Kluwer Arbitration Blog

Bridging the Gap Between Jurisdiction and Admissibility: Evaluation of Westbridge Ventures II Investment Holdings v Anupam Mittal [2021] SGHC 244

Joel Soon, Chang Wen Yee (Singapore Management University) · Tuesday, February 8th, 2022

The distinction between jurisdiction and admissibility (the "**Distinction**") has important consequences in international arbitration. Chief among these is the determination of the permissible extent of a national court's intervention regarding a final award;[1] a tribunal's decision on jurisdiction would be subject to *de novo* review by the courts, but its decision on admissibility would not be.[2] While jurisdiction refers to the power of the tribunal to hear a case, admissibility involves whether it is appropriate for the tribunal to hear it.[3]

In ***Westbridge Ventures II Investment Holdings v Anupam Mittal*** **[2021] SGHC 244** ("***Westbridge***"), the Singapore High Court ("**SGHC**") applied the "tribunal versus claim" test to determine whether subject matter arbitrability is an issue of jurisdiction or admissibility. First propounded by Professor Jan Paulsson in 2005,[4] this test has been well received and adopted by the Singapore Court of Appeal ("**SGCA**") in *BBA v BAZ* [2020] 2 SLR 481 ("***BBA***") and *BTN v BTP* [2021] 1 SLR 276 (brief summaries of both SGCA cases can be found in this blogpost). It asks "*whether the objection is targeted at the tribunal (in the sense that the claim* ***should not be arbitrated*** *due to a defect in or omission to consent to arbitration), or at the claim (in that the claim itself is defective and* ***should not be raised at all****)*" (emphasis in original).[5] Objections attacking the tribunal are classified as jurisdictional in nature, while those targeting the claims are considered objections to admissibility.[6]

This article welcomes *Westbridge* for being a principled judgment that correctly applied the "tribunal versus claim" test. Following this decision, the Singapore courts will be able to undertake a *de novo* review of a tribunal's decision on an issue of subject matter arbitrability.

The SGHC's analysis of subject matter arbitrability as a jurisdictional issue

In *Westbridge*, the SGHC had to decide which law applies to the issue of subject matter arbitrability at the pre-award stage. In concluding that the law of the seat applies, one of the main reasons provided by the SGHC was that "*subject matter arbitrability, when raised at the pre-*

award stage before the seat court, is essentially an issue of jurisdiction".[7)]

Notably, the SGHC held that a finding by the seat court as to the non-arbitrability of a particular dispute is one that strikes at the jurisdiction of the tribunal in respect of that dispute. [8)] There are two key planks to the SGHC's reasoning.

First, reliance was placed on several authorities that suggest that arbitrability is a question of jurisdiction.[9)] An excerpt from Bernard Hanotiau's article on "*The Law Applicable to Arbitrability*" (2014) 26 SAcLJ 874 was cited, which stated that "*[a]rbitrability is indeed a condition of validity of the arbitration agreement and, consequently, of the arbitrator's jurisdiction*". Further, the SGHC noted that this point was echoed in *Comparative International Commercial Arbitration* (Julian David Mathew Lew QC, Loukas A. Mistelis & Stefan Kröll) (Kluwer Law International, 2003) at [9] to [18]: "*[t]hough arbitrability is often considered to be a requirement for the validity of the arbitration agreement it is primarily a question of jurisdiction*". With respect, insofar as these authorities had not explicitly considered the Distinction, they may be of limited value in answering the question of whether the issue of arbitrability goes towards jurisdiction or admissibility.

Second, and more pertinently, the SGHC drew support from *BBA* and the SGCA's discussion therein on the Distinction.[10)] In so doing, the SGHC likewise applied the "tribunal versus claim" test.[11)] While the SGHC recognised that an issue of subject matter arbitrability may, at first glance, be seen as directed *at the claim* (and hence concerned with a question of admissibility), the SGHC took the view that non-arbitrability in fact involves a defect as to the parties' *consent to arbitration* (and hence concerns a question of jurisdiction).[12)] The SGHC observed that the concept of arbitrability finds legislative expression in section 11 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("**IAA**"), which recognises that subject matter arbitrability is subject to the limits imposed by public policy.[13)] Therefore, the parties' consent would be invalid since as a matter of public policy, the parties cannot agree to submit non-arbitrable disputes to arbitration. Instead, the courts will, in such situations, recognise that the arbitration agreement is either "*inoperative*" or "*incapable of being performed*", pursuant to section 6 of the IAA.[14)]

The SGHC also drew parallels between the consequences of a challenge made to a seat court by a party asserting non-arbitrability, and the nature of a jurisdictional objection.[15)] If the challenge before the seat court succeeds, it means that the particular dispute cannot be arbitrated in the seat, but can still be litigated in the appropriate court. In contrast, the tribunal has no discretion to exercise in relation to whether it wishes to hear a dispute that is non-arbitrable.[16)] Put in such terms, the SGHC found that the question of subject matter arbitrability, when viewed through the "tribunal versus claim" lens, cannot merely be a matter of admissibility; instead, it strikes at the tribunal's jurisdiction.[17)] Given that the SGHC was bound by the SGCA's acceptance of the 'tribunal versus claim' test, which neatly categorises issues into either the "jurisdiction" or "admissibility" label, it is the authors' view that the SGHC has correctly decided in this context that matters which do not go to admissibility must necessarily go to jurisdiction.

Difficulty posed by cases in the 'twilight zone'

While Singapore jurisprudence has had the fortune of *Westbridge*'s guidance on the issue of subject matter arbitrability, the authors opine that the SGHC's finding that it is a jurisdictional issue was a by-product of the Distinction's binary treatment of jurisdiction and admissibility. Since subject matter arbitrability could not be a matter of admissibility, it necessarily had to be a jurisdictional issue.

However, outside the context of *Westbridge*, one could potentially argue that the non-arbitrability of one aspect of the dispute does not necessarily render the parties' consent to arbitrate entirely invalid, in that other aspects of the dispute can still be validly heard by the tribunal. Seen in this light, non-arbitrability may not always indicate a defect in the tribunal's jurisdiction. Support for such a view can be drawn from the Chief Justice Sundaresh Menon's extrajudicial sentiments, wherein he noted that the doctrine of non-arbitrability "*is not an indictment of the ability of arbitrators to deal with such issues, but simply a reflection of the limits of arbitration rooted in contract*".[18)]

The difficulty in applying the "tribunal versus claim" is most apparent from cases in the "twilight zone", a phrase commonly used to refer to cases that do not fit neatly under either the jurisdiction or admissibility label.[19)] In a bid to resolve this, eminent arbitration scholars have suggested alternatives; for one, Dr Michael Hwang SC suggests doing away with the "tribunal versus claim" test in favour of an open textured approach,[20)] while others have suggested the "presumed party intentions" test, and the "draftsman" test. The latter two tests have been analysed in another blogpost.

Nonetheless, insofar as the Distinction remains good law in Singapore, *Westbridge* will remain authority for the proposition that non-arbitrability is a jurisdictional issue. This allows the Singapore courts to undertake a *de novo* independent review of a tribunal's decision on the issue. Parties seeking to assert non-arbitrability can, if dissatisfied with the tribunal's ruling on the issue, bring the matter to the seat court for redress.

References

?1	Gretta Walters, "*Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems*?" (2012) 29(6) Journal of International Arbitration 651 at 662.
?2	*BTN v BTP* [2020] SGCA 105 at [66] and [71].
?3	*Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2019] 1 SLR 263 at [207].
?4	Jan Paulsson, "*Jurisdiction and Admissibility*" in Gerald Aksen *et al* (eds), *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC Publishing, 2005) at 616–617.
?5	*BBA v BAZ* [2020] 2 SLR 453 at [77]; *BTN v BTP* [2021] 1 SLR 276 at [69]; *Westbridge* at [39].
?6	Michael Hwang SC and Lim Si Cheng, "*The Chimera of Admissibility in International Arbitration – and Why We Need to Stop Chasing it*" in *Selected Essays on Dispute Resolution* (SIAC Publishing, 2018) at 433.
?7	At [23], [36] and [40].
?8	*Westbridge Ventures II Investment Holdings v Anupam Mittal* [2021] SGHC 244 at [36] and [40].
?9	*Westbridge* at [36].
?10	At [39].
?11, ?12, ?14	At [40].
?13	At [25].
?15, ?16, ?17	*Westbridge* at [41].
?18	Sundaresh Menon, "*Arbitration's Blade: International Arbitration and the Rule of Law*" (2021) 38(1) Journal of International Arbitration 1 at 9.

?19 Fabio G. Santacroce, "*Navigating the Troubled Waters Between Jurisdiction and Admissibility: An Analysis of Which Law Should Govern Characterization of Preliminary Issues in International Arbitration*" (2017) 33(4) Arbitration International 539 at 540.

?20 Michael Hwang SC and Lim Si Cheng, "*The Chimera of Admissibility in International Arbitration – and Why We Need to Stop Chasing it*" in *Selected Essays on Dispute Resolution* (SIAC Publishing, 2018) at 434–435.