[6] Jan Paulsson, Jurisdiction and Admissibility, Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner (ICC Publishing 2005) 601, 615.

[7] See, e.g., the Swiss Federal Tribunal in Transport-en Handelsmaatschappij 'Vekoma' B.V. v. Maran Coal Corporation, judgment of 17 August 1995, ASA Bulletin 1996, 673; the U.S. 10th Circuit Court of Appeals in Dean Witter Reynolds, Inc. v. Howsam, 262 F.3d 956, 966 (10th Cir 2001) (reversed); the U.S. Supreme Court in BG Group v. Republic of Argentina, 572 U.S. 25, 41 (2014) (Roberts C.J., dissenting).

[8] See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) ("[R]eference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.").

[9] See Gary Born, International Commercial Arbitration, p.999 (3rd ed. 2020).

[10] This interpretation is based on the simple dictionary meaning of the word "condition", which the word "if" in the sample clause evokes. That meaning, according to the Merriam Webster Online Dictionary, is "something essential to the … occurrence of something else." See Definition of Condition, https://www.merriam-webster.com/dictionary/condition.

arbitration clauses envision limiting the scope of their consent to arbitration. They key here that such clauses are connected to the *forum* in which the parties will resolve their dispute.

For instance, the England and Wales High Court (Commercial Court) recently adopted the so-called "*tribunal versus claim*" test of interpreting whether the parties intended the failure of contractual preconditions to work as impediments to jurisdiction, a test suggested by leading scholars such as Paulsson, Born, Mills, and Merkin and Flannery, and approved also in the Singapore Court of Appeal in *BBA v. BAZ*[11] *and BTN v. BTP.*[12] Employing the test, the English court determined that the time-bar condition in that case was one that went to admissibility because it revolved around the issue of "*whether* [the claim] h*as been presented too early*", as opposed to "*whether there is another forum rather than arbitration in which* [the claim] *should be decided*".[13] By the court's own logic, a condition that the parties must first go to mediation (or another alternative dispute-resolution procedure) is a question that falls in the latter camp because it asks "*whether there is another forum rather than arbitration*" and should go to the question of jurisdiction.

Further, there is no room to mistake the parties' intent especially where the multi-tier arbitration agreement uses definitive language such as "*shall*" to oblige the parties to a preliminary process such as negotiation, conciliation or mediation, and uses language such as "*if*" or "*it is a condition that*" to show that this must occur before arbitration can take place. In the U.S. Supreme Court case *BG Group*, the arbitration agreement used such clear language.[14] There, the Chief Justice of the U.S. Supreme Court lamented the majority's decision to treat the arbitration agreement as presenting an issue of admissibility, commenting that "[t]*his provision could not be clearer: Before taking any other steps, an aggrieved investor must submit its dispute with a Contracting Party to that Contracting Party's own courts*".[15]

Thus, where there is a well-worded multi-tier arbitration agreement in place, one can only wonder how much more explicit the parties must be in conveying their intent to submit themselves and their dispute to arbitration only when the contractual preconditions have been satisfied.[16] Surprisingly, those that would oppose today's motion still posit that the parties seeking to limit the scope of their consent to arbitration must be clearer yet by expressly stating that no tribunal shall have any authority or jurisdiction until the contractual preconditions have been satisfied.[17]

With respect, this is not a workable solution. Expressly stating the above is too much to ask from commercial parties drafting arbitration agreements, who will likely assume by the plain language of the agreement that inserting a contractual precondition is sufficient to prevent a tribunal from exercising jurisdiction until that condition is satisfied. For one, arbitration agreements are often employed in *international* commercial contracts, whose very nature makes it difficult for parties to have the same understanding of the topic that is the subject of today's debate. Further, one need only take a quick glance at the literature to learn that even scholars

[11] Republic of Sierra Leone v. SL Mining Ltd. [2021] EWHC 286 (Comm), paras. 14-15.
[12] BTN v. BTP [2020] SGCA 105, para. 69.
[13] Republic of Sierra Leone, at para. 18.
[14] BG Group v. Republic of Argentina, 572 U.S. 25, 52 (2014) (Roberts C.J., dissenting).
[15] Id.
[16] If this was your question, you are not alone. See Alan Scott Rau & Andrea K. Bjorklund, BG Group and "Conditions" to Arbitral Jurisdiction, 43 Pepp. L. Rev. 577, 602 (2016) ("If one can imagine a possible scenario in which the parties did in fact make this defensible choice, how much more explicit does the language have to be?").
[17] See, e.g., Gary Born, International Commercial Arbitration, p.999 (3rd ed. 2020); C v. D, para. 52(5); BBA v. BAZ, section 80.

and judges have found today's topic to be counter-intuitive and confusing.[18] Thus, it would betray common sense to require commercial parties to be an expert at today's frankly esoteric topic, when even we lawyers are routinely confused.

If, as I have submitted thus far, logic and the plain import of the parties' words as shown in a clear contractual precondition should be sufficient to show the parties' intent to make the failure of said condition an impediment to a tribunal's jurisdiction, how is it that the majority of jurists, courts, and tribunals, including those of highest renown, would stand in opposition of today's motion?

Unraveling this mystery takes us to my **third point**: those that would oppose today's motion do so based largely on a faulty assumption that efficiency and finality are the parties' primary or exclusive objectives. At the offset, it should be made clear that contractual preconditions are, by and large, considered to be issues of admissibility based on the assumption that the parties would want whatever most *efficiently* leads to a *final* decision (which they would not have if contractual preconditions are regarded as impediments to jurisdiction, since that allows the possibility of one party challenging the tribunal's jurisdiction). This, for instance, is Gary Born's express rationale in his treatment of today's topic, which courts and tribunals have time and again cited in rendering a decision that is opposed to today's motion:[19]

> "In interpreting the parties' arbitration agreement, *the better approach is to **presume**, absent contrary evidence, that pre arbitration procedural requirements are not 'jurisdictional'. Similarly, parties can be **assumed** to desire a single, centralised forum (a 'one stop shop') for resolution of their disputes …* 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."[20]

Respectfully, I submit that making this assumption about the parties' intent is as wrong as it is repugnant to party autonomy for the following reasons.

First, efficiency and finality, contrary to popular understanding, are *not* an essential part of what arbitration is, and therefore do not deserve deferential treatment. Efficiency and finality are merely what many parties happen to favor, but the essence of arbitration, and what does deserve deference, is the parties' autonomy to design an alternative dispute resolution method of their choosing.[21] Party autonomy is king. It is for this reason that parties are free to place emphasis on whatever they desire. Yes, even at the expense of efficiency and finality. Indeed, courts in the United States have gone as far as to say that parties are free to agree to whatever dispute resolution method they want as long as it is not against public policy, short of an arbitration by battle, by a panel of three monkeys, by flipping a coin, or by studying the entrails of a dead bird.[22]

Second, it would be wrong to assume that commercial parties always desire efficiency and finality above all else. They do not. One of the many other virtues commercial parties seek is the prospect of amicable dispute resolution, evidenced by the popularity of the contractual preconditions to first mediate or negotiate in multi-tier arbitration clauses, which obviously come at the price of efficiency. Finality is mortal, too. By way of demonstration, a 2011 survey of American Fortune 1000 companies had about 52 percent of its respondents cite the general lack of arbitral appeals as to why they decided against arbitrating their disputes.[23]

Stripped of the presumption that the parties would have, out of their affinity for efficiency and finality, intended that their contractual precondition to arbitration should be regarded merely an issue of admissibility, I submit that my **first** and **second** points stand—the clear intent as seen in most contractual preconditions and especially multi-tier arbitration clauses is for the condition's failure to act as an impediment to a tribunal's jurisdiction.

[18] The most famous example of such literature is Methanex Corporation v. United States of America, Partial Award on jurisdiction and Admissibility, 7 August 2002, 7 ICSID Reports 239, 271 (para. 139) ("[I]t is perhaps not easy to define the exact dividing line, just as it is not easy in twilight to see the divide b/w night and day."). See also Jason Rotstein, Before Ending the Case: Disassembling Jurisdiction and Admissibility in BG v. Argentina, 51 Geo. J. Int'l L. 81, 82 (2019) ("Nevertheless, two categories of preliminary issues--jurisdiction and admissibility--are blended, blurred, and confused."); C.H. Shrueer, The ICSID Convention: A Commentary 538 (Cambridge: Cambridge University Press, 2001) ("The two terms are often used interchangeably.").

[19] See, e.g., C v. D [2021] HKFCI 1474, para. 31.

[20] See Gary Born, International Commercial Arbitration, pp.999-1000 (3rd ed. 2020) (emphasis added).

[21] See Lee Goldman, Contractually Expanded Review of Arbitration Awards, 8 Harvard Negotiation Law Review 171, 173 (2003) ("Arbitration, a contract-based form of dispute resolution, is increasingly popular because it allows the parties to avoid litigation and structure dispute resolution in a manner that best suits each party's needs.") (emphasis added).

[22] See Baravati v. Josepthhal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994); LaPine Technology Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997).

[23] Thomas J. Stipanowich & J. Ryan Lamare, Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations, 19 Harvard Negotiation Law Review 1, 53 (2015).

Before I close, distinguished members of the panel, my esteemed colleague in opposition of today's motion, ladies and gentlemen, as my **final point**, I leave you with a word of caution. If contractual preconditions are *not* regarded as impediments to the tribunal's jurisdiction, the unchecked power afforded to tribunals will threaten the legitimacy of arbitration, and therefore, contractual preconditions to arbitration *should* be regarded as impediments to the tribunal's jurisdiction.

Some contend that the failure of contractual preconditions should be regarded as an issue of admissibility because arbitrators are in the optimal position to decide matters of procedure and because of the risk of fragmenting a dispute between courts and tribunals.[24] But the opposite is true; arbitrators are in the worst position to decide this particular matter, and not allowing the possibility of fragmenting the dispute will entail an even greater risk.

How so, you ask? Let us start by noting that tribunals are generally regarded as being competent to rule on its own jurisdiction under the doctrine of Kompetenz-Kompetenz.[25] Of course, the tribunal's power to rule on its own jurisdiction does not exist in a vacuum; it coexists with the understanding that jurisdictional decisions can always be reviewed by national courts.[26] Since the inception of the Kompetenz-Kompetenz doctrine, although the extent and timing of judicial review of a tribunal's jurisdictional ruling have been debated, *whether* a jurisdictional ruling should be reviewed has never been in dispute.[27] Thus, there exists a clear understanding in the arbitral world that whether the parties have agreed to arbitrate in the first place is "*undeniably an issue for judicial determination*".[28]

And the reason why jurisdictional rulings are universally subject to judicial review is that such review allows recourse to parties that did not in fact consent to arbitration.[29] Thus, judicial review has been described as "*logically necessary*",[30] not least to avoid a tribunal's attempt at immunizing itself from review by declaring an issue one of admissibility and not of jurisdiction.[31]

If my submission—that the parties' intent as manifested in arbitration agreements with contractual preconditions is in most cases to have the failure of said condition be an impediment to the tribunal's jurisdiction—is accepted, it follows that judicial review is warranted in that situation. But if the contractual preconditions to arbitration are deemed to only concern a claim's admissibility, practically speaking, *tribunals would be in a position where it gets to decide, with total immunity, whether a claim should be heard by them*. Where a tribunal can act to its own benefit and where there exists no mechanism for accountability, there rises a serious conflict of interest. On the one hand, the tribunal must render a correct decision under the governing law, yet, on the other hand, the tribunal is incentivized always to take the case before it and immunize itself from any challenges to that decision. I submit that herein lies a potential abuse of power.

Admissibility's proponents, such as my learned colleague in opposition of today's motion, may argue that a tribunal would be able to always come to a just outcome by sometimes (as necessary) ordering a stay of the proceedings in whole or in part (pending compliance with the contractual precondition), by imposing sanctions, or even by dismissing a claim outright.[32] But just because a lioness may maintain its calm does not mean that we should rest our heads in her jaw. The mere possibility that the tribunal will not abuse its power and instead take one of the reasonable courses of action discussed above does not preclude the possibility that the tribunal will abuse that power.

There may be those in today's audience that would point out that many tribunals and courts are currently regarding contractual preconditions to arbitration as presenting issues of admissibility and doing just fine.

[24] See Gary Born, International Commercial Arbitration, pp.999-1000 (3rd ed. 2020).
[25] The doctrine needs no introduction. For reference, see Rule 25.1 of the Arbitration Rules of the Singapore International Arbitration Centre.
[26] See Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, Redfern and Hunter on International Arbitration: Student Edition, p.351 (5th ed. 2009) ("All jurisdictional decisions made by a tribunal under its kompetenz-kompetenz power are subject to judicial review, and courts have the final word on jurisdiction.").
[27] See Ashley Cook, Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz, 2014 Pepp. L. Rev. 17, 21 (2014); see also the travaux preparatoires of UNCITRAL Model Law Art. 34 as seen in the UNCITRAL's 317th, 318th, 319th, 324th, 330th and 331th meeting (debating the contours of Article 34 on setting aside a tribunal's ruling, but not questioning whether such a measure should exist).
[28] Alan Scott Rau & Andrea K. Bjorklund, BG Group and "Conditions" to Arbitral Jurisdiction, 43 Pepp. L. Rev. 577, 579 (2016)
[29] See BG Group, PLC v. Republic of Argentina, 572 U.S. 25, 60 (2014) ("The logic is simple: Because an arbitrator's authority depends on the consent of the parties, the arbitrator should not as a rule be able to decide for himself whether the parties have in fact consented.").
[30] Gary Born, International Commercial Arbitration, p.2792 (2nd ed. 2014).
[31] See August Reinisch, Jurisdiction and Admissibility in International Investment Law, 16 Law & Prac. Int'l Cts. & Tribs. 21, 25 (2017)
[32] This was suggested by the court in C v. D, para. 49.

For them, the fact that parties still seem to have faith in arbitration is evidence that we are on the right track. But I would remind them that the argument that "*things appear to be fine because there has been no observable harm*" are the famous last words of the good citizens of the Greek city of Pompeii before the volcanic Mount Vesuvius erupted and the citizens were no more. I submit that regarding contractual preconditions as simply presenting an issue of admissibility creates a system that can be abused and gives tribunals the unchecked power to do so. And if history has taught us anything, it is that "*power tends to corrupt, and absolute power corrupts absolutely*."[33]

In brief summation, contractual preconditions to arbitration should be regarded as impediments to arbitration because the conditions limit the scope of parties' consent to arbitration, which raises an issue of jurisdiction. This follows from the objective intent of the parties as seen in arbitration agreements with contractual preconditions, especially in the case of multi-tier arbitration clauses, and those that defy the parties' objective intent do so out of an erroneous assumption that parties always desire efficiency and finality above all else.

Moreover, because seeing contractual preconditions as *not* impeding a tribunal's jurisdiction will empower tribunals in a way that creates a mechanism liable for abuse, supporting today's motion, I submit, is the wiser approach. In light of the foregoing, I hereby restate that I firmly stand in proposition of today's motion.

Thank you.

Disclaimer – The views and opinions expressed in this article are solely those of the author(s)/interviewee and do not reflect the views of SIAC or YSIAC.

[33] The quote is most often attributed to the English historian and politician Lord John Acton.

TOPIC: THIS HOUSE BELIEVES THAT CONTRACTUAL PRECONDITIONS TO ARBITRATION SHOULD BE REGARDED AS IMPEDIMENTS TO THE TRIBUNAL'S JURISDICTION

by Joan Lim-Casanova of Cavenagh Law LLP Singapore

Opposition – Against the Motion

Introduction

1. The Opposition believes that contractual preconditions to arbitration should not be regarded as impediments to the Tribunal's jurisdiction. Instead, they raise a question of admissibility, not jurisdiction.

2. Jurisdiction or admissibility – so technical! Is the distinction really important?

3. Well, yes. If it is a question of jurisdiction, it is subject to review by the national courts – which may reverse the decision of the Tribunal. See for example, section 67 of the English Arbitration Act, section 24 of the International Arbitration Act in Singapore and/or Article 34(1) of the Model Law, just to name a few.

4. On the other hand, there is no basis to challenge Awards on the question of admissibility.

I. Distinction between jurisdiction and admissibility

5. First, it is important to appreciate the distinction between jurisdiction and admissibility – as this is the key area in which the two sides cross swords.

6. Many judges and academic writers have proffered tests and/or explanations to differentiate between jurisdiction and admissibility[1]: e.g. jurisdiction refers to "*the power of the tribunal to hear a case*" while admissibility refers to "*whether it is appropriate for the tribunal to hear it*"[2].

7. The Opposition likes this simple test: *Is the objecting party taking aim at the Tribunal or at the claim?*[3]

(a) If the objection is aimed at the Tribunal, i.e. that this claim should not be arbitrated and adjudicated by the Tribunal but rather, should be raised in some other forum instead – the objection is jurisdictional.

(b) If the objection is aimed at the claim, i.e. that the claim is stale because it is time-barred or that the claimant is barred from bringing the claim because of *res judicata* estoppel – the objection is one of admissibility.

8. Now, let's apply this test to the issue at hand: non-compliance with preconditions to arbitration, is this objection aimed at the Tribunal or at the claim?

9. The objection, in essence, is really saying "*this claim should not be heard at all, or at least not yet, until the preconditions are met*".

10. This objection is **not** aimed at the Tribunal. It is not saying that the dispute ought to be resolved in another forum. It does not relate at all to the role or powers of the Tribunal.

11. Rather, the objection is **taking aim at the claim**, that it was brought prematurely. The Tribunal has the jurisdiction to hear it but should decline it on the ground that the preconditions to arbitration were not met. Therefore, it is an issue of admissibility and the Tribunal's decision is final.

II. One-stop shop

12. Next, we examine the arguments for the Opposition's case that non-compliance with preconditions to arbitration raises a question of admissibility rather than act as an impediment to the Tribunal's jurisdiction.

[1] See for example, PAO Tatneft v Ukraine [2018] 1 WLR 5947 at [97]: "Issues of jurisdiction go to the existence or otherwise of a tribunal's power to judge the merits of a dispute; issues of admissibility go to whether the tribunal will exercise that power in relation to the claims submitted to it."; Chin Leng Lim, Jean Ho & Martins Paparinskis, International Investment Law and Arbitration: Commentary, Awards and Other Materials (Cambridge University Press, 2018) at p 118: "…is the challenge related to the interpretation and application of the jurisdictional clause of the international tribunal (and hence jurisdictional), or is it related to the interpretation and application of another rule or instrument (and is hence one of admissibility)?"

[2] Waste Management, Inc v United Mexican States ICSID Case No ARB(AF)/98/2, Dissenting Opinion of Keith Highet (8 May 2000) at [58], cited with approval in Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho [2019] 1 SLR 263 at [207].

[3] This question is described as the "lodestar" by Professor Jan Paulsson, "Jurisdiction and Admissibility" (2005) in Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner (Gerald Aksen et al eds) (ICC Publishing, 2005) at pp 616 and 617, also cited by the Singapore Court of Appeal in BBA and others v BAZ and another appeal [2020] 2 SLR 453 at [77].

13. When parties come together to do a deal, the last thing on their mind is what happens when good deals go bad.

14. When they finally do get to the part on the dispute resolution clause (likely as an afterthought and probably after some harassment from the transactional lawyers to run the clause past their colleagues in the dispute resolution department), most of the time, in cross-border deals, the parties agree to arbitrate. They intend that a neutral arbitral tribunal would settle **all disputes** arising from and in connection with the agreement.

15. Presumably, this would also include disputes regarding the pre-arbitration procedural requirements.

16. Such pre-arbitral conditions often include cooling off, negotiation, and/or mediation. For example:

(a) For matters involving parties based in Asia, it is common to see multi-tiered dispute resolution clause which provides that any dispute would be escalated up the hierarchies of the respective parties with representatives of increasing seniority to meet to attempt resolution[4] in good faith.

(b) In FIDIC-styled construction contracts, the dispute resolution clause would be even more structured and exhaustive.

i. In the pre-1999 FIDIC documents, clause 67 of the FIDIC 1987 Red Book requires all disputes be referred in writing to an engineer for his determination. The engineer is thereafter (and within 84 days) obliged to issue a decision in respect of the dispute. If a party is dissatisfied with the decision, it has a period of 17 days (from the date of receipt of the engineer's decision) to notify the other party that it objects to the engineer's determination and that it intends to commence arbitration proceedings.[5]

ii. Post-1999, FIDIC introduced the Dispute Adjudication Board ("**DAB**") to replace the "engineer's decision". Clause 20.4 of the FIDIC 1999 Red Book requires that all disputes be referred to the DAB for it to make a determination (within 84 days). The parties have 28 days thereafter to give notice of their dissatisfaction (if any) with the DAB's decision (the "**NoD**"). This NoD is a prerequisite to commencing arbitration since the DAB's decision will be final and binding if no NoD is given within the stipulated 28 days. Clause 20.5 obliges the parties – after a NoD has been submitted – to attempt to settle their dispute amicably before arbitration can be initiated.[6]

17. As you can see from the above examples, certain multi-tiered clauses (such as the FIDIC ones) provide clear and methodical steps to be followed prior to commencing arbitration. However, for other clauses which are less clear, issues in interpretation tend to arise – e.g. when parties are expected to enter into "*good-faith settlement negotiations*" – what constitutes good-faith negotiations and when would it be considered exhausted such that arbitration may be triggered?

18. Such issues of interpretation are capable of resolution by the arbitrators and indeed, should be submitted to the arbitrators for determination. When agreeing to the dispute resolution clause, the parties are presumed to intend that "*a single, neutral arbitral tribunal [would] resolve all questions regarding the procedural requirements and conduct of the parties' dispute resolution mechanism*".[7]

19. If you agree with the Opposition, this means that arbitration offers parties a "*one-stop shop*" to resolve all their disputes: both procedural and substantive ones. The arbitral tribunal decides, issues an award and thereafter, parties move on to enforcement and move on with their lives!

20. On the other hand, if you are for the Proposition, what may happen is this:

[4] See for example, International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another [2014] 1 SLR 130 which involved a dispute between companies incorporated in Thailand and Singapore. The Court of Appeal found at [57] that what was contemplated under cl 37.2 of the relevant agreement was that any dispute would be escalated up the hierarchies of the respective parties with representatives of increasing seniority to meet to attempt resolution.

[5] FIDIC 1987 Red Book, clause 67.

[6] FIDIC 1999 Red Book, Clause 20.4.

[7] Born, in International Commercial Arbitration (3rd Ed 2021) chapter 5 at 110 ff.

(a) Parties go for arbitration, the Respondent objects to the jurisdiction of the Tribunal on the ground that the Claimant had not satisfied the preconditions for arbitration.

(b) The Tribunal dismisses the Respondent's objection to jurisdiction by way of a preliminary ruling – the Tribunal finds that it has jurisdiction over the dispute.

(c) Dissatisfied with the Tribunal's decision, the Respondent brings the action to a national court for a declaration that the Tribunal does not have jurisdiction to determine the dispute.

(d) Even assuming that the national court agrees with the Proposition and decides to set aside the Tribunal's ruling on jurisdiction, the Claimant will then seek to strictly comply with the preconditions to arbitration and then appoint a new tribunal.

(e) Ta-da! Back to square one. What a huge waste of time, effort and money.

21. The Proposition may argue: "*hang on a minute, even if the issue regarding preconditions to arbitration goes towards admissibility rather than jurisdiction, a Tribunal could determine that a premature claim is not admissible. In that case, the parties may also be required to appoint a new tribunal after properly complying with the escalation requirements in the dispute resolution clause.*"

22. The difference is the effect of finality – decisions on the Tribunal's jurisdiction can be challenged but decisions as to admissibility cannot be reviewed. The difference lies in not having the additional step of referring the issue regarding the Tribunal's jurisdiction to the national courts for determination. This means that there is no need to spend money to appoint local lawyers to bring the action in a national court, no need to spend time for the national court to reach a decision before appointing a new tribunal.

III. Weight of authorities

23. Finally, while I would usually not use this argument in a debate, I thought it would be remiss of me not to use it for this Motion: the weight of authorities lean heavily in support of the Opposition.

24. The Opposition's case is built on the shoulders of academic giants such as Professor Gary Born[8], Professor Jan Paulsson[9] and Professor Alex Mills[10].

(a) In *International Commercial Arbitration* (3rd ed 2021), Professor Gary Born stated at pp 999-1000:

"*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.*"

(b) Professor Paulsson, in *Jurisdiction and Admissibility in Global Reflections on International Law, Commerce and Dispute Resolution* (ICC Publishing, 2005) (at pp 615-617) stated:

" 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 — given the multiplicity of fora which might otherwise come into play internationally, with hugely different practical outcomes — 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."

[8] Born, in International Commercial Arbitration (3rd Ed 2021) chapter 5.
[9] Paulsson, in Jurisdiction and Admissibility in Global Reflections on International Law, Commerce and Dispute Resolution, ICC Publishing, 2005 at 616–617.
[10] Mills, in Party Autonomy in Private International Law (CUP 2018) at 6.4.1.

25. The Opposition's case is also supported by important decisions in other jurisdictions such as the UK[11], US[12], Singapore[13] and Hong Kong[14].

26. In *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm), the English High Court declined to set aside an arbitral award, despite the fact that the defendant had allegedly failed to comply with certain pre-conditions to arbitration agreed in a multi-tiered dispute resolution clause.

27. The English High Court held that the alleged non-compliance was a question of admissibility of the claim before the Tribunal and not of the Tribunal's jurisdiction. Whether the parties had complied with the pre-arbitration procedures was therefore subject to the final decision of the Tribunal and not a question of jurisdiction to be reviewed by the English Court under s67 of the English Arbitration Act.

28. In considering whether preconditions to arbitration are a question of admissibility or jurisdiction, the English High Court found that "*the views of leading academic writers, after careful analysis by them, are all one way*"[15] – that these are matters of admissibility rather than jurisdiction.

29. The Proposition may argue that just as how there are authorities supporting the Opposition, there are also authorities supporting the Proposition's case that preconditions to arbitration were held to be impediments to the Tribunal's jurisdiction.

(a) See for example, the 2013 Singapore Court of Appeal case in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 which appears to suggest that the issue of preconditions to arbitration go to jurisdiction rather than admissibility. In that case, the Singapore Court of Appeal found that the preconditions to arbitration had not been complied with because the precise persons required to meet to try to resolve any dispute between the parties were not so involved. The Court of Appeal found at [62] and [63] that given the condition precedents for arbitration were not complied with, "*the Tribunal therefore did not have jurisdiction over the Appellant and its dispute with the Respondent*".

(b) In *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2015] 1 WLR 1145 and *HZ Capital International Ltd v China Vocational Education Co Ltd* [2019] HKCFI 2705, the English and Hong Kong Courts regarded the pre-conditions to arbitrate as a matter of jurisdiction.

30. In each of those cases cited above, the question of whether the preconditions to arbitration should go towards the issue of a tribunal's jurisdiction or admissibility was not specifically argued. Accordingly, those decisions are of limited significance to this debate.

31. In *C v D* [2021] HKCFI 1474, after examining the overwhelming authorities in various jurisdictions in favour of the Opposition's case, the Hong Kong High Court concluded that at [43] and [50] that:

"43. These academic works and international authorities demonstrate that the distinction between jurisdiction and admissibility is not one only to be drawn on the specific wording of the written law of a particular jurisdiction, but is a concept rooted in the nature of arbitration itself. They also point out the policy reasons that justify different legal treatment of jurisdictional challenges and admissibility challenges.

…

50. The approach espoused in the international materials referred to above seems to me to be entirely consistent with the policy in Hong Kong law which respects the parties' autonomy in choosing arbitration as the means to resolve their disputes with its incident of speed and finality as well as privacy…"

[11] Republic of Sierra Leone v SL Mining Ltd [2021] EWHC 286 (Comm).
[12] US Supreme Court, Breyer J, delivering the opinion of the Court in BG Group v Republic of Argentina 134 S.Ct.1198 (2002) (US Supreme Court), also cited at [15] in ibid, made it clear in relation to a similar issue of allegedly premature arbitration (at [7]–[8]) that a dispute about a procedural condition precedent to arbitration should be resolved by the arbitral tribunal.
[13] Singapore Court of Appeal in BBA v BAZ [2020] 2 SLR 453 and BTN and another v BTP and another [2021] 1 SLR 276.
[14] Hong Kong High Court in C v D [2021] HKCFI 1474.
[15] Republic of Sierra Leone v SL Mining Ltd [2021] EWHC 286 (Comm) at [14].

Conclusion

32. In conclusion, if you support the Opposition's case, it means that you are choosing to:

(a) support a one-stop shop for disputes to be resolved through arbitration with speed and finality without unnecessary expense; and

(b) uphold the principle of certainty that parties to arbitration agreements hold dearly.

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