Singapore Court of Appeal Considers the Law Governing Arbitrability and Arbitration Agreements

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In *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1, the Singapore Court of Appeal ("SCGA") held that the arbitrability of a dispute is governed, in the first instance, by the proper law of the arbitration agreement. Further, if the arbitration concerns an issue that is non-arbitrable under Singapore law as the law of the seat, that would pose an additional obstacle.[1] In reaching this decision, the SGCA provided some important guidance on the proper law of an arbitration agreement.

BACKGROUND

Mr Mittal ("the Appellant") was an Indian resident and a founder of People Interactive (India) Private Limited ("the Company"). Westbridge Ventures II Investment Holdings ("the Respondent" and, together with the Appellant, "the Parties") was a private equity fund incorporated in Mauritius. In 2006, the Respondent invested in the Company and subsequently entered into a Shareholders' Agreement ("SHA") with the Appellant.

Clause 20.1 of the SHA stated that the "[SHA] *and its performance shall be governed by and construed in all respects in accordance with the laws of the Republic of India*". Further, clause 20.2 ("the Arbitration Agreement") provided that "[a]*ll such disputes that have not been satisfactorily resolved under Clause 20.1 above shall be referred to arbitration…and the place of the arbitration shall be Singapore.*"

In 2017, the Parties' relationship deteriorated, and the Appellant complained that the Respondent had colluded to oppress him as the minority shareholder. Thus, in March 2021, the Appellant initiated proceedings before the National Company Law Tribunal in India seeking remedies for corporate oppression ("the NCLT Proceedings"). In response, the Respondent applied for, and obtained, an interim anti-suit injunction ("ASI") in Singapore restraining the Appellant from pursuing the NCLT Proceedings. In October

[1] N.B.: this is a point the English courts have yet to conclusively determine. *See, e.g., Golden Ocean Group Ltd v Humpass Intermoda Transportasi Tbk Ltd & Anor* [2013] EWHC 1240 (Comm) at [62]; and *Riverrock Securities Ltd v International Bank of St Petersburg (JSC)* [2020] EWHC 2483 (Comm) at [35].

2021, the High Court[2] held that that Arbitration Agreement had been breached by the issuance of the NCLT Proceedings and granted the Respondent a permanent ASI.

THE SUBMISSIONS

The central issue before the Singapore Court of Appeal was whether by pursuing the NCLT Proceedings, the Appellant had acted in breach of the Arbitration Agreement.

The Appellant submitted that no breach had occurred because: (i) arbitrability was determined by the governing law of the Arbitration Agreement; (ii) the law governing the Arbitration Agreement was Indian law (on the basis that the underlying law of the SHA was Indian law); and (iii) the claims in the NCLT Proceedings related to the oppression and mismanagement of the Company, and such disputes were non-arbitrable under Indian law.[3] Additionally, the Appellant argued that oppression and mismanagement disputes did not fall within the scope of the Parties' Arbitration Agreement.

The Respondent submitted that the law of the seat governed arbitrability and that the relevant disputes were arbitrable under the seat law (i.e., Singapore law), so the Appellant had breached the Arbitration Agreement by commencing the NCLT Proceedings. In any event, the Respondent argued that the proper law of the arbitration agreement was Singapore law because the presumption that the law governing the SHA (i.e., Indian law) also governed the Arbitration Agreement was displaced as the disputes were non-arbitrable under Indian law. In other words, the Respondents argued that the Parties were unlikely to have intended the choice of law for the SHA to apply to their Arbitration Agreement as such a choice would undermine that very agreement.[4] The Respondent also argued that, applying Singapore law as the proper law of the Arbitration Agreement, the disputes fell within the scope of the Arbitration Agreement.

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

3 Under Indian law the NCLT has exclusive jurisdiction over corporate oppression and mismanagement disputes.

4 This is referred to as the 'validation principle' in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 ("***Enka***") at [95], [97], [106], and [108–109] whereby an interpretation that upholds the validity of the parties' arbitration agreement is to be preferred to one which would render it invalid or ineffective.

THE JUDGMENT

Are Questions of Arbitrability to Be Determined According to the Law of the Seat or the Proper Law of the Arbitration Agreement?

The SGCA held that the arbitrability of a dispute is, in the *first instance*, determined by the law that governs the arbitration agreement.

The SGCA considered that because an arbitration agreement derives its authority from the consensus of the parties—and is the "*fount of the tribunal's jurisdiction*"[5]—the arbitration agreement together with the law that governs it must determine exactly what the parties have agreed to arbitrate. Further, whilst the law of the seat deals with matters of procedure, the law of the arbitration agreement deals with matters concerning the validity of the arbitration agreement and is, in that sense, "*anterior to the actual conduct of the arbitration*".[6]

However, the SGCA recognised that Singapore public policy could nevertheless pose an additional obstacle to arbitrability. For example, where a dispute is 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 still not be able to proceed.

What Is the Proper Law of the Arbitration Agreement?

The SGCA confirmed that the three-stage test to determine the proper law of an arbitration agreement involves considering:[7]

- Whether the parties made an **express choice of the proper law** of the arbitration agreement.
- In the absence of an express choice, whether the parties had made an **implied choice of law** with the starting point for determining the implied choice of law being the law of the contract.
- 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**.

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5 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 ("***Mittal***") at [53].

6 *Mittal* at [53].

7 *Mittal* at [62] (citing *BCY v BCZ* [2017] 3 SLR 257 ("**the *BCY* Framework**")). Note that, the *BCY* Framework is consistent with the test applied by the UK Supreme Court in *Enka*.

Express Choice of Law

The wording of the Arbitration Agreement did not constitute an express choice of law, and language providing that the underlying SHA was to be governed by Indian law was "*insufficient to constitute an express choice of the proper law of the arbitration agreement*".[8] The SGCA held that an express choice of law for an arbitration agreement required explicit language stating so in no uncertain terms.

Implied Choice of Law

As a general rule, a choice of law for the main contract will lead a court to hold that the same law also applies to the arbitration agreement.[9] Thus, the Parties had made an implied choice of Indian law as the proper law of the Arbitration Agreement, as the SHA between the Parties was governed by Indian law. Nonetheless, there were sufficient indications to negate this implication. In particular, such a choice would have frustrated the Parties' clear intention to arbitrate disputes, as oppression claims are non-arbitrable in India.

Closest and Most Real Connection

As the law of the seat of the arbitration, Singapore law would govern the procedure of the arbitration, including challenges to the tribunal or its jurisdiction, and the award when the same is eventually issued. Accordingly, Singapore law was the law which had the most real and substantial connection with the Arbitration Agreement and was therefore the proper law of the Arbitration Agreement.

What Is the Nature of the Disputes in the NCLT Proceedings?

The SGCA held that the commencement of the NCLT Proceedings was a breach of the Arbitration Agreement. This was on the basis that the majority of the complaints made by the Appellant in the NCLT Proceedings related either to the management of the Company or to the SHA, and therefore fell within the ambit of the Arbitration Agreement. The SGCA dismissed the appeal and maintained the ASI.

COMMENTARY

Following *Mittal*, the arbitrability of any Singapore-seated arbitration will be determined, in the *first instance*, by the governing law of the arbitration agreement. Parties should also be cognizant of Singapore public policy (i.e., the law of the seat of the arbitration), as this may pose an *additional* obstacle to the arbitrability of any dispute.

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8 *Mittal* at [65] (applying *BNA v BNB & Anor* [2019] SCGA 84 at [59]).

9 *Mittal* at [62] (citing *Sulamerica Cia Nacional de Seguros AS v Enesa Engelharia AS and others* [2013] 1 WLR 102.

In the absence of an express choice of governing law for an arbitration agreement, the application of the so-called "validation principle" may result in any judicial determination of the governing law of the arbitration agreement being influenced by the arbitrability of the relevant disputes under the possible jurisdictions.

When including an arbitration agreement in a commercial contract, parties should give due consideration to, and clearly express, the choice of law applicable to both the arbitration agreement and the underlying contract. This will avoid the risk of a court or tribunal finding that the proper law of the arbitration agreement is one that the parties did not expressly choose or contemplate.

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