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Dichotomy between Jurisdiction and Admissibility: Illuminating the Twilight Zone *BTN v BTP* [2021] 1 SLR 276

JOEL SOON*

ABSTRACT

The Singapore Court of Appeal's decision in *BTN v BTP* is significant insofar as it affirmed that the tribunal versus claim test, which was introduced in its earlier decision in *BBA v BAZ*, continues to apply to determine whether issues go towards jurisdiction or admissibility. Notwithstanding the strong impetus for drawing a dichotomy between jurisdiction and admissibility, the dichotomy's usefulness is called into question where issues defy easy classification. The inflexibility perpetuated by the dichotomy has led to the emergence of a twilight zone. This note will suggest that the dichotomy may be of limited usefulness in certain areas in the law of arbitration, but ultimately acknowledges that the Singapore courts are stuck between a rock and a hard place since alternatives have their own shortcomings.

Keywords: arbitration; jurisdiction; admissibility; twilight zone; Singapore

I. INTRODUCTION

After two seminal apex court decisions in *BBA v BAZ*[1] ('*BBA*') and *BTN v BTP*[2] ('*BTN*'), it is

* LLB Singapore Management University. I am grateful to the views and assistance of Ms Chang Wen Yee and Mr Louis Lau Yi Hang. All errors remain my own.

1 *BBA v BAZ* [2020] 2 SLR 453.

2 *BTN v BTP* [2021] 1 SLR 276.

well-established in Singapore law that the 'tribunal versus claim' test, which asks whether the objection is targeted at the tribunal or the claim,[3] applies to classify whether an issue goes towards jurisdiction or admissibility.[4] These decisions are to be welcomed for clarifying Singapore's approach to the dichotomy between jurisdiction and admissibility, which many have considered to be a 'longstanding issue' in international arbitration[5] where much ink has been spilled.[6]

While the dichotomy between jurisdiction and admissibility has been readily accepted by the Singapore courts, commentators have acknowledged that it is not always easy to establish a dividing line between jurisdiction and admissibility.[7] Indeed, there are cases where the dichotomy may be blurred,[8] making it difficult to fit the issue under either label.[9] In such cases where characterisation is not as straightforward, they are said to fall in a 'twilight zone'.[10] In this connection, eminent arbitration scholars, such as Hwang, have criticised the dichotomy between jurisdiction and admissibility, arguing to discard the 'admissibility' label in the 'tribunal versus claim' test.[11] The impetus for Hwang's argument stems from the failure of the test in elucidating *how* to identify if an objection targets the tribunal or the claim.[12]

In this note, the author scrutinises whether the dichotomy between jurisdiction and admissibility is useful by considering its application in several areas, ultimately concluding that

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3 *BBA* (n 1) [77]; *BTN* (n 2) [69].

4 *BBA* (n 1) [76]; *BTN* (n 2) [69]. See also Margeret Joan Ling and Serene Chee, 'Recent Developments in Singapore Arbitration Law' (International Bar Association, 14 April 2021) <https://www.ibanet.org/article/F940CF84-99C9-4952-9BB1-94C24D5A42B9> accessed 22 November 2021.

5 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, 539.

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) 431–475; Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen *et al* (eds), *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC Publishing, 2005) 608.

7 Paulsson, 'Jurisdiction and Admissibility' (n 6) 603, citing *Methanex Corporation v United States of America,* Partial Award on Jurisdiction and Admissibility, 7 August 2002, 7 ICSID Reports 239, 271; Andrew Tweeddale, 'Jurisdiction and Admissibility in Dispute Resolution Clauses' (2021) 16(1) Construction Law International 13, 14.

8 Yas Banifatemi, 'Chapter 1: The Impact of Corruption on 'Gateway Issues' of Arbitrability, Jurisdiction, Admissibility and Procedural Issues' in Domitille Baizeau and Richard Kreindler (eds), *Addressing Issues of Corruption in Commercial and Investment Arbitration* (ICC, 2015) 16, 19.

9 Santacroce, 'Navigating the Troubled Waters Between Jurisdiction and Admissibility' (n 5) 540; Tolu Obamuroh, 'Jurisdiction and Admissibility: A Case Study' (2020) 36(3) Arbitration International 373, 374.

10 Obamuroh, 'Jurisdiction and Admissibility' (n 9) 393–394; Paulsson, 'Jurisdiction and Admissibility' (n 6) 608; Luis Miguel Velarde Saffer and Jonathan Lim, 'Judicial Review of Investor Arbitration Awards: Proposals to Navigate the Twilight Zone between Jurisdiction and Admissibility' (2014) 8(1) Dispute Resolution International 85, 87 Santacroce, 'Navigating the Troubled Waters Between Jurisdiction and Admissibility' (n 5) 540.

11 Michael Hwang and Si Cheng Lim, 'Chapter 16: The Chimera of Admissibility in International Arbitration' in Neil Kaplan and Michael J. Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration* (Kluwer Law International, 2018) 265–288.

12 Hwang and Lim, 'The Chimera of Admissibility in International Arbitration – and Why We Need to Stop Chasing it' (n 6) 434.

trying to fit issues within either label may be redundant and akin to fitting a square peg into a round hole.[13] Attempts to do so will occasionally create an unnecessary twilight zone.

II. FACTS

A. BACKGROUND

The first appellant, BTN, entered into a share purchase agreement with, *inter alios*, the respondents, BTP and BTQ, for the purchase of their interests in a group of companies. The share purchase agreement contained an arbitration clause stipulating the Singapore International Arbitration Centre's rules, and an exclusive jurisdiction clause for the Mauritian courts. It provided for the respondents' employment by the second appellant, BTO, under the Promoter Employment Agreements, which contained an arbitration clause also stipulating the Singapore International Arbitration Centre's rules, and an exclusive jurisdiction clause for the Malaysian courts. Under the share purchase agreement and Promoter Employment Agreements, the respondents could be terminated 'Without Cause' or 'With Cause'. Only the former entitles the respondents to a sum of money known as 'Earn Outs'.

B. MALAYSIAN INDUSTRIAL COURT PROCEEDINGS

Following the respondents' termination With Cause, proceedings were commenced before the Malaysian Industrial Court. After numerous adjournments of hearings owing to BTO's repeated absence,[14] the Malaysian Industrial Court found in favour of the respondents and ordered BTO to compensate them accordingly.[15] Despite some initial hesitance, BTO complied and effected full payment.[16]

C. ARBITRATION PROCEEDINGS AND DECISION BELOW

The respondents then commenced arbitration under the share purchase agreement, claiming that their dismissal Without Cause entitled them to Earn Outs.[17] The main issue for the Tribunal's determination was the effect of the award rendered by the Malaysian Industrial

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13 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.
14 *BTN* (n 2) [18].
15 ibid [19].
16 ibid [24].
17 ibid [25].

Court.[18] This involved considering:[19] (a) what issues in the arbitration were said to be the subject of *res judicata*; and (b) whether the Malaysian Industrial Court's findings were binding on the Tribunal, in that the issues dealing 'with cause of termination' were *res judicata* because of the award rendered by the Malaysian Industrial Court.[20] The Tribunal, in its Partial Award, held that the issue estoppel doctrine under Singapore law prevented the appellants from arguing that the respondents were terminated 'With Cause', as this was effectively determined by the Malaysian Industrial Court.[21]

The appellants' application to the High Court was dismissed by the judge,[22] who held, *inter alia*, that the Partial Award was not a ruling on jurisdiction, as the *res judicata* issue was not a jurisdictional issue.[23] Additionally, the Partial Award was not contrary to Singapore's public policy, as the appellants had their case heard.[24]

D. THE COURT OF APPEAL'S DECISION

The appellants appealed and argued, *inter alia*, that the Partial Award was contrary to Singapore public policy for two reasons.[25] First, their ignorance of the Malaysian Industrial Court proceedings deprived them of the right to defend themselves and/or make claims relating to the respondents' termination 'With Cause' under the share purchase agreement.[26] Secondly, upholding the Partial Award would allow the respondents to take advantage of their purported breach of the Promoter Employment Agreements' arbitration agreement.[27]

The Court of Appeal rejected both arguments. It held that the appellants' alleged ignorance of the Malaysian Industrial Court proceedings was irrelevant because it resulted from its own internal arrangements.[28] They are precluded from refusing to accept the Tribunal's determination, or from complaining about the Tribunal's failure to conduct a factual inquiry into the circumstances behind BTO's non-appearance at the Malaysian Industrial Court proceedings – any relevant challenge or argument could have been made before the Tribunal.[29]

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18 ibid [27].
19 ibid [27].
20 ibid [26].
21 ibid [33]–[34].
22 ibid [35].
23 ibid [36].
24 ibid [36].
25 ibid [37] and [57].
26 ibid [57].
27 ibid [57].
28 ibid [59].
29 ibid [59]–[61].

The second argument was unmeritorious,[30] as the mandatory nature of the arbitration clause was conditional on one party invoking it. Short of this, the actions of the respondents taken in relation to the Malaysian Industrial Court did not breach the arbitration agreement.[31]

Pertinently, the Court of Appeal addressed the appellants' additional argument: if the award rests on an error of law (in this case, erroneous applications of *res judicata*) that resulted in the Tribunal not exercising its mandate, the award should be set aside on the public policy ground.[32] However, the Court of Appeal noted that 'errors of law or fact made in an arbitral decision, *per se*, are final and binding on the parties',[33] and do not engage Singapore public policy.[34] Conversely, a tribunal's decision on jurisdiction is subject to *de novo* independent review by the courts.[35]

In this connection, the appellants suggested that the present tribunal's decision that it was unable to exercise its mandate, was a decision on jurisdiction. The Court of Appeal disagreed. Applying the 'tribunal versus claim' test,[36] the Court of Appeal held that a tribunal's decision on the *res judicata* effect of a prior decision is not a decision on jurisdiction, but rather an issue on admissibility.[37] As explained in *The Royal Bank of Scotland NV v TT International Ltd*,[38] which laid down principles equally applicable to a tribunal's decision on *res judicata*,[39] the *res judicata* doctrine operates against litigants, and not against courts.[40] It does not have any effect on the court's authority to hear the dispute before it.[41] Further, where a party argues that a dispute has already been resolved, the party is not seeking resolution of that dispute in another forum; instead, the party does not want the claim to be resolved in any forum.[42] Accordingly, the appellants' jurisdictional challenge failed on this distinction, because *res judicata* issues go towards admissibility.[43]

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30 ibid [63].
31 ibid [63].
32 ibid [65].
33 ibid [66]; *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, [56]. Cf. *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* AIR 2003 SC 2629.
34 *BTN* (n 2) [66]; *PT Asuransi* (n 33) [57]; *AJU v AJT* [2011] 4 SLR 739, [66].
35 *BTN* (n 2) [66].
36 ibid [69], citing *BBA* (n 1) [77]–[79].
37 *BTN* (n 2) [71].
38 *Royal Bank of Scotland NV v TT International Ltd* [2015] 5 SLR 1104.
39 *BTN* (n 2) [71].
40 *Royal* (n 38) [115].
41 ibid [115].
42 *BTN* (n 2) [71], citing Walters, 'Fitting a Square Peg into a Round Hole' (n 13) 675.
43 *BTN* (n 2) [71], and [74]–[77] where the Court of Appeal disagreed with reasoning from two foreign cases because they stand for a position which the Court of Appeal does not accept in Singapore.

III. ANALYSIS

A. THE DICHOTOMY BETWEEN JURISDICTION AND ADMISSIBILITY

Before examining how the Court of Appeal in *BTN* applied the 'tribunal versus claim' test, it is pertinent to explore the dichotomy between jurisdiction and admissibility in greater detail,[44] to understand the implications that flow therefrom. While jurisdiction refers to 'the power of the tribunal to hear a case', admissibility asks the question of 'whether it is appropriate for the tribunal to hear it'.[45] They are similar in no less than two ways: they are not only both part of the universe of preliminary questions,[46] but a finding of either lack of jurisdiction and/or inadmissibility will lead to the same result – the tribunal withholds itself from examining the merits of the claim.[47] Despite the similarities, the fundamental distinction between the two concepts is significant,[48] and is 'not merely an exercise in linguistic hygiene pursuant to a pedantic hair-splitting endeavour'.[49] As a tribunal's jurisdiction is founded on the parties' consent,[50] to object against an arbitral tribunal's jurisdiction is to argue that consent is non-existent, invalid, not within the scope of the dispute in issue, or in violation of public policy.[51] However, when an admissibility challenge is raised, the party alleges that a claim is defective, and should not be heard in any forum.[52] Examples include timeliness, mootness, and ripeness.[53] As there is inherent difficulty in determining whether an objection goes to jurisdiction or admissibility, the 'tribunal versus claim' test attempts to simplify this exercise: objections attacking the tribunal are classified as jurisdictional in nature, and those targeting the claim are

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44 Nikita V Nota, 'International Arbitration: Some Reflections on Jurisdiction and Admissibility' (2010) 2 Ukrainian Journal of Business Law 31, 31; Santacroce, 'Navigating the Troubled Waters Between Jurisdiction and Admissibility' (n 5) 539.

45 See Zachary Douglas, *The International Law of Investment Claims (Cambridge University Press, 2009) [291] and [310];* Chin Leng Lim, Jean Ho and Martin Paparinskis, *International Investment Law and Arbitration: Commentary, Awards and Other Materials* (Cambridge University Press, 2018), 118. See Obamuroh, 'Jurisdiction and Admissibility' (n 9) 377. Tweeddale, 'Jurisdiction and Admissibility in Dispute Resolution Clauses' (n 7) 13–14.

46 Nota, 'International Arbitration' (n 44) 32.

47 Hwang and Lim, 'The Chimera of Admissibility in International Arbitration – and Why We Need to Stop Chasing it' (n 6) 433; Walters, 'Fitting a Square Peg into a Round Hole' (n 13) 661; Santacroce, 'Navigating the Troubled Waters Between Jurisdiction and Admissibility' (n 5) 540; Yas Banifatemi, 'Chapter 1' (n 8) 19.

48 Paulsson, 'Jurisdiction and Admissibility' (n 6) 603.

49 *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2019] 1 SLR 263, [208].

50 N Blackaby, C Partasides QC, A Redfern, and M Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) [5.110]; Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (2nd edn, Kluwer Law International 1999), 253.

51 *BBA* (n 1) [78]; Walters, 'Fitting a Square Peg into a Round Hole' (n 13) 661.

52 Hanno Wehland, 'Jurisdiction and Admissibility in Proceedings Under the ICSID Convention and ICSID Additional Faculty Rules' in Crina Baltag (ed), *ICSID Convention After 50 Years: Unsettled Issues* (Kluwer Law International, 2016) 227, 234; Walters, 'Fitting a Square Peg into a Round Hole' (n 13) 661; Nota, 'International Arbitration' (n 44) 32.

53 Obamuroh, 'Jurisdiction and Admissibility' (n 9) 391; William W Park, 'Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law' (2007) 8 Nevada Law Journal 135, 153; Walters, 'Fitting a Square Peg into a Round Hole' (n 13) 662.

objections to admissibility.[54]

Although the Court of Appeal in *BTN* applied the 'tribunal versus claim' test without much difficulty, the author submits that it may not always provide helpful guidance in distinguishing between an objection to jurisdiction or admissibility.[55] In arriving at the correct conclusion that *res judicata* issues are admissibility issues,[56] the Court of Appeal relied on principles laid down in *Royal Bank*, which involved *res judicata* in the context of court proceedings, and on well-reasoned 'logic' as explained by Gretta Walters.[57] While the Court of Appeal suggested that 'this statement of principle is applicable to decisions made by arbitral tribunals on issues of *res judicata*',[58] ultimately it did not directly apply the 'tribunal versus claim' test to explain how *res judicata* attacks the claim in the context of arbitration proceedings. One could, on this basis, question the efficacy of the test.

Since there exists no clear guidance in academic literature as to *when* an objection targets the claim or tribunal, it has been suggested that 'instincts' are possibly relied upon when making such determination.[59] However, courts should be wary of such unsatisfactory forms of decision-making, 'because it [would] involve a veiled reliance on instinct which is sheltered from scrutiny as opposed to express reasoning'.[60]

To be clear, the Court of Appeal most certainly averted such problems. It was also was fully entitled to rely on *Royal Bank* to reach its conclusion on the *res judicata* issue. But good judicial decision-making on one occasion does not necessarily cure the inadequacy of the 'tribunal versus claim' test. As will be discussed, where claims involve conditions precedent or non-arbitrability, it could be argued that they lie within the twilight zone where the answer is not crystal clear,[61] and application of the 'tribunal versus claim' test thereto may not yield the same success in terms of classification.

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54 Hwang and Lim, 'The Chimera of Admissibility in International Arbitration – and Why We Need to Stop Chasing it' (n 6) 433; Paulsson, 'Jurisdiction and Admissibility' (n 6) 616.

55 Hwang and Lim, 'The Chimera of Admissibility in International Arbitration – and Why We Need to Stop Chasing it' (n 6) 434.

56 *BTN* (n 2) [71]. See also *Chiro Corp. v Ortho Diagnosis Sys.*, 207 F.3d 1126 (9th Cir. 2000); *Marriott International Hotels, Inc v J.N.A.H. Development S.A.* (2010) no. 09/13559.

57 *BTN* (n 2) [71], citing Walters, 'Fitting a Square Peg into a Round Hole' (n 13) 672 and 675.

58 *BTN* (n 2) [71].

59 Hwang and Lim, 'The Chimera of Admissibility in International Arbitration – and Why We Need to Stop Chasing it' (n 6) 454.

60 ibid 455.

61 Miguel and Lim, 'Judicial Review of Investor Arbitration Awards' (n 10) 89.

B. AREAS WHERE THE DICHOTOMY BETWEEN JURISDICTION AND ADMISSIBILITY MAY NOT BE USEFUL

(i) Conditions Precedent to Arbitration

Multi-tier dispute resolution clauses,[62] which provide for arbitration only after contractually-prescribed procedures have been exhausted (conditions precedent to arbitration),[63] are increasingly being adopted, especially in complex construction and engineering contracts.[64] Despite such clauses being attractive for promoting efficiency, cost-savings and cooperation,[65] they are notoriously known as 'midnight clauses'[66] which are inserted at the eleventh-hour of contractual negotiations.[67] Unsurprisingly, multi-tier dispute resolution clauses tend to be haphazardly drafted.[68]

This is significant because the construction of such clauses can affect whether it is a jurisdictional or admissibility issue.[69] Whereas it could be regarded as 'jurisdictional' on the theory that it is a condition to a party's consent to arbitrate, it could also be characterised as an admissibility issue because the claim is not ripe to be heard.[70] Indeed, this is an area where national and international authorities have diverged.[71] Such dissonance reveals that the application of the dichotomy is not so straightforward.

The UK decision in *The Republic of Sierra Leone v SL Mining Ltd*[72] is an apt starting point. There, Sir Michael Burton noted that '[t]he views of the leading academic writers, [were]

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62 For clarity, such clauses are enforceable. See *International Research Corp. PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2012] SGHC 226; *HSBC Institutional Trust Service v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 378. See also *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) 127 Con LR 202; *Emirates Trading Agency LLC v Prime Minister Exports Pte Ltd* [2015] 1 WLR 1145. Cf. *Walford v Miles* [1992] 2 AC 128.

63 Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2014) 278.

64 Michael Pryles, 'Multi-Tiered Dispute Resolution Clauses' (2001) 18(2) Journal of International Arbitration 159, 159.

65 ibid.

66 Jo Delaney and Charlotte Hendriks, 'Multi-Tiered Dispute Resolution Clauses: A Reminder of the Court of Appeal's Split Decision' *Global Arbitration News* (11 August 2020) <https://globalarbitrationnews.com/multi-tiered-dispute-resolution-clauses-a-reminder-of-the-court-of-appeals-split-decision/> accessed 22 November 2021.

67 Didem Kayali, 'Enforceability of Multi-Tiered Dispute Resolution Clauses' (2010) 27(6) Journal of International Arbitration 551, 553.

68 ibid.

69 Michael McErlaine and James Allsop, 'Trends in Questions of Jurisdiction and Admissibility in International Arbitration' (Kluwer Arbitration Blog, 2 November 2021) <http://arbitrationblog.kluwerarbitration.com/2021/11/02/trends-in-questions-of-jurisdiction-and-admissibility-in-international-arbitration/> accessed 22 November 2021.

70 Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 997–998.

71 ibid 999.

72 *The Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286.

all one way',[73] as with 'important decisions in other jurisdictions'[74] – the failure to satisfy conditions precedent to arbitration, is a question of admissibility.[75] Thereafter, the Hong Kong court in *C v D*[76] followed *SL Mining*, reaching the same conclusion on the issue.[77] Notably, the court held that there was no dispute about the existence, scope and validity of the arbitration agreement, and the parties' commitment to arbitrate was not in doubt.[78] Recently, Calver J in *NWA v NVF*[79] applied Sir Michael Burton's reasoning in *SL Mining*, finding that questions of whether a clause amounted to a condition precedent and whether it had been breached were matters of admissibility.[80] In the court's view, such an approach, as advocated in academic commentaries,[81] is consistent with both the commercial purpose of arbitration clauses[82] and the objective intention of the parties.[83]

However, the position is far from settled. The Singapore Court of Appeal in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* ('***IRC***') found that the tribunal did not have 'jurisdiction' to proceed with the arbitration, due to non-compliance with the multi-tier dispute resolution clause.[84] Although *IRC* may seem to be at odds with the English and Hong Kong positions, this is likely because *IRC* was decided in a time when the dichotomy between jurisdiction and admissibility had not yet been adverted to in a Singapore case; such a consideration was also noted by Sir Michael Burton when he analysed English authorities preceding *SL Mining*.[85] Given the weight of English and Hong Kong authorities, the author posits that the Singapore courts would likely consider that non-compliance with multi-tier

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73 Born, *International Commercial Arbitration* (n 70) 1000; Jan Paulsson, 'Jurisdiction and Admissibility' (n 6) 616–617; Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018) [6.4.1]; Alex Mills, 'Arbitral Jurisdiction' in Thomas Schultz and Federico (eds), *Oxford Handbook of International Arbitration* (Oxford University Press, 2020) 6–7.

74 *BG Group v Republic of Argentina* 134 S.Ct.1198 (2002) (US Supreme Court); *BBA* (n 1); *BTN* (n 2).

75 *SL Mining* (n 72) [14]–[15] and [21]. Cf *Emirates* (n 62), where although the court suggested that such issues are a matter of jurisdiction, it was not cognisant of the Dichotomy, and hence should not be relied upon.

76 *C v D* [2021] HKCFI 1474.

77 ibid [42] and [53], citing *SL Mining* (n 72) [16].

78 ibid [53]. See also Born, *International Commercial Arbitration* (n 70) 1007.

79 *NWA v NVF* [2021] EWHC 2666.

80 ibid [55] and [67]. Cf. *Emirates* (n 62) and *Tang v Grant Thornton International Limited* [2013] 1 All ER 1226.

81 *NWA* (n 79) [48]–[53], citing Born, *International Commercial Arbitration* (n 70) 975 and 1000; Louis Flannery QC and Robert M Merkin QC, *Merkin & Flannery on the Arbitration* (6th edn, Informa Law 2019) [30.13.2]; Chartered Institute of Arbitrators, International Arbitration Practice Guideline (2015) <https://www.ciarb.org/media/4192/guideline-3-jurisdictional-challenges-2015.pdf> accessed 22 November 2021; Paulsson, 'Jurisdiction and Admissibility' (n 6) 614–617.

82 *Premium Nafta Products Limited v Fili Shipping Company Limited* [2007] UKHL 40, [5]–[8].

83 *NWA* (n 79) [47].

84 *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130, [63]; Nandakumar Ponniya and Michelle Lee, 'Chapter 9: Commencement of Arbitration' in Sundaresh Menon (ed), *Arbitration in Singapore – A Practical Guide* (2nd edn, Sweet & Maxwell 2018) [9.022].

85 *SL Mining* (n 72) [13].

dispute resolution clauses fall within the 'admissibility' label,[86] notwithstanding its lack of opportunity to do so till date.

In any event, the lack of coherence in how multi-tier dispute resolution clauses have been characterised is noticeable.[87] Although it could plausibly be argued that the Swiss Supreme Court's ruling that arbitration proceedings should be stayed until pre-arbitral steps have been complied with[88] is a reference to admissibility, the Swiss courts have equivocated in this regard, given that they have used the labels 'admissible' and 'jurisdictional' synonymously.[89] This conflation is unsurprising if one considers that the dichotomy between jurisdiction and admissibility has not played a major role in Swiss commercial arbitration. The focus has simply been on jurisdiction.[90] Similarly, it is unclear in Australia whether non-compliance with multi-tier dispute resolution clauses is a jurisdictional or admissibility issue.[91] Paulsson even suggests that the failure to respect condition precedents could be a jurisdictional issue, if a party insists that his consent to arbitration is contingent on a *bona fide* attempt at settlement.[92] With the characterisation of conditions precedent to arbitration varying among different legal systems,[93] perhaps owing to the difference in how civil law and common law lawyers look at this issue,[94] the dichotomy between jurisdiction and admissibility may be of limited usefulness in that it serves to obfuscate rather than explain. One may perhaps see the 'tribunal versus claim' test as a crude attempt to pigeonhole legal principles into either admissibility or jurisdiction, when they could shade into either depending on the perspective adopted or the facts of each case.

(ii) Non-arbitrability

Non-arbitrability is another area in which the dichotomy between jurisdiction and

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86 This is a position that is indeed consistent with UK and Hong Kong. Both *SL Mining* and *C v D* had cited Singapore authorities and applied the Test that was endorsed in Singapore in coming to its eventual conclusion. This arguably demonstrates how the Test would likely be applied by the Singapore courts if and when the time comes. See *SL Mining* (n 72) and *C v D* (n 76).

87 See generally, Hamish Lai *et al*, 'Multi-Tiered Dispute Resolution Clauses in International Arbitration – The Need for Coherence' (2020) 38(4) ASA Bulletin 796.

88 *X Ltd v Y SpA* [2016] 4A_628/2015, 18.

89 Tweeddale, 'Jurisdiction and Admissibility in Dispute Resolution Clauses' (n 7) 15, citing *A SA v B SA* [2014] 4A_124/2014, where the Swiss Supreme Court was also unclear as to whether non-compliance with FIDIC's mandatory requirements gave rise to a jurisdictional or admissibility challenge.

90 Marco Stacher, 'Jurisdiction and Admissibility under Swiss Arbitration Law – the Relevance of the Distinction and a New Hope' (2020) 38(1) ASA Bulletin 55, 55.

91 George M Vlavianos and Vasilis F L Pappas, 'Multi-Tier Dispute Resolution Clause as Jurisdictional Conditions Precedent to Arbitration' *Global Arbitration Review* (6 June 2017) <https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/2nd-edition/article/multi-tier-dispute-resolution-clauses-jurisdictional-conditions-precedent-arbitration> accessed 22 November 2021, citing *United Group Rail Services Ltd v Rail Corp New South Wales* [2009] NSWCA 177.

92 Paulsson, 'Jurisdiction and Admissibility' (n 6) 613.

93 Born, *International Commercial Arbitration* (n 70) 989.

94 Tweeddale, 'Jurisdiction and Admissibility in Dispute Resolution Clauses' (n 7) 14.

admissibility may be unhelpful. Generally, arbitrability refers to the possibility or otherwise of settling a dispute by arbitration.[95] Although what amounts to arbitrable subject matter is not the subject of comprehensive statutory guidance,[96] the 'concept of arbitrability finds legislative expression in section 11 of the IAA',[97] where subject matter arbitrability is subject to the limits imposed by public policy.[98] Singapore has thus chosen to define areas of non-arbitrability by with reference to Singapore public policy.[99]

Whether non-arbitrability is a jurisdictional or admissibility issue was most recently considered in *Westbridge Ventures II Investment Holdings v Anupam Mittal*,[100] where Mohan JC (as he then was) ruled that a finding of arbitrability (or non-arbitrability) is one that strikes at the tribunal's jurisdiction in respect of that dispute.[101] In reaching this conclusion, reliance was placed on several authorities which state that arbitrability is a question of jurisdiction. An excerpt from Bernard Hanotiau's article was cited, which stated that '[a]rbitrability is indeed a condition of validity of the arbitration agreement and, consequently, of the arbitrator's jurisdiction'.[102] Further, the High Court observed that this point was echoed in *Comparative International Commercial Arbitration*: '[t]hough arbitrability is often considered to be a requirement for the validity of the arbitration agreement it is primarily a question of jurisdiction'.[103] With respect, however, to the extent that these authorities had not explicitly considered the dichotomy, they may be of limited value in determining whether the issue of arbitrability goes towards jurisdiction or admissibility.

More crucially, the High Court had recourse to the 'tribunal versus claim' test,[104] and found that non-arbitrability raises a defect as to the parties' consent to arbitration.[105] Parties' consent would be invalid[106] since parties cannot agree to submit non-arbitrable disputes to

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95 Hunter, *Redfern and Hunter on International Arbitration* (n 50) [2.29]; Obamuroh, 'Jurisdiction and Admissibility' (n 9) 386; Loukas A Mistelis, 'Arbitrability – International and Comparative Perspectives' in Loukas A Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009) 1, 3–4.

96 Menon, *Arbitration in Singapore* (n 84) [15.056].

97 *Westbridge Ventures II Investment Holdings v Anupam Mittal* [2021] SGHC 244, [25].

98 ibid [25]. See also *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414, [28]–[30].

99 Menon, *Arbitration in Singapore* (n 84) [15.057]. It should be noted this notion of public policy is potentially broader than that identified in Article 34(2)(b)(ii) of the Model Law, which is concerned with fundamental notions and principles of justice as opposed to domestic policy considerations. See also *Westbridge* (n 97) [26]. Cf. *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, [59].

100 *Westbridge* (n 97).

101 ibid [36].

102 Bernard Hanotiau, 'The Law Applicable to Arbitrability' (2014) 26 SAcLJ 874, [1].

103 Julian David, Mathew Lew QC, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) [9-18].

104 *Westbridge* (n 97) [39]–[40].

105 ibid [40].

106 The arbitration agreement would be rendered 'inoperative' or 'incapable of being performed' under section 6 of the IAA. See also *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373, [73].

arbitration as a matter of public policy.[107] The High Court observed that the issue of subject matter arbitrability 'cannot merely be a matter of admissibility'; instead, it strikes at the tribunal's jurisdiction.[108] While the assumption that matters which do not go to admissibility necessarily go to jurisdiction in this context, this does not preclude an interpretation that non-arbitrability could possibly be *both* a matter of admissibility and jurisdiction,[109] depending on the circumstances at hand.

First, Menon CJ, speaking extrajudicially, 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'.[110] Insofar as jurisdiction refers to 'the power of the tribunal to hear a case', it could be argued that non-arbitrability may not fall neatly within the jurisdiction label. Secondly, Paulsson suggested that the US Supreme Court, in two cases,[111] implicitly treated the issue of arbitrability as an admissibility issue.[112] That there is no panacea can be observed from the fact that he goes on to question whether the classification was correct in these cases, suggesting that non-arbitrability could also go to the issue of jurisdiction.[113] For now, while Singapore jurisprudence has had the fortune of *Westbridge's* guidance on this issue, it can at least be said that the issue of non-arbitrability is one that defies easy classification, insofar as the dichotomy between jurisdiction and admissibility is concerned.

C. AN ALTERNATIVE?

It is apposite to turn to consider the alternatives which have been proffered. According to Hwang, the question should simply be 'whether the objection, if factually proven, would impinge upon the *consent* of the objecting party to arbitration, so as to amount to a jurisdictional objection'.[114] Instead of force-fitting issues into a binary between jurisdiction and admissibility, Hwang suggests that the inquiry should be whether an objection is jurisdictional or non-

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107 *Westbridge* (n 97) [40].

108 ibid [41]. See also Stacher, 'Jurisdiction and Admissibility under Swiss Arbitration Law' (n 90) 57, where arbitrability is also a jurisdictional issue in the Swiss courts.

109 Paulsson, 'Jurisdiction and Admissibility' (n 6) 614.

110 Sundaresh Menon, 'Arbitration's Blade: International Arbitration and the Rule of Law' (2021) 38(1) Journal of International Arbitration 1, 9.

111 *Howsam v Dean Witter Reynolds, Inc* (2002) 536 U.S. 79; *Green Tree Financial Corp. v Bazzle* (2003) 123 S Ct 2402.

112 Paulsson, 'Jurisdiction and Admissibility' (n 6) 612.

113 ibid 613.

114 Hwang and Lim, 'The Chimera of Admissibility in International Arbitration – and Why We Need to Stop Chasing it' (n 6) 434.

jurisdictional.[115] This stands in stark contrast to the present tribunal versus claim test, which equates non-jurisdictional inquiries with admissibility when it may not necessarily be as straightforward.

As Hwang posits, adjudicators should 'open [their] minds to alternative methods which may be better at identifying if consent is affected.[116] On conditions precedent, the suggested approach is to apply contractual interpretation to '*interpret the offer to arbitrate*' to determine if the party had 'intended the precondition to be a *condition to its consent* to arbitrate' [emphasis in original].[117] Such an approach comports not only with the Singapore courts' focus on the underlying 'substance'[118] of the 'tribunal versus claim' test where analysing parties' consent is paramount,[119] but also with the English courts' focus on giving effect to the commercial purpose of the arbitration clause[120] and the 'objective intention of the parties'.[121] Also in line with this is Born's suggestion that the consequences of non-compliance with conditions precedent 'are ultimately matters of contractual interpretation'.[122]

It is proposed that the 'tribunal versus claim' test can remain of general application, but where courts are faced with scenarios where the dichotomy between jurisdiction and admissibility is less clear, Hwang's approach would circumvent problems posed by the twilight zone. The upshot of this proposal is that it averts tying the adjudicators' hands into conclusively placing an issue within the binary, where the answer may not strictly lie therein. In practice, cases such as *BTN* and *BBA* will be unaffected as they can be resolved solely on an application of the 'tribunal versus claim' test. But where this proposed approach comes in handy is where issues defy easy classification under the dichotomy. For issues that fall outside jurisdiction but cannot be clearly said to be one of admissibility, Hwang's approach would label it as a non-jurisdictional issue, thereby leaving no room for the twilight zone.

Such an approach encourages principled decision-making. For jurisdictional issues, the body of rules concerning jurisdiction can continue to apply.[123] Conversely, for non-

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115 See also Stacher, 'Jurisdiction and Admissibility under Swiss Arbitration Law' (n 90), where the author proposes not to use the jurisdiction-admissibility dichotomy for Swiss law, but to focus on whether an issue is a jurisdictional one.

116 Hwang and Lim, 'The Chimera of Admissibility in International Arbitration – and Why We Need to Stop Chasing it' (n 6) 434–435.

117 ibid 435. See also Tweeddale, 'Jurisdiction and Admissibility in Dispute Resolution Clauses' (n 7) 15.

118 *Westbridge* (n 97) [40].

119 *BBA* (n 1) [78].

120 *NWA* (n 79) [33], citing *Premium Nafta* (n 82) [5]–[8].

121 ibid [47].

122 ibid [48], citing Born, *International Commercial Arbitration* (n 70) 975.

123 Hwang and Lim, 'The Chimera of Admissibility in International Arbitration – and Why We Need to Stop Chasing it' (n 6) 435. See, *eg*, Rule 28 of the Arbitration Rules of the Singapore International Arbitration Centre (2016).

jurisdictional issues, the tribunal has 'the discretion to conduct proceedings in such manner as it considers appropriate'.[124] As for difficulties associated with Hwang's approach, it is worthy of another discussion in and of itself. Briefly, it is suggested that such an approach would lack certainty, since courts would invariably have to decide on *how* to identify if consent is affected.

D. IMPETUS FOR THE DICHOTOMY BETWEEN JURISDICTION AND ADMISSIBILITY

Despite the potential difficulty in classifying certain issues under either label, as alluded to above, the author acknowledges that the dichotomy between jurisdiction and admissibility remains relevant for several reasons. First, it has been heralded for its important consequences in international arbitration,[125] chief of which is determining the extent of a national court's intervention and the level of deference that it will accord the final award.[126] A tribunal's decision on jurisdiction is subject to *de novo* independent review by the courts, while a tribunal's decision on admissibility is not.[127]

Secondly, the Dichotomy serves to determine practical matters such as who should bear the burden of raising the objection.[128] For instance, a tribunal can review its jurisdiction *proprio motu*,[129] but not the admissibility of a claim which is instead raised by parties.[130] Thirdly, labelling an objection as jurisdictional or admissibility implicates the *res judicata* effect of a tribunal's ruling.[131] A tribunal's decision of lack of jurisdiction carries a *res judicata* effect on the same tribunal, while a ruling of inadmissibility does not invariably bar rehearing of the same claim in the future.[132] In the latter situation where the plaintiff sues too early,[133] the tribunal may find the claim temporarily inadmissible,[134] and stay the proceedings until the relevant

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124 ibid 435. See, for example, Rule 19 of the Arbitration Rules of the Singapore International Arbitration Centre (2016).

125 Walters, 'Fitting a Square Peg into a Round Hole' (n 13) 662; Nota, 'International Arbitration' (n 44) 32.

126 Obamuroh, 'Jurisdiction and Admissibility' (n 9) 375; Walters, 'Fitting a Square Peg into a Round Hole' (n 13) 662.

127 *BTN* (n 2) [66] and [71]. See also N Blackaby, C Partasides QC, Hunter, *Redfern and Hunter on International Arbitration* (n 50) [5.112]; Santacroce, 'Navigating the Troubled Waters Between Jurisdiction and Admissibility' (n 5) 540–541; Tweeddale, 'Jurisdiction and Admissibility in Dispute Resolution Clauses' (n 7) 14.

128 Walters, 'Fitting a Square Peg into a Round Hole' (n 13) 662.

129 Santacroce, 'Navigating the Troubled Waters Between Jurisdiction and Admissibility' (n 5) 551; See, *eg*, Decision 4A_618/2019 of the Swiss Supreme Court, where the court held that the arbitrator was entitled to investigate jurisdiction of its own volition.

130 Yas Banifatemi, 'Chapter 1' (n 8) 19; Nota, 'International Arbitration' (n 44) 32. See also Chittharanjan F. Amerasinghe, *Jurisdiction of International Tribunals* (The Hague, London, New York: Kluwer Law International, 2003) 286; Santacroce, 'Navigating the Troubled Waters Between Jurisdiction and Admissibility' (n 5) 551.

131 Walters, 'Fitting a Square Peg into a Round Hole' (n 13) 662.

132 Obamuroh, 'Jurisdiction and Admissibility' (n 9) 377.

133 *BTN* (n 2) [70]; Paulsson, 'Jurisdiction and Admissibility' (n 6) 616.

134 Santacroce, 'Navigating the Troubled Waters Between Jurisdiction and Admissibility' (n 5) 551.

admissibility conditions are satisfied.[135]

IV. Conclusion

Ultimately, *BTN* is but one of the many recent decisions where the Singapore courts' stance is made clear in no uncertain terms – the 'tribunal versus claim' test and the dichotomy between jurisdiction and admissibility is here to stay. This pragmatic approach may be lauded for its certainty and efficacy, though the dichotomy is also imperfect in lacking the flexibility that other more open-textured approaches may offer.[136] It appears that the Singapore courts are stuck between a rock and a hard place insofar as alternatives would pose their unique challenges. In striking the difficult balance between certainty and flexibility, it is hoped that Singapore law will develop in a manner which reduces, or hopefully, eradicates, the twilight zone.

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[135] ibid.

[136] Apart from Hwang's test, there exists the 'presumed party intentions' test and the 'draftsman' test. See Iris Ng, 'Jurisdiction or Admissibility? The Status of Time Bars Under Singapore Arbitration Law' (Kluwer Arbitration Blog, 7 August 2020) <http://arbitrationblog.kluwerarbitration.com/2020/08/07/jurisdiction-or-admissibility-the-status-of-time-bars-under-singapore-arbitration-law/> accessed 22 November 2021.