England and the United States

- *JT Mackley v Gosport Marina* [2002] (TCC)
  - Non-compliance with a specific and definite pre-condition to arbitration: the Court accepted jurisdiction to stay the reference to arbitration until the procedural irregularity was corrected (and not permit the arbitral tribunal to decide the pre-condition issue)

- *Emirates Trading Agency v Prime Mineral Exports* [2014] (Comm)
  - A ‘friendly discussion’ provision is an enforceable pre-condition to arbitral jurisdiction.
  - Contrary to the tradition position that agreements to negotiate are unenforceable.
  - Potential problem with ruling: an arbitral tribunal could be divested of jurisdiction by an enforceable pre-condition to negotiate rather than the pre-condition being within the tribunal’s authority to decide.

- *BG Group v. Argentina*, 134 S. Ct. 1198 (2014)
- *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002)
  - The fulfillment of conditions precedent is a 'procedural' questions for the arbitrators, not the courts to decide.
  - A reviewing court will accord 'considerable deference' to the arbitrators' determination.
  - 'Procedural' versus 'substantive' arbitrability
  - A potential carve-out: where the prerequisite is expressly stated to be a condition of consent to arbitration.

- Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200 (2d Cir. 2002)
  - Sotomayor opinion
  - Rejects challenge to arbitral award where arbitrator did not uphold a condition precedent (a negotiation provision).

- *HIM Portland v. DeVito Builders*, 317 F.3d 41 (1st Cir. 2003)

  - Precedes *BG Group*.
  - Court refused a motion to compel arbitration where there was a mediation pre-condition.
  - The FAA did not apply because the arbitration clause had not been 'activated.'
  - Could still be relevant: (a) does not entail deference to an arbitrator's determination; (b) The *BG* consent carve-out