

***The Determination of Arbitrability at the Pre-award Stage:
Anupam Mittal v Westbridge Ventures II Investment Holdings [2023] SGCA 1***

I. Executive Summary

In disputes involving arbitration agreements, one issue that often arises is whether the dispute in question even falls under the scope of the arbitration agreement. This is known as “subject-matter arbitrability”. The question may be further complicated by the agreement being subject to the laws of different jurisdictions, as the law governing the agreement, the law of the seat (i.e. the law governing the arbitration process), and the law of the forum (i.e. the jurisdiction where the arbitration occurs), may differ. As such, determining which law will apply to determine the subject-matter arbitrability of the dispute may not be a straightforward matter.

In the landmark case of *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1, the Court of Appeal (“CA”) decided that at the pre-award stage (i.e. before an arbitral award is made), the arbitrability of a dispute (i.e. subject-matter) will be determined using a novel “composite” approach, i.e. by both the *law that governs the arbitration agreement* as well as *Singapore law*. Specifically, if it is a foreign governing law and that law provides that the subject matter of the dispute cannot be arbitrated, the Singapore court will not allow the arbitration to proceed because it would be contrary to public policy (albeit foreign public policy) to enforce such an arbitration agreement.

At the same time, where a dispute may be arbitrable under the law of the arbitration agreement, but Singapore law as the law of the seat considers that dispute to be non-arbitrable, the arbitration would not be able to proceed. In both cases, it would be contrary to public policy to permit such an arbitration to take place.

II. Material Facts

This case was brought by an Indian resident and a founder of a company incorporated in India (the resident and founder “**Mittal**”, and the company the “**Company**”), against a Mauritian private equity fund Westbridge Venture II Investment which was also an investor (the “**Investor**”). The parties had previously entered into certain agreements. This included a Share Subscription (2006) and Share Purchase Agreement (2006) under which Company shares were issued to the investor, and a shareholders’ agreement (the “**SHA**”) regulating the parties’ rights and responsibilities as shareholders. In 2008, the parties to the SHA signed the First Supplementary Subscription-Cum-Shareholders’ Agreement (the “**SSSA**”) with SVB India Capital Partners LP, SVB Financial Group and the Investor.

The SHA and the SSSA contained identically-worded governing law and arbitration clauses. In essence, SHA Clause 20.1 and Clause 20.2 stated that the SHA “shall be governed by and construed ... in accordance with the laws of the Republic of India” and referred any “dispute relating to the management of the Company or relating to any of the matters set out in” the SSSA to arbitration in Singapore. Thus, the parties have not only chosen to arbitrate, but have also chosen “to arbitrate under Singapore law in Singapore” in accordance with the rules of the International Chamber of Commerce (“**ICC**”).

The parties’ relationship soured in 2017 when the investor expressed an interest in exiting from the Company. Subsequently, Mittal commenced proceedings before the National Company Law Tribunal (“**NCLT**”) in Mumbai, India, seeking remedies for corporate oppression. In response, the Investor filed suit (the “**HC suit**”) in Singapore’s High Court (“**HC**”), and obtained an interim anti-suit injunction against Mittal. Following this, Mittal commenced suit in the Bombay High Court seeking declaration that the NCLT was the only forum competent to adjudicate on disputes raised in the NCLT petition. At the time of the appeal, the Bombay suit had yet to be fixed for hearing.

The HC then granted the Investor a permanent anti-suit injunction against the appellant on the basis that the arbitration agreement was breached by the commencement of the NCLT Proceedings, holding that: (a) the law governing the issue of arbitrability at the pre-award stage was the law of the *seat*; (b) given that Singapore law was the law of the *seat*, the disputes between the parties were arbitrable under this law; (c) assuming Indian law governed the arbitration agreement, the parties' disputes fell within the ambit of the arbitration agreement. Mittal appealed.

III. Issues on Appeal

On appeal, the CA addressed the following four questions—

- A. Are questions of arbitrability to be determined in accordance with the law of the seat or the proper law of the arbitration agreement?
- B. What is the proper law of the arbitration agreement in this case?
- C. What is the proper characterisation of the disputes here?
- D. Even if the disputes are arbitrable, should the court order a stay of the anti-suit injunction on case management grounds?

A. Are questions of arbitrability to be determined in accordance with the law of the seat or the proper law of the arbitration agreement?

The CA first noted that both the HC and Assoc Prof Darius Chan (as *amicus curiae* or friend of the court) agreed that issues of arbitrability should be determined according to the law of the forum, irrespective of whether this issue arose at the pre-award stage or after the award had been issued. The CA also noted the views of the drafters of the UNCITRAL Model Law on International Commercial Arbitration (“**Model Law**”) and other jurisdictions, which had adopted the law of the forum (which is usually the law of the seat) at the pre-award stage to determine subject matter arbitrability. However, the CA noted that this approach failed to place enough weight on the importance of public policy in relation to issues of arbitrability.

The CA observed that an arbitration agreement is an agreement by parties to remove disputes that may arise between them from adjudication by any national court system and subject them instead to resolution by privately appointed adjudicators. Nations, however, had an interest in what issues should only be determined in public forums because some issues had wider public impact beyond the disputants' individual interests. This public interest could be expressed in legislation or be recognised by the judicial system as part of the public policy of the state. The CA further noted that different nations had different circumstances and contexts. Thus, their legislation or public policies on what may be the subject of private dispute resolution may not accord with those of other states.

Referring to *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373, the CA further held that the “essential criterion of non-arbitrability is whether the subject matter of the dispute is of such a nature as to make it contrary to public policy for that dispute to be resolved by arbitration.” This concept found legislative expression in section 11 of the International Arbitration Act 1994 (2020 Rev Ed) (“**IAA**”), which states that “[a]ny 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.” The CA held that comports with the natural reading of the section, the term “public policy” as referred to in this section was not restricted to the public policy of Singapore but extended to foreign public policy where this arose in connection with the essential elements of the arbitration agreement.

The CA thus held that if it is contrary to local or relevant foreign public policy to determine a dispute arising under an arbitration agreement by arbitration, that dispute cannot proceed to arbitration in Singapore. For a foreign arbitration agreement, that would be the result even if Singapore law might find the dispute to be capable of resolution by arbitration.

The CA further held that the arbitrability of a dispute is firstly determined by the governing law of the arbitration agreement. This is because an arbitration agreement derives its authority from the consensus of the parties, and the arbitration agreement is the fount of the arbitration tribunal's jurisdiction. The law of the seat deals with matters of procedure, but the law of the agreement deals with matters of the validity of the agreement and is hence anterior to the actual conduct of the arbitration. And it is only when an arbitration agreement does come into effect that the law of the seat kicks in. However, that did not mean that the law of the seat is irrelevant to the arbitrability issue. Indeed, if the arbitration concerns an issue that happens to be non-arbitrable by the law of the seat, that would be an additional obstacle under the Model Law.

As such, should the governing law be a foreign law which provides that the subject matter of the dispute cannot be arbitrated, the Singapore court will not allow the arbitration to proceed on the basis that it is contrary to public policy (though foreign public policy) to enforce the arbitration agreement. Further, due to section 11 of the IAA, should a dispute be arbitrable under the law of the arbitration agreement but Singapore as the law of the seat considers the dispute non-arbitrable, the arbitration is similarly unable to proceed. In both situations, it would go against public policy to allow for such an arbitration to take place (the "composite" approach).

The CA then noted that it was common ground that under Singapore law, disputes involving claims of corporate oppression can be arbitrated while under Indian law they can only be resolved by the NCLT. It then considered whether Indian law is the proper law of the arbitration agreement and thus to be given primacy.

B. The proper law of the arbitration agreement

The CA applied the three step framework laid down in *BCY v BCZ* [2017] 3 SLR 357 ("BCY"), which determines the proper law of an arbitration agreement:

Stage 1: Whether parties expressly chose the proper law of the arbitration agreement

Stage 2: In the absence of an express choice, whether parties made an implied choice of the proper law to govern the arbitration agreement, with the starting point for determining the implied choice of law being the law of the main contract.

Stage 3: If neither an express choice nor an implied choice can be discerned, which is the system of law with which the arbitration agreement has its closest and most real connection.

Stage 1: The CA noted that the initial inquiry was whether the parties expressly chose the proper law of the arbitration agreement – this required consideration of SHA Clause 20. The CA found that the language of Clause 20.1 did not amount to an "express choice of law" for the arbitration agreement. The reference in the clause to Indian law being "in all respects" the governing law of "[the SHA] and its performance" was not to be interpreted as expressly choosing the governing law of the arbitration agreement as well, even if that agreement was contained in the main contract. Instead, an express choice of law for an arbitration agreement would only be found if there was explicit language stating so in no uncertain terms.

Stage 2: As there was no express choice of law of the arbitration agreement, the CA considered if the choice of Indian law to govern the SHA made Indian law the implied law to govern the arbitration agreement. The general rule is that the choice of law used for the main contract would also apply to the

arbitration agreement, unless there are clear indications to the contrary. The choice of a seat different from the law of the governing contract would not, by itself, displace that starting point. Instead, the governing law of the main contract “should only be displaced if the consequences of choosing it as the governing law of the arbitration agreement would *negate* the arbitration agreement”, even if the parties have shown a “clear intention to be bound to arbitrate their disputes”.

The CA then found that there were “sufficient indications to negate the implication that Indian law was intended to govern the arbitration agreement in the SHA” as that implication would mean frustrating the parties’ intention to arbitrate all their disputes. It pointed out that the facts in this case demonstrated, strongly, the parties’ desire for all disputes to be resolved by arbitration. For instance, the shareholders specifically created a provision for all disputes concerning the agreement and its performance to be dealt with in arbitration. Further, not only did they choose to arbitrate but they also chose to arbitrate under Singapore law in Singapore and according to the rules of the ICC, thereby choosing a seat and an arbitral body the common feature of which was that neither had any connection with India. Such an intention would be inconsistent with an implied choice of Indian law as the law of the arbitration agreement: such choice would negate the agreement, since oppression claims are not arbitrable in India.

The CA further noted Singapore’s strong public policy in favour of arbitration. As such, the courts had to give effect to this public policy by upholding the arbitration agreement and the obligation to arbitrate, unless there was good reason not to do so.

Stage 3: Given that there was neither an express nor implied choice of law, the CA then determined which law had the most real and substantial connection with the arbitration agreement in the SHA. The CA considered that under SHA Clause 20.2, the arbitration was to proceed in Singapore. As the law of the seat, Singapore law would govern the arbitration’s procedure, including challenges to the tribunal or its jurisdiction, as well as the award when the same was issued. As such, it held that Singapore law was the law of the arbitration agreement.

C. Nature of the disputes in the NCLT petition

With Singapore law governing the arbitration agreement, the question now was whether the commencement of the NCLT Proceedings by Mittal was in breach of that agreement. This meant considering whether the claims in the NCLT Proceedings would fall within the ambit of the arbitration agreement.

There were categories of disputes that must be submitted to arbitration: disputes relating to the management of the Company, and disputes relating to the provisions and interpretation of the SHA. In deciding whether any dispute fell within one category or the other or neither, this term in the arbitration agreement would be interpreted in accordance with Singapore law as the governing law of the arbitration agreement.

The CA then held that “practically all the complaints made” by Mittal in the NCLT Proceedings pertained either to the management of the Company or to the SHA. That all these allegations might eventually support a finding of oppression nonetheless did not take them out of the categories of disputes which the SHA expressly provided should be submitted to arbitration. As such, the CA agreed with the HC that the institution of the NCLT Proceedings was a breach of the arbitration agreement. On that basis, there was no ground on which to discharge the anti-suit injunction granted by the HC.

D. Even if the disputes are arbitrable, should the court order a stay of the anti-suit injunction on case management grounds?¹

Under section 49(2) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) read with section 18(2) and paragraph 9 of the First Schedule to the SCJA, the CA had case management powers to stay (i.e. pause) the court proceedings in Singapore, until the concurrent proceedings in the Bombay High Court and NCLT had concluded. This would be a limited stay, the main reason of which would be to avoid conflicting decisions between the two courts.

The CA noted that the grant of a limited stay pursuant to the SCJA was a discretionary exercise of the court's case management powers. In exercising these powers, the court could consider all circumstances of the case. Here, the underlying concern was the need to ensure an efficient and fair resolution of the dispute, based on a list of non-exhaustive factors such as which proceeding was first commenced, and whether the termination of one proceeding was likely to have a material effect on the other.

Additionally, the court must aim to strike a balance between three higher order concerns which may pull in different directions: a claimant's right to choose whom to sue and where; the court's desire to prevent a claimant from circumventing the operation of an arbitration clause; and the court's inherent power to manage its processes to prevent abuse of process and ensure an efficient and fair resolution of disputes. The balance to be struck must serve the ends of justice. The CA then concluded that no limited stay of these proceedings should be granted, and that Mittal should be held to his obligations under the arbitration agreement, for two reasons.

First, there did not appear to be a likelihood that the Bombay suit would be resolved in the next year, and the CA did not think that any limited stay it imposed should run above 12 months. Mittal's applications in the Bombay courts had (as of the date of this judgment) no given hearing date. The CA considered this is an unsatisfactory position as there was no telling how long the stay would have to be in place before even a preliminary adjudication was made. More time might then be taken for possible appeals and the final hearing. In this balancing exercise, the courts had to consider the position of the Investor (as well as that of Mittal), and it was highly undesirable for allegations of breach of the SHA and mismanagement (including oppression) to be hanging over the Investor's head for a lengthy period of time.

Second, it was too speculative to conclude that it was fruitless to conduct an arbitration solely because of the possibility that the award could not be enforced in India. The process of arbitration was beneficial for the parties, as it would compel them to collect and test their evidence and legal arguments, and give them strong indications of the strength of their respective cases.

The CA thus affirmed the HC's grant of the anti-suit injunction.

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¹ In accordance with Article 49(2) of the Supreme Court of Judicature Act (2020 Rev Ed), "[t]he Court of Appeal has, in an appeal and for any purpose related to an appeal, all the jurisdiction and powers of the court or tribunal from which the appeal was brought." This is also referred to as "case management" powers in this section.