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Midnight Clauses: Court of Appeal Decides That Foreign Public Policy May Frustrate an Agreement to Arbitrate Disputes In Singapore

***Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1**

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LEGAL UPDATE

In this Update

In *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1, the Court of Appeal decided that the arbitrability of a dispute is determined not only by the law of the seat of arbitration, but also by the law that governs the arbitration agreement.

This update discusses the Court of Appeal's analysis on the novel question of law and suggests some practical considerations for commercial parties seeking to conclude an arbitration agreement.

INTRODUCTION

The Court of Appeal's recent decision of *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 ("***Anupam Mittal***") sounded a warning that commercial parties and their legal advisors should carefully negotiate and craft their arbitration agreement, lest the parties' desire to settle disputes by arbitration be frustrated. An arbitration agreement should not be a 'midnight clause' that parties insert at the last minute before a contract is finalised.

Even though the Court of Appeal ultimately found a way to uphold the parties' desire to arbitrate their disputes in Singapore, it decided that an agreement to arbitrate disputes in Singapore may be rendered ineffective by foreign public policy considerations. One example would be where the subject matter of the parties' dispute is not arbitrable under the law governing the arbitration agreement, which may not be Singapore law.

This update discusses the Court of Appeal's analysis and suggests some practical considerations for commercial parties seeking to conclude an arbitration agreement.

RELEVANT BACKGROUND

The dispute stemmed from a relationship breakdown in the management of an Indian-incorporated company, People Interactive (India) Private Limited ("**Company**"), which owns and operates a well-known online and offline matrimonial service, shaadi.com.

The Appellant was a founder of the Company, while the Respondent was a private equity fund that invested in the Company. Being shareholders in the Company, the Appellant and the Respondent were parties to a Shareholders' Agreement and a Supplementary Subscription-Cum-Shareholders' Agreement ("**Agreements**") which contained identically-worded governing law and arbitration clauses.

The Agreements were governed by Indian law. Any dispute relating to the management of the Company or to any matters set out in the Agreements was to be referred to ICC arbitration in Singapore.

Notwithstanding the parties' arbitration agreement, the Appellant filed a petition in the National Company Law Tribunal ("**NCLT**") in Mumbai, India on 3 March 2021, seeking remedies for corporate oppression. The Appellant subsequently justified this by claiming that oppression and mismanagement claims are not arbitrable under Indian law.

The Respondent swiftly applied to the Singapore High Court for a permanent anti-suit injunction restraining the Appellant from pursuing its claims in the NCLT proceedings and in any other forum other than an

arbitration tribunal constituted in accordance with the ICC rules and seated in Singapore.

THE LOWER COURT'S DECISION

At first instance, the General Division of the High Court granted the permanent anti-suit injunction. The High Court judge held that the arbitration agreement was breached by the commencement of the NCLT proceedings and there were no good reasons to withhold the injunction.

A key issue that the High Court judge had to decide was the law that governed the issue of subject matter arbitrability at the pre-award stage. It is well-recognised that certain subject matters are non-arbitrable as a matter of public policy, even if parties privately agree to arbitrate those disputes. In this case, 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 and not by arbitration.

Among other things, the High Court judge held that the law that governed the issue of arbitrability at the pre-award stage was the law of the seat and applying Singapore law, the disputes between the parties were arbitrable. He therefore granted the permanent anti-suit injunction sought by the Respondent.

The Appellant appealed against the High Court judge's decision.

COURT OF APPEAL'S DECISION

The Court of Appeal dismissed the appeal and maintained the permanent anti-suit injunction. However, the Court of Appeal achieved the same result through a different reasoning.

KEYPOINT

The Court of Appeal held that the arbitrability of a dispute is determined not only by the law of the seat, but also by the law that governs the arbitration agreement.

The Court of Appeal introduced a new "composite" approach. At the pre-award stage, the arbitrability of a dispute is determined by the law that governs the arbitration agreement. But that is not the end of the inquiry. If a dispute is arbitrable under the law governing the arbitration agreement but happens to be non-arbitrable under Singapore law as the law of the seat, that would be an additional obstacle to arbitrating the dispute in Singapore.

If a foreign law governs the arbitration agreement 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 (foreign) public policy under section 11 of Singapore's International Arbitration Act 1994 (2020 Rev Ed) ("**IAA**").

Section 11 of the IAA similarly operates to stop an arbitration 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. This also ensures consistency with the post-award position where Article 34(2)(b)(i) of the Model Law on International Commercial Arbitration empowers the seat court to set aside an arbitral award if the subject-matter of the dispute is not capable of settlement by arbitration under the law of the seat.

Ultimately, the Court of Appeal managed to save the parties' desire to arbitrate by finding that the law governing the arbitration agreement was the same as the law of the seat, that is, Singapore law.

Applying the three-stage test set out in *BCY v BCZ* [2017] 3 SLR 357 and *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102, the Court of Appeal found that:

(a) the parties did not make an express choice of law for the arbitration agreement;

(b) the parties' clear intention to settle all their disputes by arbitration, with the courts playing a supporting role by granting interim relief and enforcing any arbitral award, negated any implied choice of Indian law which would render some of their disputes non-arbitrable. The presumption that Indian law which governed the substantive contract would also govern the arbitration agreement was displaced; and

(c) Singapore law had the most real and substantial connection with the arbitration agreement, and was the law governing the arbitration agreement.

Therefore, the complaints and claims mounted by the Appellant before the NCLT were arbitrable and the commencement of the NCLT proceedings in Mumbai by the Appellant was in breach of the arbitration agreement. There was no ground on which to discharge the permanent anti-suit injunction granted by the High Court judge.

COMMENTARY

The Court of Appeal's novel approach deviates from that taken in other national courts and is likely to engender some further debate and consideration in the near future.

Notwithstanding that, the Court of Appeal has espoused a timely reminder that it "*lies in the hands of the parties themselves and their legal advisors*" to carefully negotiate and craft their arbitration agreement, so as to mitigate any issues from arising to frustrate the parties' desire to settle some or all of their disputes by arbitration. Commercial parties cannot simply select an arbitration-friendly seat and count on the seat court to always decide in favour of the position that is the most 'pro-arbitration'.

For a start, commercial parties should expressly choose a governing law for their arbitration agreement, which can differ from the governing law of the substantive contract in which the arbitration agreement can be found. Any such choice should explicitly state in no uncertain terms that it is meant to apply to the parties' arbitration agreement.

Despite the lessons that should have been learnt from the numerous fights which has taken place before courts and tribunals in the past decade, it is still not common practice for parties to state an express choice of law for their arbitration agreement. Even the model clauses currently offered by the major arbitral institutions, such as the SIAC, the ICC and the LCIA, do not so provide.

Parties who seek to minimise the risk of attacks on their arbitration agreement should look to pair a 'safe' or arbitration-friendly seat with a 'safe' law that is chosen to govern the arbitration agreement. It may be helpful to take advice from arbitration lawyers even when one is at the early stage of negotiating and closing a deal.

Finally, there will still be residual enforcement risk even if an arbitration is allowed to proceed, if one is required to enforce the arbitral award in a jurisdiction outside of the arbitral seat. The Court of Appeal in *Anupam Mittal* recognised the possibility that an eventual arbitral award may not be enforceable in India despite its decision that the parties there should go to arbitration, even though it refused to accept this as an inevitable result. This risk is inherent in any cross-border dispute resolution process and parties will do well to investigate and identify their likely enforcement strategy as early as possible.

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