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Dispute over Matrimonial Service Website: Singapore Adopts Composite Approach in Declaring Dispute to be Arbitrable

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Issues relating to the arbitrability of disputes have gained increasing prominence in recent years. The question of which law ought to govern an arbitration agreement and concomitantly the inquiry as to whether a dispute is arbitrable, in the absence of an explicit choice of law governing the arbitration agreement has been explored in previous judgments in Singapore (*see,* e.g., BCY v BCZ [2016] SGHC 249 (“*BCY v BCZ*”) and BNA v BNB and another [2019] SGCA 84) and the United Kingdom (“UK”) (*see,* e.g., Kabab-Ji SAL v Kout Food Group [2021] UKSC 48 (“*Kebab-Ji*”) and Enka Insaat Ve Sanayi AS v OOO “Insurance Company Chubb” and others [2020] UKSC 38 (“*Enka v Chubb*”)). The recent judgment of the Singapore Court of Appeal (“**SGCA**”) in Anupam Mittal v Westbridge Ventures II Investment Holdings [2023] SGCA 1 (“*Anupam v Westbridge*”) is the latest in a line of authorities confirming the validity of arbitration agreements. In assessing the arbitrability of the dispute in *Anupam v Westbridge,* the SGCA explored how arbitrability should be determined at the pre-award stage. Notably, the SGCA endorsed a two-tiered approach (termed the “composite” approach by the *amicus curiae*) to determine arbitrability. While focusing on the enforceability of the resulting award, this approach arguably results in a narrower approach to arbitrability than previously adopted by the Singapore and the UK courts when considering the validity of arbitration agreements.

Background

Anupam v Westbridge concerned an appeal of an anti-suit injunction issued by the Singapore High Court (“**SGHC**”) in favour of the arbitration agreement contained in the parties’ Shareholders’ Agreement (“**SHA**”). The SHA was governed by Indian law and contained an arbitration clause providing for arbitration under the ICC Rules seated in Singapore. The parties had not expressly agreed on the law governing the arbitration clause.

While Singapore law allows claims related to corporate oppression and mismanagement to be arbitrated, Indian law does not; rather, the National Company Law Tribunal (“**NCLT**”) has exclusive jurisdiction to hear such disputes. The appellant argued that Indian law governed the arbitration agreement and, on that basis, the parties could not have intended for their dispute to fall within the arbitration agreement, which was rendered null and void.

In granting the anti-suit injunction, the SGHC held that the law of the seat (i.e., Singapore law) governed the issue of arbitrability (previously commented on here) and that the dispute was arbitrable. Notably, while the SGHC did not consider it necessary to determine the proper law of the arbitration agreement, on appeal, the SGCA considered this to be a pivotal issue in determining arbitrability.

The "Composite" Approach

The SGCA disagreed with the SGHC's finding that the law of the seat governed the issue of arbitrability at the pre-award stage. In deciding whether the dispute was arbitrable, the SGCA adopted the "composite" approach. In the first instance, this approach consists of an inquiry under the law governing the arbitration agreement. If the law governing the arbitration agreement is a foreign law (i.e., other than Singapore law), consideration will also be afforded to whether that foreign law allows the subject matter of the dispute to be arbitrated. If the law governing the arbitration agreement confirms the validity of the arbitration agreement, the inquiry is then repeated under the law of the seat. The SGCA justified the rationale of this two-tiered test on the basis that "*[s]ince enforcement may be sought in a court other than the seat court, it stands to reason that there is no basis at all for thinking that the question of arbitrability is to be governed solely by the law of the seat.*" [1)]

The SGCA then applied the three-stage test laid down in *BCY v BCZ* (previously commented on here and here) to determine the law of the arbitration agreement. In the absence of an express choice of law governing the arbitration agreement, the SGCA applied the seminal English Court of Appeal decision in Sulamèrica Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638 and undertook the choice-of-law analysis. The SGCA considered that the following circumstances displaced the presumption that the governing law of the SHA (i.e., Indian law) applied to the arbitration agreement: (i) the parties were all from India and presumptively aware that matters under the exclusive jurisdiction of the NCLT were not arbitrable; (ii) the language of the arbitration agreement, which specifically referred to disputes "*relating to the management of the Company*" and (iii) the attention to the mechanics of the arbitration clause which included arbitration under the ICC Rules seated in Singapore, both of which had no connection to India. Based on this analysis, the SGCA determined that Singapore was both the law of the arbitration agreement and the law of the seat, leading to a finding that the dispute was arbitrable under Singapore law.

Divergence from the English Approach; Deviation from *Amicus Curiae*'s Approach

Interestingly, the SGCA did not consider the ruling of the recent UK Supreme Court decision in *Kebab-Ji*, which decided a similar issue: the governing law of the arbitration agreement. In *Kebab-Ji*, the UK Supreme Court, endorsing the earlier decision of *Enka v Chubb*, upheld the UK Court of Appeal's finding that the law applicable to the arbitration agreement was the governing law of the main contract (i.e., English law) and not the law applicable to the seat of the arbitration (i.e., French law), despite the arbitral tribunal's findings to the contrary (discussed in a previous blog post here).

The SGCA's decision also deviated from the approach advocated by the *amicus curiae*, who was of the view that considerations of pre-award arbitrability should be determined by the law of the forum, usually the law of the seat court. The *amicus curiae* placed weight on the construction of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**"). It reasoned that although not explicit, the drafting history of the Model Law suggested that the same law governing the validity of arbitration agreements that "*would apply in ascertaining the subject matter arbitrability of a dispute in setting aside proceedings*"[2] (i.e., post-award), should also apply pre-award. This was also the stance taken by the UK Supreme Court in *Kebab-Ji, Enka v Chubb* and courts in a number of jurisdictions.[3]

Role of Foreign Public Policy in Determining Arbitrability

In contrast to the SGHC's opinion that it was "*neither necessary nor desirable for this court to give effect to foreign non-arbitrability rules, particularly when doing so would potentially undermine Singapore's policy of supporting international commercial arbitration,*"[4]

In the SGCA's opinion, the reference to public policy in Section 11 of the Singapore International Arbitration Act 1994 ("**IAA**") extends beyond Singapore and includes foreign public policy as well. In particular, the SGCA considered that since Section 11 of the IAA did not expressly restrict the public policy to that of Singapore, in contrast to Section 31(4)(b) of the IAA, it must have been within the drafters' contemplation that arbitrations may be seated in Singapore but have no other connection to Singapore apart from that and accordingly, the natural meaning of public policy may be read as the public policy of any country. Consequently, if the foreign law governing the arbitration agreement provides that the subject matter of the dispute cannot be arbitrated, the Singapore courts will not allow the arbitration to proceed because enforcing such an arbitration agreement would be contrary to public policy, albeit the public policy of a foreign jurisdiction.

It remains to be seen whether other courts will similarly factor in considerations of foreign public policy in deciding the arbitrability of a dispute.

Malaysia, like Singapore, is a Model Law jurisdiction. However, in contrast to Singapore's IAA, Malaysia's Arbitration Act 2005 explicitly states that any dispute subject to arbitration may be determined by arbitration "*unless the arbitration agreement is contrary to public policy in Malaysia or the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia*". Given the explicit reference to "*the laws of Malaysia,*" the logical inference is that public policy considerations, when determining arbitrability under the Malaysian Arbitration Act, was intended to be restricted to Malaysia's alone. Additionally, the Malaysian Federal Court's decision in *Arch Reinsurance Ltd v Akay Holdings Sdn Bhd* [2019] 1 CLJ 305 ("*Arch Reinsurance*") provides some insight as to how the Malaysian courts would decide issues of arbitrability. In this case, the Malaysian Federal Court applied Malaysian law to the question of arbitrability despite the seat of the arbitration and the governing law of the underlying contract being that of Singapore. A reason for this could well be that the subject matter of this dispute concerned the right of title to property, a statutory right under the Malaysian National Land Code, which cannot be curtailed by private agreement. Notwithstanding whether the Malaysian Federal Court was correct in applying Malaysian law instead of Singapore law to determine the question of arbitrability, or that the underlying dispute in this case related to a security in Malaysia and was

subject to remedies specifically reserved to the jurisdiction of the Malaysian courts, the Malaysian courts' approach indicates that arbitrability can be determined by Malaysian laws in some instances, despite the parties' express choice of a foreign law (i.e., Singapore) as the seat of the arbitration and the governing law of the underlying agreement.

Unlike Singapore and Malaysia, the UK is not a Model Law jurisdiction. Nonetheless, the language of the UK Arbitration Act 1996 ("**UKAA**") does provide some insight on whether the UK courts may take foreign public policy into consideration in their analysis of arbitrability at the post-award stage. Section 81(c) of the UKAA affirms the right to refuse the "*recognition or enforcement of an arbitral award on grounds of public policy.*" From the construction of Section 81(c), the logical inference is that public policy in the UKAA refers to that of the seat of arbitration since it is tied directly to the recognition or enforcement of arbitral awards. However, by including a separate provision in Section 81(a) which affirms the right to refuse "*matters which are not capable of settlement by arbitration*" and by the UK Supreme Court's ruling in *Enka v Chubb* that the UKAA does not support any presumption that the law of the seat governs the arbitration agreement,[5)] the reasoning applied by the SGCA in *Anupam v Westbridge* could be analogously extended to the UKAA as well: the law that applies to questions of arbitrability may be both the law of the arbitration agreement as well as the law of the seat, thereby allowing foreign public policy considerations to factor into the analysis of arbitrability.

Is Reducing the Risks of Setting Aside Pro-Arbitration?

In minimising the prospects of arbitral awards being set aside at the post-award stage, the "composite" approach adopted by the SGCA enhances the principle of comity that represents the ethos of international arbitration. While the SGCA in *Anupam v Westbridge* viewed this approach as protecting the sanctity of arbitration, the "composite" approach arguably results in a narrower approach to arbitrability than that previously adopted by the Singapore and UK courts when considering the validity of arbitration agreements. By adopting a two-tiered inquiry to determine arbitrability, the risk is that disputes intended to be resolved *via* arbitration could fall outside the "composite" test for arbitrability. Where the gavel falls in this balancing exercise between reducing the risks of setting aside arbitral awards vis-à-vis enforcing arbitration agreements relating to the disputes that parties intended to arbitrate remains to be seen in future cases in the aftermath of *Anupam v Westbridge.*

While the SGCA's decision in this case was premised on the specific language of section 11 of the IAA, it remains to be seen whether courts in other jurisdictions will adopt the same approach and whether the reach of the "composite" approach will be extended. The sequitur of the "composite" approach may well result in taking into account the public policy of jurisdictions apart from the seat of the arbitration or the governing law of the main agreement, for instance, where the parties or the subject of the dispute are located, as was done by the Malaysian courts in *Arch Reinsurance*.

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References

?1 ¶ 54.

?2 ¶ 42.

?3 For instance, the United States, France, and Switzerland, amongst others. *See* Gary B Born, International Commercial Arbitration (Kluwer Law International, 3rd ed., 2021) at page 644.

?4 ¶ 54.

?5 ¶ 94.

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