NWA & FSY v NVF, RWX & KLB [2021] EWHC 2666 (COMM)

(I) THE ISSUE

This case raised the question of whether the failure of a party to comply with a term of an arbitration agreement to first mediate the dispute before referring it to arbitration, results in the arbitral Tribunal not having **jurisdiction** to hear the dispute (so as to be susceptible to challenge under section 67 of the Arbitration Act 1996 (the ***Act***)) or concerns only a challenge to the **admissibility** of the dispute, on which the Tribunal's decision is final (and which does not fall within the scope of section 67 of the Act).

(II) BACKGROUND TO THE APPLICATION

Under a written agreement dated 25 June 2007 (the ***Agreement***), the parties agreed to reorganise their existing business dealings concerning patents for the display of high-resolution 3D video holograms.

Under clause 10.2 of the Agreement, in the event of "*a dispute arising out of or in connection with th[e] Agreement*" the parties were to "*first seek settlement of that dispute by mediation in accordance with the London Court of International Arbitration Mediation Procedure*" and only "*if the dispute is not settled by mediation within 30 days of the commencement of the mediation […] the dispute shall be referred to […] arbitration*". [9]

A dispute arose between the parties and on 18 April 2019, the Defendants (the claimants in the arbitration) sent to the London Court of International Arbitration (***LCIA***) (cc'ing the Claimants) a Request for Arbitration (***RFA***) in accordance with the LCIA Mediation Procedure. In the RFA, the Defendants requested that "*once the Arbitration had been commenced, it was immediately stayed, prior to the constitution of a tribunal, to allow the parties to seek settlement of the dispute by LCIA Mediation as required by clause 10.2(b)*." [13]

The LCIA invited the Claimant's comments on this proposal by letter of 25 April 2019. Further communications from the Defendants and LCIA to the Claimants followed but the Claimants failed to engage with the proposal of mediation.

Nonetheless, despite having shown no intent to resolve the dispute by mediation over the past two years, the Claimants contended in this Application that because the Defendants requested mediation at the same time as requesting arbitration and proposed that the Arbitration be stayed for 30 days before appointment of an arbitrator to allow the parties to seek to resolve the dispute by mediation, they did not "*first seek settlement of the dispute by mediation*" in accordance with clause 10.2, and so the arbitrator has no jurisdiction to hear the dispute.

Calver J considered this to be a "*highly unattractive stance to adopt*" but accepted that "*if it is correct as a matter of the proper construction of the arbitration agreement contained within clause 10.2 of the Agreement, the Claimants are nonetheless entitled to adopt it*." [26]

Section 30(1) of the Act empowers an arbitrator to rule on his own "*substantive jurisdiction*". In his partial award on jurisdiction dated 7 September 2020 (the ***Award***), the arbitrator addressed this issue and determined that he had substantive jurisdiction over the dispute.

(III) THE SECTION 67 APPLICATION

Section 67 of the Act provides a mechanism under which arbitral awards can be challenged on the basis that the Tribunal lacked "*substantive jurisdiction*" when the award was made. The Claimants challenged the Award under section 67(1)(a) of the Act and sought its setting aside and variation in whole or in part under sections 67(3)(b) and (c).

Calver J considered that "*the first and central question for this court […] is whether the Defendants' alleged non-compliance with the requirement for prior LCIA Mediation is a matter merely affecting the admissibility of the claim or goes to the tribunal's substantive jurisdiction to determine the claim at all*." [28]

If non-compliance goes to the Tribunal's substantive jurisdiction, then a section 67 challenge may properly be brought and the Court must determine whether the Defendants failed to comply with this pre-arbitral condition and, if relevant, the consequences of non-compliance.

However, if the alleged non-compliance with the requirement to mediate speaks only to the admissibility of the claim, this does not fall within the scope of section 67 and the decision of the arbitrator on the issue will be final.

(IV) THE REASONING OF THE COURT

(a) Jurisdiction or admissibility

In interpreting clause 10.2 Calver J held that the ordinary principles of contractual interpretation apply.

Calver J considered it was clear that by clause 10.2 the parties had agreed (i) to arbitrate any dispute arising out of or in connection with the Agreement; and (ii) first to seek settlement of such a dispute by mediation in accordance with the LCIA Mediation Procedure, but to ensure this did not delay the resolution of the dispute stipulated a 30-day window to do so.

The second Claimant submitted that the (alleged) failure to mediate meant that it was not open to the arbitrator to stay the Arbitration in order to allow for mediation as suggested by the Defendants in the RFA, because if the arbitrator had no jurisdiction he would, *a fortiori*, also have no jurisdiction to order a stay.

The Court rejected this construction and noted that the consequence of the second Claimant's submission was that in a case where, as here, one party simply refused to mediate, the tribunal would *never* gain jurisdiction over the dispute, despite the parties clearly having agreed to arbitrate their disputes. [40]

Having reviewed the Agreement, the Court proposed its own construction of clause 10.2 holding that "*the objective intention of the parties was clearly to obtain a swift and final determination of their dispute, if it could not be settled by LCIA Mediation, by way of an expedited LCIA arbitration*". In those circumstances, "*clause 10.2 should be construed in the light of that intention. A construction which allows one or other party to frustrate that intention should be avoided. This favours an 'admissibility' construction rather than a 'jurisdiction' construction so far as the requirement to submit to mediation is concerned*." [47]

Consequently, the Court considered that the correct analysis was that "*the dispute had been validly submitted to arbitration under clause 10.2 as it is a dispute arising out of or in connection with the Agreement. Clause 10.2 also contains a procedural requirement to first seek settlement of the dispute by mediation. It is for the arbitrator to determine the consequences of any alleged breach of that procedural condition.*" [55]

This interpretation was in agreement with the recent decision of Sir Michael Burton in *Sierra Leone v SL Mining Limited* [2021] EWHC 286 (Comm) and was corroborated by multiple academic authorities which consider that compliance with pre-arbitration procedural requirements to arbitration, such as time limits or the fulfilment of conditions precedent (i.e. conciliation provisions) are matters of admissibility not jurisdiction (see paragraphs [48]-[53]).

(b) Additional arguments

The Court went on to dispose of two further arguments relied on by the Claimants in an attempt to cast the issues as a matter of jurisdiction.

(i) Section 30(1)(a): Validity of the arbitration agreement

The Claimants argued that the arbitration agreement was "*inoperative*" by reason of the (alleged) failure of the Defendants to comply with the mediation provision and accordingly there was no "*valid*" arbitration agreement for the purposes of section 30(1)(a) of the Act. [61]-[69]

Calver J held that the failure to conduct mediation did not mean that there was not a "*valid*" arbitration agreement or that the agreement to arbitrate was "*inoperative*". He did not consider that a failure to comply with a procedural condition of this type could serve to make the arbitration agreement inoperative. Section 30(1)(a) was therefore not engaged.

(ii) Section 30(1)(c): Had matters been submitted to arbitration in accordance with the arbitration agreement?

The Claimants submitted that the Defendants' (alleged) failure to mediate meant that matters had not been "*submitted to arbitration in accordance with the Agreement*". [70]-[78]

Calver J considered that section 30(1)(c) of the Act seeks to ensure that the matters referred to arbitration are within the *scope* of the arbitration agreement and not whether the procedure laid down by the arbitration agreement for matters validly referred has been followed.

He held that there had been a valid reference to arbitration of a dispute arising out of or in connection with the Agreement and that "*the matters which have been referred to arbitration are not in dispute*". Section 30(1)(c) was also therefore not engaged.

(V) DECISION

For the reasons summarised above, the Court concluded that there was no basis for any challenge to the Award under section 67 of the Act.