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Jurisdiction or Admissibility? The Status of Time Bars Under Singapore Arbitration Law

Iris Ng (Singapore Attorney-General's Chambers) · Friday, August 7th, 2020

In *BBA and others v BAZ and another appeal* [2020] SGCA 53, the Singapore Court of Appeal ("SGCA"), in refusing to set aside an arbitral award, held that issues of time bar which arise from the expiry of statutory limitation periods go towards admissibility and not jurisdiction. Such issues cannot therefore be reviewed *de novo* by the seat court under Singapore law. This post examines that decision from a comparative perspective and also considers how the court's reasoning might apply to contractual time bars.

Background and summary of the Singapore decisions

The dispute arose out of the sale and purchase of a controlling block of shares in one of India's largest pharmaceutical manufacturers (a company pseudonymised as "C"). The buyer was BAZ, a Japanese company. The sellers were the family members of C's founder and companies controlled by them. A few years after the sale, BAZ commenced arbitration against twenty of the sellers, alleging concealment of an internal report detailing how C engaged in data falsification to expedite the obtaining of regulatory approval for drug products.

The arbitration was seated in Singapore and conducted under the ICC rules. The tribunal rendered its award in 2016, holding in favour of BAZ by a majority. In particular, it held that BAZ's claim was not time barred under the Indian Limitation Act 1963 ("Indian Limitation Act").

The respondent sellers then brought proceedings to set aside the award in Singapore. Five of the sellers, who were minors, brought separate proceedings from the rest. The Singapore High Court found that time bar was not a jurisdictional issue that could be reviewed *de novo* by the court, and that the tribunal did not exceed its jurisdiction.

The sellers – apart from the minors against whom the award was set aside – appealed against the refusal to set aside the award. The SGCA dismissed the appeal in its entirety (see here for a summary of the SGCA's decision).

The SGCA's decision: Statutory time bars as an admissibility issue

In holding that issues of time bar arising from statutory limitation periods go towards admissibility, the SGCA endorsed the "tribunal versus claim" test underpinned by a consent-based analysis for distinguishing between issues of jurisdiction and admissibility. (*BBA v BAZ* at [76]) As explained by the SGCA, the "tribunal versus claim" test 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*). (*BBA v BAZ* at [77]) In the former case the objection goes towards jurisdiction, and in the latter case, towards admissibility.

Besides the "tribunal versus claim" test, at least two other tests exist in the authorities – the "presumed party intentions" test in American case law (see *BG Group Plc v Republic of Argentina*, discussed below), and the adoption of a draftsman-like perspective to the enquiry (which I will call the "draftsman" test) proposed by some commentators.[1] Interestingly, the same outcome would likely have been reached on either of these tests in relation to statutory time bars.

First, the "presumed party intentions" test asks whether parties intended to submit that dispute or an aspect of the dispute to the arbitrators or the courts. Justice Breyer explains this idea in the majority opinion of the United States Supreme Court in *BG Group Plc v Republic of Argentina*:[2]

> On the one hand, courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about "arbitrability". These include questions such as "whether the parties are bound by a given arbitration clause," or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." …
>
> On the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration. … courts assume parties "normally expect a forum-based decision maker to decide forum-specific procedural gateway matters" … These procedural matters include … the satisfaction of "prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate." …

While the same conclusion (that statutory limitation issues go towards admissibility) would likely have been reached under the "tribunal versus claim" and "presumed party intentions" tests, the latter has been criticised for providing insufficient guidance for distinguishing issues of jurisdiction from admissibility. The allocation of responsibility between courts and tribunals is usually not a matter that parties consider. Absent express indications of party intention, courts are left with significant leeway to decide a matter *de novo*, as this article argues. The "tribunal versus claim" test might therefore be the easier-to-apply option.

Second, under the "draftsman" test, objections go towards admissibility if they relate to interpretation of another rule or instrument. As succinctly explained in one treatise:[3]

> The more draftsman-like reading would focus on the place that the issue occupies in

> the structure of international dispute settlement: 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)?

Applying that test, the limitation issue would go towards admissibility because the Indian Limitation Act is external to the jurisdiction clause. That said, the SGCA's recognition of an exception to the general position (that issues of statutory limitation go towards admissibility) where parties *expressly* refer to statutory time bars in their arbitration clauses (such as by specifying that time-barred claims are outside the tribunal's jurisdiction) parallels the straightforward application of the "draftsman" test in terms of outcome. The extent to which Singapore's version of the "tribunal versus claim" test is broader than the "draftsman" test would then depend on the court's receptiveness to expansionary arguments regarding implied terms to the agreement.

Commentary: Extending the SGCA's reasoning to contractual time bars

A related question is whether *contractual* time bar provisions would go towards jurisdiction or admissibility under the "tribunal versus claim" test. The "presumed party intentions" test translates somewhat oddly in this context, since there could well be actual evidence of the parties' intentions to contend with. The "draftsman" test, on the other hand, would invariably produce the same result by virtue of how the contractual time limit must be found in the arbitration agreement.

The Australian and English cases have interpreted contractual time bars to determine if they bar the remedy or extinguish the claim,[4)] though some English cases have expressed doubt whether such clauses must invariably fall into one category or the other.[5)] However, in view of the SGCA's statement in *BBA v BAZ* that "[i]t makes no difference whether the applicable statute of limitations is classified as substantive (extinguishing the claim) or procedural (barring the remedy) in the private international law sense", it is questionable whether these distinctions will apply with equal force under Singapore law. As the SGCA noted, in both cases the complaint is that the claim is stale and therefore defective, and not that the bringing of time-barred claims fall outside the scope of consent to arbitration.

Contractual time bars may therefore warrant a more nuanced analysis under the "tribunal versus claim" test. The result would likely hinge on the way the arbitration agreement is worded.

It may be framed similarly to statutes of limitations, adopting wording such as "no claim shall be brought" or "all claims shall be dismissed" after a specified period. If so, there is no indication that the bringing of time-barred claims is something the parties did not consent to, and the time limit would be construed as targeting the claim and thus a matter of admissibility. Some support for this outcome is found in the Hong Kong Court of Appeal's decision in *Grandeur Electricity Co Ltd v Cheung Kee Fung Cheung Construction Co Ltd*, which held that the application of a contractual time bar was for the tribunal to rule on.

The arbitration clause may also contain "eligibility requirements, prohibiting arbitrators from hearing claims more than a fixed number of years after the alleged wrong occurred".[6)] Such

requirements might be construed as restricting the right to arbitrate by defining the scope of consent, and could conceivably be regarded as jurisdictional.

In sum, the SGCA's decision provides a timely clarification of how issues of statutory limitation will be decided in setting aside applications. It remains to be seen how courts in Singapore and in other jurisdictions will treat issues of contractual limitation.

**The author reported on the Court of Appeal case above in the course of her work. This article is written in the author's personal capacity, and the opinions expressed in the article are entirely the author's own views.*

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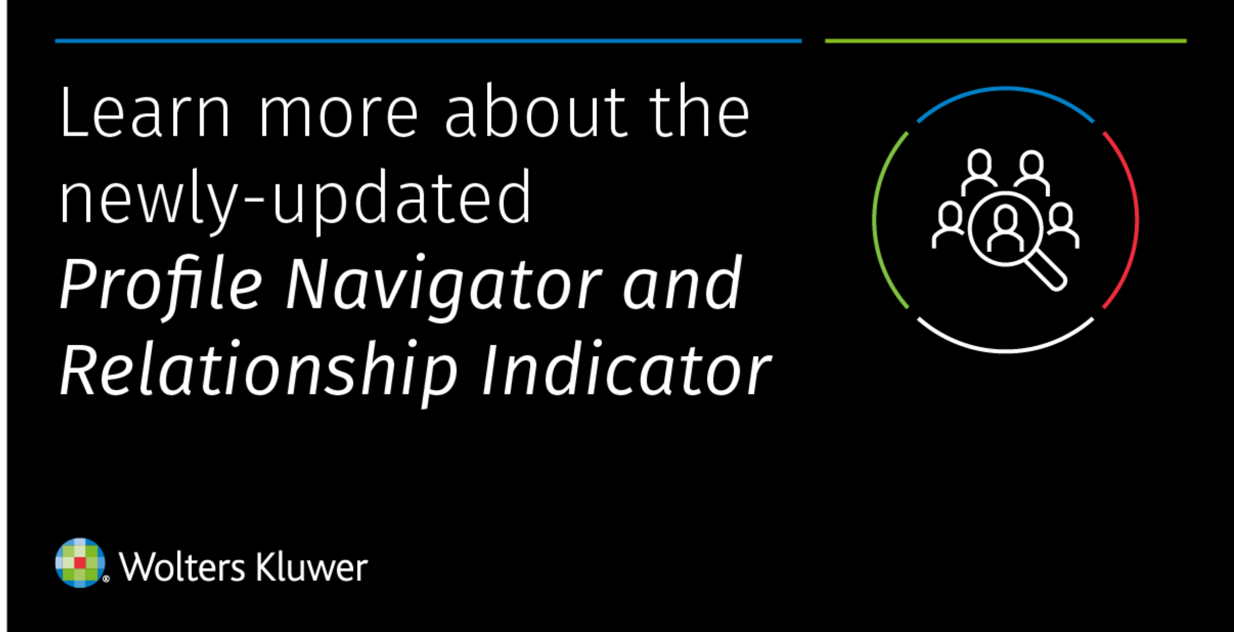

References

?1, ?3 Chin Leng Lim, Jean Ho & Martins Paparinskis, *International Investment Law and Arbitration* (CUP, 2018) at p 118.

?2 *BG Group Plc v Argentina* 134 S Ct 1198, 1206–1207.

?4 *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* (2001) 250 FLR 63 at [160]–[164]; *Wholecrop Marketing Ltd v Wolds Produce* [2013] EWHC 2079 (Ch) at [26].

?5 See *eg*, *Smeaton Hanscomb & Co Ltd v Sassoon Setty Son &* Co [1953] 2 All ER 1471 at 1473–1474.

?6 William W Park, "Arbitral jurisdiction in the United States: who decides what?" (2008) 11 IALR 33 at 35.

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