M&B Singapore Presentation

The Internationalisation of Arbitration Law

And the Doctrine of Arbitrability

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1. The 2nd edition of Mustill & Boyd sought to state the law at 1 January 989. It is not straightforward to identify the number of non-English cases cited in that edition, but in terms of decisions from clearly non-English law reports, there are:
   - Four from Canada;
   - Three from Australia;
   - One each from the US, Ireland, New Zealand.
   - And one from the Malayan Law Reports. I thought it impolitic to check from what side of the causeway it came!

2. Where are we now?
   - Australia comes in at an impressive 31.
   - The United States at 10.
   - India at 7.
   - New Zealand at 6.
   - Canada still at 4.
   - Ireland still at 1

3. Have I missed anyone out? Oh, forgive me. Singapore. Well, there are 4 cases before neutral citation was adopted here. And since then, 81 first instance cases. And 52 Court of Appeal cases.

4. Now those statistics demonstrate vindicate the judgment of those who decided to make case law freely available through sites such a BAILII, the National Archives and Singapore Law Watch. And to adopt a neutral citation methodology so that it was no longer necessary to subscribe to expensive sets of law reports to be able to access and deploy case law materials. They also reflect the rise of Singapore as one of the world's leading arbitration venues.

5. But the statistics overall reflect the recognition, among common law and civilian jurisdictions, of the transnational nature of international arbitration. Many of its foundational instruments are international in character – most importantly the New York Convention, but also the UNCITRAL Model Law. Arbitrations will frequently involve parties from two jurisdictions entering into a contract governed by the law of a third, which provides for disputes to be arbitrated with a legal seat at a fourth, perhaps by arbitrators from three more jurisdictions, who produce an award which has to enforced in yet more. Reflecting that international context, when fashioning solutions to the problems which this highly effective mechanism for cross-border dispute resolution can throw up, we need to be alive to how courts in other jurisdictions have tackled similar problems, and try and identify any emerging international consensus. As I have put it in one note, with a nod to speech by the Chief Justice on a different topic, we may have a somewhat uncommon law of commerce, but we have an increasingly common law of arbitration.

6. The increasing readiness to consider arbitration jurisprudence from other jurisdictions has been led by Apex Courts where, dare I say it, there may be more time to obtain and consider it. A particularly important instance was the decision of the Singapore Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57 which has been cited in 15 cases in my jurisdiction, two of them judgments of mine. It features prominently in two recent decisions of Apex courts for the legal systems of England and Wales and those common law countries who retain appeals to the Privy Council, *Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] UKSC 32 and *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corp* [2023]UKPC 33.

7. What, I think, is particularly noticeable about *Tomolugen* and *FamilyMart* is that an internationalist approach is adopted when considering an issue which national parochialism has historically dominated: that of arbitrability.

8. Now arbitrability – which I will somewhat inadequately define as the public policy limitations on the types of dispute which may be validly subject to binding determinations by private contractual tribunals – is a most elusive notion. The concept finds only very limited reference in the English Arbitration Act 1996, s.81(1)(a) and

(c) preserving "any rule of law as to … matters which are not capable of settlement by arbitration or … the refusal of recognition or enforcement of an arbitral award on the grounds of public policy", and s.103(3) providing that the court may refuse to recognise or enforce a New York Convention award "if the award is in respect of a matter which is not capable of being settled by arbitration, or if it would be contrary to public policy to recognise or enforce the award". It is addressed more explicitly in s.11(1) of the Singapore International Arbitration Act 1994, which provides that "): "any disputes which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so"

9. But arbitrability also comes into arbitration law through the law of contract, and in particular the public policy of the applicable law of the arbitration agreement. If an arbitration is expressly governed by the law of Ruritania, a dispute is referred in relation to the Ruritanian telecoms industry, and the law of Ruritania provides that disputes about essential communications services are not arbitrable, it will be argued that the agreement is not enforceable under its applicable law, and that a stay or injunction to enforce the arbitration agreement should be refused. The fact that different systems of law which may govern the issue of arbitrability for different purposes – the law of the seat, the applicable law of the arbitration agreement and the law of a place of attempted enforcement – was confirmed by the Singapore Court of Appeal in *Westbridge Ventures II Investment Holdings v Anupan Mittal* [2023] SGCA 1. That decision came out shortly after I had written a section of *Mustill & Boyd* suggesting that the first instance decision was wrong. Fortunately, that was also the view of the Court of Appeal. I am going to refer to these two different contexts as contractual arbitrability, and forum arbitrability.

10. Now focussing on contractual arbitrability for the moment, ordinary principles of the common law of contract suggest that a contract will not be enforced to the extent that the agreement is unenforceable under its applicable law. Thus in *The Amazonia* [1990] 1 Lloyd's Rep 236, the English Court of Appeal accepted that if the arbitration agreement in that case, which had a seat in England and Wales, had been governed by Australian law, it would not have been valid and enforceable because s.9 of the Australian Carriage of Goods by Sea Act 1924 so provided. But the courts of the

forum may refuse to give effect to public policy rules of the applicable law if to do so would contravene the public policy of the forum. If, for example, the law of Ruritania said that disputes with individuals of a certain ethnicity could not be arbitrated, I suspect that the courts of England and Wales would feel able to enforce and support the arbitration agreement nonetheless. That is a somewhat improbable example. But the principle of law it reflects is relied upon by some, including at least one fellow author, to support the view that contractual arbitrability should never be a relevant consideration, and all that matters is forum arbitrability. That argument is advanced on the basis that the ability to resolve disputes in arbitration is such an obvious and unchallengeable universal good that any limit upon it outside of a very narrow category disputes with an intensely public character is a bad thing.

11. One of the themes of the new edition Mustill & Boyd is that arbitration is only partly contractual. Nonetheless, in my view, it is clearly contractual enough that it will only be a rare case in which an arbitration agreement will be enforced even though it is invalid under its applicable law. So far as contractual arbitrability is concerned, therefore, the scope for a converging approach across international boundaries is going to be challenging.

12. What of forum arbitrability? The *Mustill and Boyd 2001 Companion* observed that:

> "no doubt … fragmentary examples of inarbitrability could be collected, but since they cannot be assembled into a coherent doctrine we shall not pursue them in this Companion Volume, leaving them to the Third Edition if a sufficient consensus has started to emerge".

13. Well, thank you for that legacy, Michael and Stewart!

14. I think a consensus has started to emerge, but its contours are still being fought over. In my jurisdiction, cases such as *FamilyMart*, *Nori Holding Limited v Public Joint Stock Co v Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm) and *Bridgehouse (Bradford No.2) Ltd v BAE Systems Plc* [2020] EWCA Civ 759 have established that the policy of enforcing agreements to arbitrate disputes is so strong that something rather compelling is required for the court to refuse to give effect to

such an agreement.

15. Decisions in England and Wales have relied on the statement of general principles in s.1 of the 1996 Act including:

> "(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."

16. The *2001 Companion* predicted that s 1 would have a 'profound psychological effect' on the courts, arbitral tribunals and the parties. That prediction has proved entirely accurate. It has become a feature of arbitration and arbitration-related court hearings to find one or more of the principles being deployed by both sides to support diametrically opposed positions. The *2001 Companion* expressed the view that the words 'subject only to such safeguards as are necessary in the public interest' were not concerned with the issue of arbitrability, being: 'concerned with the manner of resolving arbitrations and not with the permissible subject-matter of arbitrations'. However, it is possible to read the words 'free to agree how their disputes are resolved' not simply as a reference to how their disputes are resolved *in arbitration*, but as extending to what forum their disputes are resolved in. That reading has gained judicial traction, with s 1(b) being relied upon in the context of arbitrability disputes to support an expanded view as to what matters can be arbitrated." But we must not deceive ourselves. The strong pro-arbitration public policy seen in England and Wales, and I would respectfully suggest, in this jurisdiction, is consistent with legislative policy, but it is very much a judicial work product.

17. I would like briefly to look at two areas where the tensions of arbitrability are most evident: shareholder remedies and relief arising in insolvency.

18. Taking shareholder remedies first, it is barely 10 years ago that as distinguished an arbitration lawyer as Justice Quentin Loh in *Tomolugen* at first instance ([2016] SGCA 101) held that minority oppression claims were not arbitrable, and there was a body of Australian case law to similar effect. In *FamilyMart,* the Cayman Island Court of Appeal including Sir Bernard Rix and Sir Alan Moses, reached the same view

(Civil Appeal Nos 7 and 8 of 2019, Cayman Islands Court of Appeal, 23 April 2020). The approach which ultimately prevailed in the Apex Courts involves a degree of dispute fragmentation, with findings as to the facts said to constitute shareholder oppression being made in the arbitration, which then form the basis for "relief which only a court can give."

19. So far as I can tell, we have yet to have a difficult case in which the preclusive effect of the arbitral factual determination and the independent interest of the court in determining what relief should order have come into stark conflict. But then the fact that we have not may well tell its own tale, with the arbitral decision being determinative in practice, and the apparent fragmentation of the dispute being more apparent than real.

20. The insolvency context is more challenging, and one group of commentators have referred to a "clash of cultures" between the worlds of arbitration and insolvency law. There are certainly conflicting public policies, as Lord Briggs noted in *Sian Participation Corp v Halimeda International Ltd* [2024] UKPC 6 in the Privy Council: the policy of upholding agreements to arbitrate, and the efficient conduct of the bankruptcy or liquidation for the benefit of all creditors.

21. Take first class remedies – the setting aside of contracts entered into at undervalue or which involved a preference, where the contracts in issue contain arbitration clauses. In *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] SGCA 21, the Singapore Court of Appeal had to consider whether claims by the liquidator of a company to set aside a transaction as at an undervalue and to avoid certain payments on the basis that they constituted a transaction to defraud creditors fell within an arbitration agreement and were arbitrable. The court held that claims by a liquidator to avoid transactions of an insolvent company concluded at an undervalue were not arbitrable, the powers in question existing "for the benefit of the general body of creditors in an insolvency or insolvency-related context". There are statements to similar effect in other decisions in England and Singapore.

22. These decisions, however, are all concerned with the arbitrability of avoidance claims arising under the *law of the seat*. Where avoidance claims have been raised in a

foreign insolvency, and that insolvency has not been recognised under the Cross-Border Insolvency Regulations, the English courts have been willing to grant anti-suit injunctions restraining those proceedings on the basis that they involve a breach of the arbitration agreement: Males J did in *Nori Holding Ltd v Public Joint stock Co Bank Otkritie* [2018] EWHC 1343 (Comm) and I did in *Riverrock Securities Ltd v International Ban*k *of St Petersburg* [2020] EWHC 2483 (Comm).

23. While the consistency of these states of affairs has been doubted, I was satisfied that there is a very difference between the pursuit of insolvency-related relief under the laws of the forum or in a cross-border insolvency which the forum has recognised, and insolvency-related claims seeking to set aside a contract which is subject to an arbitration agreement in other cases.

24. Which brings me to *Sian Participation*. This is not a case about arbitrabilit1616y as such, but of something quite close to it: whether a pro arbitration public policy should influence the court's approach when exercising judicial discretions arising outside arbitration legislation. *Sian Participation* came within a year of *FamilyMart*, and with three of the same judges: Lord Reed, Lord Lloyd Jones and Lord Briggs. The cases are consistent, but the mood music perhaps a little different. The immediate context was the merits test for a winding up petition in determining whether the debt is genuinely disputed on substantial grounds. Where the debt arises under a contract with an arbitration agreement, the idea of the court determining whether there is an arguable defence brings immediate and unfortunate echoes of the time when it was possible to resist a stay in favour of the arbitration by bringing a cross-application for summary judgment at the same time.

25. In *Salford Estates (No 2) Ltd v Altomart Ltd* [2014] EWCA Civ 1575*,* the English Court of Appeal held that a creditor's winding up petition neither was nor included a claim within the meaning of s.9 of the Arbitration Act 1996, such that the provisions of the Act were not directly engaged. However, he applied the policy of the 1996 Act by analogy, saying that the court's discretion under s.122(1)of the Insolvency Act 1986 should be guided by the legislative policy of the 1996 Act.

26. The Privy Council held that *Salford Estates* was wrongly decided and that, in effect, the policy reach of the Arbitration Act 1996 or the Model Law was determined by the scope of the mandatory stay provisions. The Privy Council stated that:

"None of the general objectives of arbitration legislation (efficiency, party autonomy, pacta sunt servanda and non-interference by the courts) are offended by allowing a winding up to be ordered where the creditor's unpaid debt is not genuinely disputed on substantial grounds."

27. *FamilyMart* and *Sian Participation* make for an interesting comparison. In the former, the public policies animating the laws governing minority shareholder protection did not prevent the enforcement of an arbitration agreement for the purposes of making the requisite findings of fact. It would have been possible for the law to adopt a similar approach for winding-up petitions based on the failure to pay debts, with arbitrators finding whether the debt is genuinely disputed on substantial grounds, and the court then making the winding-up order on the basis of those findings. The growing acceptance of summary determination procedures in international arbitration could have lent support to such an approach. But the Privy Council's decision is a reminder that sometimes the policy in favour of permitting the determination of disputes by a process of arbitration will find itself in conflict with other equally strong or stronger policies which animate other areas of the law. And, in something of a hostage to fortune, I will finish by suggesting that the landscape thrown up by this clash of the tectonic plates of the law will be clearer in the fourth edition of Mustill & Boyd. Whenever it appears …