Dispute Resolution Hotline

January 19, 2023

A NEW COMPOSITE APPROACH: SINGAPORE COURT OF APPEAL SETTLES LAW FOR DETERMINING ARBITRABILITY OF DISPUTES

- Private equity investors ought to be careful in wording their arbitration clauses, particularly in a shareholders' agreement, as this could potentially determine if disputes are heard by their choice of forum or not.
- Arbitrability of disputes at a pre-award stage is determined by applying a composite approach. i.e. the arbitrability of disputes is determined under two laws being (i) the law of the arbitration agreement; and (ii) the law of the seat.
- The law of the arbitration agreement is decided pursuant to a three-stage test: (i) does there exist an express choice for law governing the arbitration agreement; (ii) if not, is there an implied choice for law governing the arbitration agreement; and (ii) if there is neither an express nor an implied choice, which law has the closest and most real connection to the arbitration agreement. For the second stage, there is a presumption that parties' selection of a law of the contract acts as their implied choice for the law of the arbitration agreement. However, such a presumption may be displaced if the law of the contract would negate the arbitration agreement.

SYNOPSIS

In *Anupam Mittal v Westbridge II Investment Holdings* ("**Anupam Mittal**"),[1] the Singapore Court of Appeal ("**SGCA**") settled the issue on which law would determine the subject-matter arbitrability of a dispute at a pre-award stage in Singapore. The SGCA held that it is the law of the arbitration agreement, and not just the law of the seat, which shall decide which disputes are arbitrable at the pre-award stage. This finding is primarily based on the impact of foreign public policy on arbitrability of disputes i.e. if a foreign arbitration agreement deems certain disputes to be non-arbitrable, then Singapore courts will not permit parties to arbitrate to promote international comity.

FACTUAL BACKGROUND

People Interactive (India) Private Limited ("**Company**") was founded by Anupam Mittal and currently owns the popular matrimonial website "Shaadi.com". Shaadi.com was founded by Anupam Mittal and his cousins, Anand Mittal ("**AM**") and Navin Mittal ("**NM**"), who were initial shareholders of the Company. Westbridge II Investment Holdings ("**Westbridge**"), a private equity firm incorporated in Mauritius, was an investor in the Company pursuant to which it had entered into a Shareholders' Agreement ("**SHA**") with Anupam Mittal and his cousins. The arbitration agreement within the SHA stipulated the law of the seat as Singapore and Indian law as the law governing the main contract. Further, the arbitration agreement stated that disputes "*relating to the management of the Company or relating to any of the matters set out in this Agreement*" shall be settled by arbitration.

As of 2021, Westbridge owned majority of the shares with a shareholding of 44.38% in the Company, while Anupam Mittal held 30.26% of the shares in the Company. Westbridge also appointed its nominee director on the Board of the Company in accordance with the SHA ("**Nominee Director**"). Further, the SHA dictated that if an Initial Public Offering ("**IPO**") was not completed within 5 years from the closing date, then Westbridge could redeem its shares and, if necessary, "drag" all shareholders to sell their shares to a third-party.

Disputes arose between the parties when Westbridge sought to exit the Company since no IPO was completed within 5 years from the closing date. As part of this disengagement process, the parties disagreed on several points including: (i) potential sale of the Company to a third-party (an alleged competitor of the Company); and (ii) Westbridge's refusal to consent to re-appointment of AM and AM as the managing and founding directors of the Company respectively.

JUDICIAL HISTORY AND PROCEEDINGS BEFORE THE SINGAPORE HIGH COURT

In 2021, Anupam Mittal filed a petition before the National Company Law Tribunal ("**NCLT**") in India to, *inter alia*, injunct Westbridge from interfering in the management of the Company. In response, Westbridge filed an original suit before the Singapore High Court for an anti-suit injunction to restrain Anupam Mittal from commencing proceedings before the NCLT. The Singapore High Court ("**SGHC**") granted the anti-suit injunction.

While granting the anti-suit injunction, the SGHC held that it is the law of the seat which governs subject - matter arbitrability. It held that, in the present case, the law of the seat was Singapore law under which oppression and mismanagement cases were arbitrable. Accordingly, the SGHC held that Anupam Mittal's initiation of the proceedings before the NCLT was in violation of the arbitration agreement since the arbitration agreement required that such disputes be referred to arbitration. In any case, the SGHC found that the parties had intended to refer disputes relating to management of the company to arbitration in light of the broadly worded arbitration agreement within the SHA. Aggrieved by the findings of the SGHC, Anupam Mittal appealed to the SGCA.

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ARGUMENTS BY ANUPAM MITTAL BEFORE THE SGCA

First, it is the law of the arbitration agreement which governs subject - matter arbitrability. In this case, the law of the arbitration agreement was Indian law. Since this was a case of oppression and mismanagement which is non-arbitrable under Indian law i.e. the law of the arbitration agreement, the NCLT would have exclusive jurisdiction over such disputes.

Second, disputes relating to oppression and mismanagement cannot be said to be covered within the words "*relating to the management of the Company*" since the arbitration agreement would then be rendered unworkable and nullified under Indian law.

ARGUMENTS OF WESTBRIDGE BEFORE THE SINGAPORE COURT OF APPEAL

First, it is the law of the seat which governs the question of arbitrability. As Singapore law is the law of the seat under which oppression and mismanagement disputes are arbitrable, the Singapore High Court was correct in imposing an anti-suit injunction.

Second, even if it is assumed that the law of the arbitration agreement determines subject – matter arbitrability, it is Singapore law which is the law of the arbitration agreement because if law of the substantive contract (i.e. Indian law) is deemed to be the law of the arbitration agreement, then disputes would be rendered non-arbitrable, which goes starkly against Singapore's policy of encouraging arbitration.

Third, even if Indian law was to be assumed to be the law of the arbitration agreement, the disputes would still be arbitrable since the tribunal would be prevented from granting only the relief for oppression but not from adjudicating the merits of the claim.

Fourth, regardless of whether it is Singapore law or Indian law which is the law of the arbitration agreement, the disputes are contractual in nature and relate to the management of the Company, and are hence covered within the wording of the arbitration agreement.

JUDGMENT OF THE SGCA

Law of the seat or law of the arbitration agreement – Which governs the issue of arbitrability?

The SGCA disagreed with the SGHC and held that it is the law of the arbitration agreement which determines subject – matter arbitrability.

First, the SGCA placed emphasis on public policy considerations in relation to issues of arbitrability. It held that since States have an interest in excluding certain disputes from private adjudication motivated by public interest, non-arbitrability is essentially a question of public policy. The SGCA differentiated between Sections 11 and 31 of the International Arbitration Act, 1994 ("**IAA**")[2] to hold that at a pre-award stage, the courts in Singapore may consider public policy of other countries (and not just Singapore law) to decide if a dispute is arbitrable. It held that even though drafters of the UNCITRAL Model Law ("**Model Law**") may have intended that the law to determine the arbitrability of disputes at the pre-award and post-award (i.e. set aside) stages is the same, the drafters did not include any article to that effect and thus drafters of Section 11 of the IAA cannot be constrained by such an intention.

Second, the SGCA held that the arbitration agreement between the parties is formed by consensus of the parties and should, therefore, be determinative of the issues that the parties have agreed to arbitrate. It further held that since the law of the arbitration agreement determines the validity of the arbitration agreement, questions of what disputes may be arbitrated by a tribunal pursuant to such an agreement have to be determined in accordance with the law of the arbitration agreement. In other words, an arbitration agreement which provides for arbitration of disputes which are not arbitrable under the law of the arbitration agreement may not form as valid consent of the parties to arbitrate such disputes. Consequently, a tribunal cannot claim jurisdiction to arbitrate such disputes pursuant to the arbitration agreement.

Third, the SGCA held that the law of the seat is nevertheless relevant. If a dispute is non-arbitrable under the law of the seat, it would be an "additional obstacle" by virtue of Article 34(2)(b)(i) of the Model Law.[3] This results in a "composite approach", where:

i. first, the law of the arbitration agreement determines arbitrability – if the dispute is non-arbitrable under the proper law of the arbitration agreement, then Singapore courts will not permit the arbitration to proceed;

ii. second, if the dispute is arbitrable under the proper law of the arbitration agreement but non-arbitrable under the Singapore law as the law of the seat, then too arbitration cannot be permitted.

What is the proper law of the arbitration agreement in the present case?

Having stated that it is the law of the arbitration agreement which will determine arbitrability, the SGCA proceeded to determine whether Indian law is the law governing the arbitration agreement in the present case. For this purpose, it alluded to the three-stage test laid down in ***BCY v BCZ***[4] ("**BCY**"), which adopted the test in *Sulamérica Cia Nacional de Seguros SA and others v. Enesa Engelharia SA and others* ("**Sulamérica**"),[5] to determine the proper law of arbitration agreement –

- *Stage I – Whether parties expressly chose the proper law of the arbitration agreement* – The SGCA found that Indian law being "*in all respects*" the governing law of "*the SHA and its performance*" does not point expressly towards Indian law being the law of the arbitration agreement.
- *Stage II – If there is no express choice, whether there is an implied choice of the law of the arbitration agreement* – To determine such implied choice, the starting point would be the law of the contract. However, such implication can be displaced if choosing the substantive law of the contract as the law of the arbitration agreement would negate the arbitration agreement when parties had clearly evinced their intention to arbitrate. The SGCA found that determining Indian law to be the law of the arbitration agreement would frustrate the parties' intention to arbitrate as minority oppression disputes are non-arbitrable in India (*per* the judgment this was a common position of the

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March 19, 2025

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February 18, 2025

parties). The SGCA held that the parties intention to arbitrate shareholder disputes was clear from the express inclusion of disputes "*relating to the management of the Company*" in the arbitration agreement.

- *Stage III – If there is neither an express nor an implied choice, the system of law with which the arbitration agreement has its closest and most real connection will be the law of the arbitration agreement* – The SGCA stated that Singapore law, being the law of the seat, would govern the procedure of the arbitration including eventual challenges to the tribunal, its jurisdiction or the award when it is issued. Accordingly, it held that Singapore law has the closest and most real connection to the arbitration agreement and, therefore, it should be the law of the arbitration agreement.

The nature of disputes in the petition before the NCLT

Having held that Singapore law is the law governing the arbitration agreement, the SGCA went on to analyze whether disputes submitted before the NCLT fell within the ambit of the arbitration agreement. The court categorized disputes covered by the arbitration agreement in two: (i) disputes relating to mismanagement of the company; and (ii) disputes relating to the provisions and interpretation of the SHA. It found that all disputes contemplated by the petition before the NCLT fell into either of the two categories, and hence, the NCLT proceedings were in breach of the arbitration agreement. Accordingly, it upheld the anti-suit injunction granted by the SHGC.

NDA VIEWS

In this case, the SGCA altered the prevailing law in Singapore[6] which stated that the law of the seat determines which disputes are arbitrable at a pre-award stage. By finding that it is the law of the arbitration agreement (along with the law of the seat) which determines arbitrability of disputes at a pre-award stage, the court gave primacy to foreign public policy considerations and principles of comity when determining arbitrability of disputes. While the parties in the present case had expressly included clear terms in the arbitration agreement to evince their intention to arbitrate disputes relating to the Company's management, it remains to be seen how Singapore courts will determine intention of parties to arbitrate similar disputes in more standard arbitration clauses. To avoid such ambiguities, as a practical takeaway, private equity investors ought to be careful in wording their arbitration clauses, particularly in a shareholders' agreement, as this could potentially determine if disputes are heard by their choice of forum or not.

Moreover, it remains to be seen how Singapore courts will decide the law governing the arbitration agreement (when no express choice or implied choice for such law has been made) in situations where the law of the seat would invalidate an arbitration agreement. This situation, highlighted in the UK Supreme Court's decision of *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* ("**Enka**"),[7] has not yet received an answer in English jurisprudence. In *Enka*, the court proposed that if the law of the seat invalidates the arbitration agreement, the seat law may not be presumed to have the closest connection to the arbitration agreement under the third-stage of the *Sulamérica* test. However, the court left the possibility of such an exception open since the facts of *Enka*, like *Anupam Mittal*, did not require any such enquiry. However, we look forward to decisions from Singapore and the English courts which will provide clarity for situations when such an exception may apply."

Further, as compared to Singapore, the position in India is not as clear. The Supreme Court in ***Reliance Industries v Union of India***,[8] ("**Reliance Industries**") held that issues of arbitrability have to be determined by applying the substantive law of the contract rather than the law of the seat or the law of the arbitration agreement. In this case, the court stated that even if courts in England (the law of the seat as well as law of the arbitration agreement in that case) would determine issues of arbitrability, such issues would have to be determined by applying the law of the substantive contract (Indian law in this case). Specifically, the court stated as below:

> ***"76.4.*** *The conclusion of the High Court that in the event, the award is sought to be enforced outside India, it would leave the Indian party remediless is without any basis as the parties have consensually provided that the arbitration agreement will be governed by the English law. Therefore, the remedy against the award will have to be sought in England, where the juridical seat is located. However, we accept the submission of the appellant that since the substantive law governing the contract is Indian law, even the courts in England, in case the arbitrability is challenged, will have to decide the issue by applying Indian law viz. the principle of public policy, etc. as it prevails in Indian law."*

The Supreme Court reached this conclusion despite referring and agreeing to its earlier decision of ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd. & Ors.***,[9] wherein it had held that the law of the arbitration agreement will determine arbitrability of disputes:

> "*Where the law governing the conduct of the reference is different from the law governing the underlying arbitration agreement, the court looks to the arbitration agreement to see if the dispute is arbitrable, then to the curial law to see how the reference should be conducted.*"

The correctness of this finding in *Reliance Industries* was questioned in ***Government of India v Vedanta Limited*** ("**Vedanta**").[10] The Supreme Court therein stated that "*the observation made in para 76.4 of the Reliance judgment does not have any precedential value*" and that it is "*not the ratio of that judgment, which is contained in paras 76.1 to 76.3.*" However, the Supreme Court seems to have contextualized this disagreement on the ground that *Reliance Industries* has different facts and the issue of arbitrability was not raised in *Vedanta*.

Therefore, the position in India on this issue is still unclear. It remains to be seen whether Indian courts will: (i) affirm the position taken in *Reliance Industries*; (ii) apply the law of the *lex fori* to determine arbitrability of disputes at a pre-award stage like countries such as United States, France, Switzerland, Holland, Belgium, Italy, Austria and Sweden;[11] (iii) apply the erstwhile Singapore position wherein the law of the seat determines arbitrability of disputes at a pre-award stage; or (iv) follow the SGCA's position in the present case to find that the law of the arbitration agreement along with the law of the seat shall determine issues of arbitrability at a pre-award stage. Any clarity on this aspect would ensure greater predictability for parties seeking referral of their disputes to arbitration in front of Indian courts.

– Ansh Desai, Ritika Bansal & Ashish Kabra

You can direct your queries or comments to the authors

[1] [2022] SGCA 1.

[2] Section 11 of the IAA reads as:

"***11. Public Policy and arbitrability*** *– (1) Any dispute 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...*"

Section 31 of the IAA reads as:

"**31. Refusal of enforcement**: *(4) In any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court may refuse to enforce the award if it finds that*:

(a) …

(b) enforcement of the award would be contrary to the public policy of Singapore."

[3] Article 34(2)(b)(i) of the Model Law reads as:

"(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) …

(b) the court finds that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or,

failing any indication thereon, under the law of this State."

[4] [2017] 3 SLR 357.

[5] [2013] 1 WLR 102.

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

[7] [2020] EWCA Civ 574.

[8] (2014) 7 SCC 603.

[9] (1998) 1 SCC 305.

[10] (2020) 10 SCC 1.

[11] Gary B Born, International Commercial Arbitration (Kluwer Law International, 3rd ed, 2021), p 644.

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