How Useful is the Distinction Between Jurisdiction and Admissibility?

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1. Those who have opened the third edition of Mustill & Boyd will see it has a new title, and three new chapters, addressing the issue of investor-state dispute settlement. That vibrant and controversial feature of the international arbitration landscape had yet to make much of an impression in England and Wales, when the second edition was published in 1989. The growth of that particular type of arbitration has brought a number of benefits to arbitration law – a good example being the publication of numerous tribunal rulings on issues such as bifurcation and stay, which have helped achieve greater consistency in arbitral practice.

2. But for English lawyers at least, it has also brought us the distinction between issues of jurisdiction and issues of admissibility, the former reviewable de novo before the supervisory or enforcement court, the latter subject to due process review only. In this short presentation, I want to consider how useful that investment arbitration transplant has proved in the world of international commercial arbitration.

3. Now the framers of the English Arbitration Act 1996 took the bold step of including a statutory definition of the concept of jurisdiction – or, as it is put, "substantive jurisdiction".[1] This appears in s.30(1) of the Act:

> "(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—
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> (a) whether there is a valid arbitration agreement,
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> (b) whether the tribunal is properly constituted, and
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> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement."

4. English law differs from the UNCITRAL Model Law in two respects: in referring the concept of "substantive jurisdiction", as opposed to just jurisdiction, and in providing some form of definition of the term. The closest to a definition one finds is in the commentary to the UNCITRAL Model Law, which refers to the arbitral tribunal's jurisdiction as "the foundation, content and extent of its mandate and power."[2]

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[1] See Robert Merkin KC, "Substantive Jurisdiction and the Arbitration Act 1996" [2021] JBL 273.

[2] Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 200 [26].

5. Applying conventional principles of statutory construction under English law, English courts have held the s.30 definition to be exhaustive,[3] and the Departmental Advisory Committee commentary on the draft Arbitration Bill said that in s.30(1), they had "spelt out what we mean by 'substantive jurisdiction'".[4] Thus far, at least, courts have been able to apply that definition without too much difficulty, utilising the flexibility of the language used to arrive at intuitive applications of the binary jurisdiction/non-jurisdiction divide on the facts of particular cases. One potential area of difficult is s.30(1)(b), where the courts have been willing to imply the need for substantial non-compliance with the requirements for the appointment of the arbitral tribunal.[5] These conclusions are consistent with case law on Article V(1)(d) of the New York Convention requiring that the non-compliance have a meaningful effect on the arbitral process.[6]

6. As is well-known, the distinction between challenges to the arbitral process or award which are jurisdictional in nature, and those which are not, has received more extended consideration in the context of investment treaty arbitration. A particularly influential treatment is that of Professor Jan Paulsson[7] which distinguishes between a challenge to the legal power of a tribunal to hear a case (described as a jurisdictional challenge) and a challenge as to the appropriateness of the claim for adjudication (described as an admissibility challenge). While the view that there is a distinction of principle between issues going to jurisdiction and those going to admissibility has gained significant support, it is striking, to my mind, that there is a wide variety of formulations seeking to explain the nature of the distinction. In the investment treaty context, it is possible to find statements distinguishing between "the existence of adjudicative power" (jurisdiction), and "the exercise of adjudicative power",[8] or between challenges "directed against the tribunal (and … hence jurisdictional)" and those "directed at the claim (and … hence one of admissibility)".[9] These formulations have been considered by a number of investment treaty arbitration tribunals, although different views have been expressed as to which side of the divide particular challenges fall.[10]

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[3] *Union Marine Classification Services LLC v The Government and Union of Comoros* [2015] EWHC 508 (Comm), [2015] 2 Lloyd's Rep 49; *C v D1 and others* [2015] EWHC 2126 (Comm), [127]-[135]; *Soletanche Bachy France SAS v Aqaba Container Terminal (Pvt) Co* [2019] EWHC 362 (Comm), [2019] 1 Lloyd's Rep 423, [60]; *NDK Ltd v HUO Holding Ltd and another* [2022] EWHC 1682 (Comm), [2022] Bus LR 761, [17]; *Wael Buheiry v Vistajet Limited* [2022] EWHC 2998 (Comm), [68].

[4] DAC Report of February 1996, para 139.

[5] *Sumukan Ltd v Commonwealth Secretariat (No 2)* [2007] EWCA Civ 1148, [2008] Bus LR 858, [23]. *Flashbird Ltd v Compagnie de Sécurité Privée et Industrielle SARL* [2022] UKPC 32; [2022] Bus LR 55.

[6] *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd* [2018] EWHC 2713 (Comm_; [2019] 1 Lloyd's Rep 1, [63]; *Tongyuan (USA) International Trading Group v Uni-Clan Ltd* 2001 WL 98036.

[7] Jan Paulsson, "Jurisdiction and Admissibility" in Gerald Asken *et al* (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (2005), ICC Publication 693. For a discussion of this issue in the context of investment treaty arbitration see *Mustill & Boyd: Commercial and Investor State Arbitration* (3rd) (LexisNexis, 2024), [19-26].

[8] Professor Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), [291] and [310].

[9] Chin Leng Lim, Jan Ho and Martins Paparinskis, *International Investment Law and Arbitration: Commentary, Awards and Materials* (Cambridge University Press, 2018), 118.

[10] See *L Gouiffes and M Ordonez "Jurisdiction and Admissibility: Are We Any Closer to a Line in the Sand?"* (2015) 31 Arbitration International 107.

7. In addition to an inherent suspicion of the utility of a conceptual divide which can be expressed in such different terms, I think caution is required in transferring the analysis adopted in the investment treaty context to international commercial arbitration, because of the particular mechanism by which a submission agreement comes into existence between the investor and the state, viz the investor, by commencing arbitration, accepting the standing offer of the state to arbitrate qualifying disputes.[11] This provides considerable scope for treating certain requirements as terms of the state's offer to arbitrate, and accordingly as jurisdictional issues, such as a requirement to exhaust local remedies.[12]

8. Nonetheless, the jurisdiction/ admissibility distinction has been applied in common law court decisions dealing with international commercial arbitrations, both in Model Law jurisdictions where there is no statutory definition of which issues are jurisdictional, and under the 1996 Act, where there is.

9. Thus in *BAZ v BBA*,[13] Belina Ang Saw J relied upon the distinction when deciding that the contention that a claim was time barred was not jurisdictional in nature. The Singapore Court of Appeal upheld the decision,[14],and there is a decision to similar effect in *The Nuance Group (Australia) Pty Ltd v Shap Australia Pty Ltd*.[15] But courts and arbitral tribunals having been deciding whether or not claims are time barred for years, without thinking that they were deciding an issue of admissibility. Perhaps we are like Moliere's Monsieur Jordain, who was astonished to find he had been speaking prose all of his life without knowing it.

10. In *BTI v BTP*, Ang Saw J applied the distinction when finding that a preclusion argument based on an issue estoppel was not jurisdictional in nature,[16] describing the distinction as a "useful foil" in international commercial disputes.[17] Her decision was upheld on appeal.[18] Once again, I wonder how useful the concept of admissibility is here.

11. The distinction between jurisdiction and admissibility has acquired its greatest traction when dealing with arguments that an arbitral tribunal lacked jurisdiction because a pre-arbitration element of a multi-tiered dispute resolution clause was not complied with – negotiations between principals, or a cooling off period. In the Hong Kong Court of Appeal in *C v D*,[19] the Court considered whether a failure to undertake good faith negotiations, when this was the first step in a tiered dispute resolution clause, deprived the arbitral tribunal appointed at the second stage of jurisdiction. The court held that the objection that the first tier of the clause had not been complied with raised an issue of admissibility rather than jurisdiction,[20] suggesting that the

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[11] See *Mustill & Boyd: Commercial and Investor State Arbitration* (LexisNexis, 2024), [18-4].
[12] For an example *Swissborough Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2018] SGCA 81, [2019] 1 SLR 263, [206]-[209].
[13] *BAZ v BBA* [2018] SGHC 275, [2020] 5 SLR 266, [128]-[131].
[14] *BAZ v BBA* [2020] SGCA 53, [2020] 2 SLR 453, [73].
[15] *The Nuance Group (Australia) Pty Ltd v Shape Australia Pty Ltd* [2021] NSWC 1498.
[16] *BTN v BTP* [2019] SGHC 212, [2019] 3 SLR 305, [63]-[70].
[17] *BTN v BTP* [2019] SGHC 212, [2019] 3 SLR 305, [70].
[18] *BTN v BTP* [2020] SGCA 105, [2020] 5 SLR 1250, [68]-[72].
[19] *C v D* [2022] HKCA 729. See Shanu Matos, "Jurisdiction Admissibility and Escalating Dispute Resolution Agreements" [2023] LMCLQ 18.
[20] *C v D* [2022] HKCA 729, [28]-[42], [45].

distinction informed the "construction and application" of Article 34(2)(a)(iii) of the UNCITRAL Model Law as given effect in the Hong Kong Arbitration Ordinance. The court suggested that a complaint of prematurity was aimed at the claim rather than the tribunal, and for that reason was properly characterised as going to admissibility rather than jurisdiction.[21]

12. It is in this context that the distinction has entered the law on international commercial arbitration in England and Wales – in *Republic of Sierra Leone v SL Mining Ltd*[22] and *NWA v NTF*.[23] Some previous English cases were inclined to treat compliance with legally enforceable obligations which arose at the earlier stages of a multi-tiered dispute resolution clause as jurisdictional for the purposes of s.30(1) of the 1996 Act.[24]

13. There is no doubt that such a classification could be very inconvenient. There can be much for arbitral tribunals to do in the period before it is accepted that a fully enforceable right has crystallised, just as there is for a court: to determine whether the right is indeed so conditioned and, if so, what the true scope and effect of the condition is; whether the condition has been complied with, or waived; whether the non-compliance results from a breach of contract by the party alleging non-compliance, in which case what consequences follow; and in giving effect to the condition to ensure it is complied with. Where compliance with a condition of pre-arbitration mediation is, properly analysed, a pre-condition to the *enforcement* of a right in arbitration, it is difficult to see why non-compliance should, on the proper construction of the arbitration agreement, deprive an arbitral tribunal of jurisdiction, any more than any other form of issue which might arise as to the present enforceability of an asserted right would do so.

14. So it is easy to understand why more recent cases have looked for means of holding that the many arguments which can arise in relation to compliance with the early stages of a multi-tiered dispute resolution clause are not jurisdictional. Describing those requirements as a matter of admissibility and not jurisdiction is one such step.

15. But it must be possible for parties to achieve through their arbitration agreement the outcome that the arbitral tribunal will have no jurisdiction in respect of a particular reference until the preliminary steps have been taken or the waiting period has elapsed – for example a clause which provided that no arbitral tribunal can be constituted until particular steps aimed at a negotiated settlement have been completed, or a particular period had elapsed, or which conditions a party's right to appoint an arbitrator on those matters having taken place.

16. If that is correct, then the effect of a failure to follow pre-arbitration procedures on the jurisdiction of the arbitral tribunal over a particular reference must ultimately depend on the terms of their contract, such that an *a priori* classification of any dispute of this

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[21] *C v D* [2022] HKCA 729, [60].
[22] *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm), [2021] Bus LR 704.
[23] *NWA v NTF* [2021] EWHC 2666 (Comm), [2021] Bus LR 1788.
[24] *JT Mackley & Co Ltd v Gosport Maria Ltd* [2002] EWHC 1315 (TCC), [2002] BLR 367, [35]-[37] (serving notice of the dispute on the Engineer under clause 66(2) of the ICE Conditions); *Tang v Grant Thornton International Ltd* [2012] EWHC 3198 (Ch), [2013] 1 Lloyd's Rep 11; *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2014] EWHC 2104 (Comm), [2015] 1 WLR 1145.

kind as relating to admissibility rather than jurisdiction[25] would not be appropriate. Nor can the distinction often drawn between objections aimed at the claim and objections aimed at the tribunal provide an infallible litmus test, because it is easy to conceive of language capable of both characterisations which would be sufficiently clear to amount to a jurisdictional objection. What can be said, however, is that a construction which would deprive the parties' chosen tribunal of the ability to determine the many questions which can arise as to whether a right cannot be exercised because a pre-condition has not been satisfied, or at least to do so finally rather than on a basis which allows those issues to be argued *de novo* before the curial or an enforcement court, must weigh heavily in favour of a construction which makes non-compliance a possible defence to the pursuit of the claim, rather than something which deprives the arbitral tribunal of jurisdiction.

17. But there may be cases where the terms of the clause sufficiently clearly preclude the arbitral tribunal having jurisdiction until the pre-arbitral procedures have been complied with, however inconvenient and uncommercial the consequences of such an agreement might be, just as parties, can by sufficiently clear wording, divide their dispute into a series of separate and overlapping boutiques rather than providing for a one-stop shop.[26] However robust the interpretative presumption adopted by the court may be, there comes a point when it must yield to the language, however unwisely, chosen by the parties. The different opinions as to the correctness of particular decisions do not seem to reflect any conceptual disagreement, but different views as to where that point should be. In this context, at least, the description of the effect of compliance as going to 'jurisdiction' or 'admissibility' is essentially conclusory, describing the consequence of one of the two rival constructions.

18. To conclude therefore, the question I wish to pose is whether the distinction between issues of jurisdiction and issues of admissibility is a conceptually sound and principled one? Or is this simply a slogan, which sometimes is attached to issues we have been deciding without difficulty for years without it, and on other occasions obscuring policy-driven interpretative presumptions as to the effect of the parties' arbitration agreement?

[25] Which appears to be the approach of Sir Michal Burton in *Sierre Leone Mining* [2021] EWHC 286 (Comm), [2021] Bus LR 704, [16]. For a persuasive criticism of that decision see Serena Lee, "Procedural Prerequisites to Arbitration: Categorisation Over Construction?" [2022] LMCLQ 40.

[26] *T v B* [2021] HKCFI 3645, [23] places the distinction between admissibility and jurisdiction in this context – imposing a requirement for clear and unequivocal language before pre-arbitral procedural requirements engaged the tribunal's jurisdiction.