NAVIGATING THE LEGAL LABYRINTH: EXPLORING ADMISSIBILITY AND JURISDICTION IN INTERNATIONAL ARBITRATION

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ABSTRACT

The article examines the tenuous intricacies of admissibility and jurisdiction in international arbitration, which are elemental determinants of dispute resolution outcomes. It emphasizes the increasing importance of international arbitration especially with respect to changing legal authorities. The paper also looks at some of key differences between admissibility and jurisdiction, highlighting their interdependence and influence on tribunal decisions and domestic court reviews. This study sought to establish whether or not there can be a merger between jurisdictional objections and admissibility objections such as those based on non-compliance with procedural stipulations and exhaustion of local remedies; that is the focus. Some issues which challenge arbitral tribunals include disputes over jurisdiction and discretion to construe arbitration agreements. It gives strong emphasis on separability principle as it upholds the integrity of an arbitration agreement. The other issues touched on here include public policy grounds for setting aside an award; as well as that delicate tightrope walk by courts when handling cases touching on their jurisdictions. Admissibility remains significant despite being less emphasized in seminal instruments such as UNCITRAL Arbitration Rules 1976 but can still be seen in key cases such as Daimler v Argentina . In summary therefore, this article calls for a clear distinction among various processes in international arbitrations since it continues to advocate for a fairer more consistent approach that characterizes these proceedings.

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I. INTRODUCTION

The burgeoning significance of International Arbitration in dispute resolution has given rise to unexplored queries concerning Admissibility and Jurisdiction. With the recent surge in attention toward International Arbitration, there emerges a sphere where legal facets continue to evolve and face examination, lacking definitive precedents.

Central among these is the delineation between jurisdiction and admissibility, the contestation of arbitral tribunal jurisdiction before national courts, and the timeframe for raising jurisdictional issues during arbitral proceedings, among others.

The intricacies posed by admissibility and jurisdiction in international arbitration are interdependent, shaping the scope of issues raised during proceedings and influencing the final outcome. For instance, the categorization of admissibility and jurisdictional matters determines whether subsequent review by national courts is permissible. National courts may review decisions on admissibility only if a significant violation of fair procedure is established, a latitude not extended to issues of jurisdiction.

The prevailing sentiment in judgments addressing this matter suggests that discerning whether a raised legal question pertains to admissibility or jurisdiction necessitates scrutiny of whether the inquiry targets the arbitral tribunal or challenges the claim itself. This differentiation holds significance, as if an arbitral tribunal lacks the jurisdiction to preside over a matter, it consequently lacks authority to delve into the case's substantive merits.

II. CONVERGENCE OF JURISDICTIONAL AND ADMISSIBILITY OBJECTIONS

Differentiating Jurisdiction and Admissibility in the context of arbitration results in a complex relationship representing a path of ambiguity. Several matters arising in an arbitration proceeding which are commonly classified to be matters of admissibility converge by falling under the ambit of jurisdictional issues as well, conditional upon the facts and circumstances of the case in question[2]. For instance:

[2] Elliott Geisinger and Alexandre Mazuranic, International Arbitration in Switzerland: A Handbook for Practitioners (Second Edition, Kluwer Law International, 2013)

1. Non-compliance with processual stipulations raises dual concerns related to admissibility and jurisdiction, depending upon if these stipulations are deemed as essential conditions concerning the agreement to arbitration.

2. The challenges associated with the refusal of benefits clauses are generally perceived in the framework of admissibility or merits concerning substantive rights. However, when such clauses are mandated by an investment treaty as a precondition for the host State's consent to arbitration, they can potentially present obstacles to jurisdiction as a procedural rights-related jurisdictional issue[3].

3. Neglecting to observe negotiation or waiting periods has been acknowledged as having implications on both jurisdiction and admissibility. Some tribunals refrain from rigidly classifying these lapses as purely jurisdictional or admissible if the practical consequences remain unaltered. However, in instances where an investment treaty explicitly requires adherence to such periods as a prerequisite for the host State's consent to arbitration, it could potentially hinder the establishment of jurisdiction.

4. Non-compliance with the exhaustion of local remedies is commonly regarded as an admissibility concern, mirroring a similar perspective. Nevertheless, in cases where an investment treaty stipulates it as a prerequisite for the host State's consent to arbitration, it has the potential to impede jurisdiction.

In essence, the delineation between these categories can be intricate and contextual.

III. ARBITRAL JURISDICTION AND ITS CHALLENGES

Every arbitral tribunal is competent to hear matters in its own jurisdiction. However, the implementation of this precept facilitates the party not satisfied with the arbitral award the opportunity to challenge the award and the rationale behind it. Jurisdictional challenges are more so often raised in such aforementioned instances, presenting itself to be a rough sea to navigate by the arbitrators and the parties involved in the proceeding, with diverging interpretations by the judiciary creating a situation of ambiguity.

[3] Shiroor Tejas, Ludwig Marie- Helene, *Admissibility (Procedure),* (JusMundi 17 October 2023) < https://jusmundi.com/en/document/publication/en-admissibility-procedure> accessed 6th January 2024

The National Courts hearing jurisdictional issues rule the claim challenging the tribunal's jurisdiction to be admissible only when it satisfies certain grounds and is raised prior to the time limit decided. The grounds to be satisfied when raising an issue of jurisdiction are,

1. *Invalid arbitration agreement*

A contract out of which any dispute arises which will be heard by an arbitral tribunal is bound to contain clauses documenting the agreement between both the parties involved to arbitrate the dispute in question. The mutual agreement between the parties involved, to opt for arbitration as the dispute resolving mechanism in case of any dispute arising as recorded in the general contract is broadly recognized to constitute a distinct and standalone contract apart from the primary agreement.

Article 34(2)(a)(i) of the Model Law on International Commercial Arbitration of the United Nationals Commission on International Trade Law[4] discusses the invalidity of the arbitration agreement where the drafters have outlined that the validity and legitimacy of the agreement should be evaluated based on the law chosen by the involved parties. If there's no explicit indication, it will be assessed according to the law governing the location where the annulment procedures are occurring. Interpreting Article 34(2)(a)(i), commentators on UNCITRAL Model Law recommend it to be read in view of the principle of separability; implying that if the primary contract is deemed invalid, it does not necessarily render the arbitration agreement void[5].

The concept of separability within the arbitration agreement ensures the continuation of the arbitral clause, even if the primary contract is deemed invalid. This principle is acknowledged and firmly established in the majority of prominent arbitration jurisdictions[6].

[4] United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration (Model Law), https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration accessed 5th January 2024

[5] P. Ortolani, 'Application for Setting Aside as Exclusive Recourse against Arbitral Award' in I. Bantekas, P. Ortolani, S. Ali, M. Gomez M. Polkinghorne, *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (Cambridge University Press, 2020)

[6] Article 16(1), UNCITRAL, Model Law on International Commercial Arbitration; *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] Q.B 70; *DHL Project & Chartering Ltd v Gemini Shipping Co Limited (Newcastle Express)* [2002] EWCA Civ 1555

In the context of jurisdictional issues, a party needs to demonstrate either the incapacity of a party involved in the arbitration agreement or the agreement's invalidity according to the law chosen by the parties[7].

2. *Exceeding the arbitrators' mandate*

In many legal systems, an award can be invalidated if the arbitral tribunal has "exceeded its authority" or acted beyond the scope of the arbitration agreement or the submissions made by the parties—referred to as *ultra petita*. However, this provision doesn't extend to situations where the award addresses matters less than what was requested by the parties, known as *infra petita* scenarios[8]. In instances aforementioned, challenges to the jurisdictional authority of arbitrators may arise due to their exercise of specific procedural powers, such as imposing sanctions for document non-production, granting interest, or issuing interim relief[9].

There are two scenarios that presents itself as an opportunity to set aside the award in this context,

- The first scenario is when the award included rulings on issues exceeding the scope of the parties' submissions[10];
- Second scenario being when a tribunal addresses a dispute that was not envisioned by, or did not fall within the terms of the parties' submissions.

This reasoning for challenge essentially stems from the "consent principle"[11]. The jurisdiction's consensual nature sets boundaries on the tribunal's authority and abilities. These limitations encompass the expansion of the parties' right to be heard, known as the principle of *ne ultra petita*. This principle acts as a protective measure against the award making determinations on matters that the parties didn't have the chance to consider or address through submissions or comments to the tribunal, which the tribunal then considers[12]. Therefore, if the tribunal exceeds

[7] Nigel Blackaby, Constantine Partasides, et. al., 'Chapter 2: Agreement to Arbitrate' in *Redfern and Hunter on International Arbitration* (7th edition, OUP, 2022) 59
[8] P. Ortolani, 'Application for Setting Aside as Exclusive Recourse against Arbitral Award' P. 879, in I. Bantekas, P. Ortolani, S. Ali, M. Gomez M. Polkinghorne, *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (Cambridge University Press, 2020) 858-898
[9] William W. Park, '*Arbitral Jurisdiction in the United States: Who Decides What?'* (2008) (International Arbitration Law Review) 36
[10] Article 34(2)(a)(iii), UNCITRAL, Model Law on International Commercial Arbitration
[11] G Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Vol. 2, Chapter VII, Division A (2), (1986)) 524
[12] Erdem Küçüker, '*Awarding Beyond the Claims of the Parties: The Swiss Perspective'* (3 Jul. 2020) https://arbitrationblog.kluwerarbitration.com/2020/07/03/awarding-beyond-the-claims-of-the-parties-the-swiss-perspective/ accessed 6 January 2024

its jurisdiction and decides on or neglects to decide on matters covered by the parties' arbitration agreement, it would violate the parties' right to equitable and equal treatment. This overstepping can occur in two ways: either by deciding on more matters than the parties submitted for arbitration (*ultra petita*) or by awarding legal relief beyond what was requested by the parties (*extra petita*).

Challenges based on *ultra petita* or *extra petita* grounds face a high threshold for success, and the instances where such challenges may prevail are extremely limited as a consequence[13]. When a jurisdictional challenge is raised regarding the arbitrators exceeding their mandate, courts must delicately balance carefully analysing the parties' submissions (as well as the final award) to decide on the challenge without veering into reopening the case itself on its substantive merits.

3. *Subject matter falling within the scope of the arbitration agreement and public policy*

Arbitrators bear the duty of evaluating the conformity of disputes between the involved parties with the substantive parameters outlined in the arbitration agreement. While acknowledging any distinct or divergent approach stipulated by the pertinent applicable laws, arbitrators are counseled to adopt a broad interpretation of the arbitration agreement, conscientiously considering the collective intent of the parties involved.

Therefore, should it become evident that specific issues or disputes fall outside the purview of the arbitration agreement, arbitrators should contemplate the possibility of abstaining from adjudicating on those particular matters or disputes.

As per Article 34(2)(b)(i) and (ii) of the Model Law, an award can be annulled if a court determines that either the dispute's subject matter isn't arbitrable or if the award contradicts 'public policy'. In some jurisdictions, discussions in the 1970s highlighted concerns that the public policy defense posed 'the greatest single threat to the use of arbitration'.[14]. There were evident worries that courts might annul awards merely by determining that enforcing the award would contradict the forum's public policy.

Article 2(b)(ii) of the UNCITRAL Model Law allows setting aside an award if it conflicts with the public policy of the arbitration seat. While frequently used, this ground for annulment

[13] *Essar Oilfields Servs. Ltd v. Norscot Rig Mgt Pvt Ltd* [2016] EWHC 2361
[14] Joel R Junker, *The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards',* (California Western International Law Journal 7 (1977)) 228

introduces complexities similar to those faced in other contexts where the public policy doctrine applies, notably in recognizing and enforcing arbitral awards.

In practical terms, when an award faces challenges based on substantive public policy, the courts at the arbitration seat should refrain from supplanting the arbitrators' decision with their own judicial interpretation[15]. A successful challenge on public policy grounds should only arise if the arbitrators have neglected or misinterpreted essential legal principles.

IV. ADMISSIBILITY IN ARBITRATION

In the realm of international commercial arbitration, 'admissibility' denotes the authority vested in a tribunal to adjudicate a case at a specific juncture, accounting for potential transient or enduring flaws within the claim. Upon the tribunal's establishment of jurisdiction, it is incumbent upon them to proceed with addressing the substantive aspects of the claim, encompassing evaluations of admissibility.

Determining jurisdiction holds immense importance for an arbitral tribunal—it's almost a duty for them to address and resolve this matter, even without it being explicitly raised[16], unlike admissibility, which doesn't carry the same imperative. The term "admissibility" isn't typically outlined in International Investment Agreements (IIAs), or in key arbitration rules like the ICSID Convention, ICSID Arbitration Rules, and UNCITRAL Arbitration Rules.

However, there exists a significant body of work discussing admissibility, despite its absence in these documents. Specific conditions mentioned in treaties, like waiting periods, requirements on local exhaustion, and fork-in-the-road provisions, are actively debated, highlighting disagreements about the intentions of the parties and the policy decisions—matters that tribunals seem tasked to navigate. This introduces flexibility and choice into discussions that impact the boundaries of jurisdiction and admissibility[17].

In the context of International Investment Arbitration, the court's ruling in *Daimler v Argentina*[18] bears considerable importance concerning matters of admissibility. *Daimler v. Argentina* strongly emphasizes that all dispute resolution provisions based on Bilateral

[15] *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43
[16] Inna Uchkunova*, Arbitral, Not Arbitrary – Part II: Special Case of Application of Arbitral Discretion*
[17] Hanno Wehland, *Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules*, in ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES (Crina Baltag ed., 2017)
[18] *Daimler Fin. Servs. AG v. Argentine Republic*, ICSID Case No. ARB/05/1

Investment Treaties (BITs) inherently concern jurisdiction. It asserts that there's no necessity to bring in policy arguments; all conditions for arbitration in an international investment instrument pertain to jurisdiction. On the other hand, admissibility, involving discretionary decisions, holds a more restricted role. The viewpoint suggests that attributing policy determinations at the outset distorts the credibility and efficacy of investor-state dispute settlement.

The forecast of the Supreme Court's ruling in BG v. Argentina appears to align with the insights offered by Jan Paulsson in his discourse on "Jurisdiction and Admissibility"[19]. Paulsson elucidates on the widespread misuse of the term "arbitrability," noting its detrimental impact on international coherence. He emphasizes that the term's broad interpretation has resulted in significant confusion, disrupting the established and beneficially narrow understanding of the concept in other spheres.

In the intricate landscape of arbitration, the dimension of admissibility stands as a critical juncture. Its role, often intertwined with jurisdictional boundaries, shapes the contours of proceedings. The evolving nature of admissibility's discourse continues to impact the credibility and efficacy of investor-state dispute resolution, prompting ongoing reflections on its scope, discretion, and implications within the realm of arbitration.

Recapitulating, the concept of admissibility in arbitration serves as a crucial determinant in shaping the trajectory of dispute resolution. While not explicitly outlined in certain foundational arbitration documents, its influence pervades discussions and deliberations, especially concerning international investment agreements. The balance between jurisdiction and admissibility, while distinct, remains pivotal in framing the boundaries and scope of arbitrational authority.

Navigating these intricate elements ensures the credibility and effectiveness of dispute resolution mechanisms, contributing significantly to the evolution and refinement of arbitration practices on a global scale.

[19] Jan Paulsson, *Jurisdiction and Admissibility, in Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (G. Aksen, K.H. Bo¨ckstiegel, P.M. Patocchi, & A.M. Whitesell eds., 2005) 601-603

V. CONCLUSION

In the realm of international arbitration, comprehending admissibility and jurisdiction is akin to navigating a maze. These aspects wield considerable influence, determining the scope of issues addressed and shaping the trajectory of a case.

Exploring this territory reveals complexities similar to unravelling a knot—each decision about what's admissible significantly impacts case resolution. Diverse perspectives among courts and arbitrators further add layers of complexity, making the path less straightforward.

However, recent strides have been made. There's a growing consensus about the distinctions between admissibility and jurisdiction[20]. This shift is crucial as it fosters a fairer and more consistent approach to resolving disputes worldwide.

In essence, comprehending admissibility and jurisdiction in international arbitration signifies itself through its predominancy in shaping the outcome of the case. The more clarity we achieve in this aspect, the more equitable and effective the resolution of global disputes becomes.

[20] Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Bloomsbury Publishing 2017)