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Anupam Mittal v Westbridge: Potential Paradox of the Singapore Court of Appeal's 'Composite Approach' on the Law Applicable to Arbitrability

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On 6 January 2023, the Singapore Court of Appeal (the **SCA**) passed a judgment in **Anupam Mittal v Westbridge Ventures II** that redefines existing notions of the law applicable to subject matter arbitrability at the pre-award stage (the ***Westbridge* Judgment**). The High Court's decision which was appealed before the SCA is discussed here.

National courts and academics have grappled with the question of what law is applicable to subject matter arbitrability at the pre-award stage. The answer is usually (but not exclusively) one of three options. *First*, the law of the forum seised. Using this approach, many courts apply their own national laws to determine arbitrability. *Second*, the law applicable to the arbitration agreement. *Third*, the law of the seat.

The *Westbridge* Judgment is remarkable because it uses a combination of these approaches. The SCA held that at the pre-award stage, subject matter arbitrability should be determined based on: (1) the law applicable to the arbitration agreement; and (2) the law of the seat, *i.e.*, Singapore.

This post uncovers a potential paradox in the *Westbridge* Judgment.

Facts

The facts are discussed in a recent post on this blog (here). The central issue concerned what law applies to arbitrability at a pre-award stage, since the dispute between the parties involved claims relating to corporate oppression and mismanagement and such issues, while not arbitrable under Indian law (*i.e.*, the law governing the contract), are arbitrable under Singapore law (*i.e.*, the law of the seat).

Deviating from the *lex fori* approach

The SCA was aware that since the UNCITRAL Model Law on International Commercial Arbitration provides that the *lex fori* (*i.e.*, the law of the court in which the proceedings are brought) governs arbitrability at the post-award stage, many national courts apply *lex fori* to

determine arbitrability at the pre-award stage for consistency (para 43). Despite this, the SCA decided not to apply *lex fori* to the question of subject matter arbitrability at the pre-award stage for one key reason (para 44) – "*the importance of public policy in relation to issues of arbitrability*". The SCA relied on *Tomolugen v Silica* (discussed here) and section 11 of the Singapore International Arbitration Act (**IAA**) to link public policy with arbitrability.

Noting that "public policy" in section 11 of the IAA is capable of encompassing not just Singapore but also foreign public policy, the SCA considered that it would be too narrow to determine arbitrability at the pre-award stage with reference to the *lex fori* alone.

The composite approach

The SCA therefore decided to adopt a 'composite approach' to determining arbitrability at the pre-award stage. The SCA reasoned that the law applicable to the arbitration agreement decides its validity, including what disputes the parties considered arbitrable (paras 53–54). Therefore, where the arbitration agreement is governed by a foreign law, a dispute cannot proceed to arbitration if it is contrary to the public policy of that country even if the dispute would be arbitrable under Singapore law as the law of the seat. However, the SCA further noted that application of a foreign governing law alone would lead to an anomalous result where Singapore courts would apply different laws at the pre-award stage and at the setting aside stage. This could result in contradictory decisions by the same court in the same case at different stages of the arbitration proceeding. The SCA therefore held that the law of the seat would apply to issues of arbitrability in addition to the law governing the arbitration agreement (para 59). The SCA's reasoning is discussed in detail here.

The potential paradox

The SCA's 'composite approach' may create a paradox.

Singapore courts follow the well-established three-step test for determining the law applicable to the arbitration agreement (see *BCY v BCZ* and *BNA v BNB* discussed on this blog here, here and here). The three steps in order of priority are: express choice, implied choice, and closest and most real connection. Where parties expressly choose the law of the arbitration agreement, Singapore courts will give effect to that law. Where there is no express choice of law governing the arbitration agreement, Singapore courts look to determine the parties' implied choice using the governing law of the main contract as the starting point. If they are unable to discern an implied choice, Singapore courts will look to apply the law with the closest and most real connection, which is often the law of the seat.

However, the SCA's application of this three-step test in the *Westbridge* Judgment has arguably created a curious paradox in the arbitrability context. The paradox arises because the second step of the three-step test can be inconsistent with applying a foreign non-arbitrability rule. The paradox can be summarised as follows:

1. on the one hand, the SCA decided that non-arbitrability rules of a foreign law governing the arbitration agreement would apply to determine arbitrability at the pre-award stage; and

2. on the other hand, it found that the existence of a non-arbitrability rule in a foreign law is the basis for refusing to apply that law as the law of the arbitration agreement.

In *Westbridge*, the parties did not make any express choice of law of the arbitration agreement. At the second stage of the test, the SCA found that since the non-arbitrability rules under Indian law (*i.e.*, the governing law of the contract) would effectively negate the parties' agreement to arbitrate, Indian law could not be the parties' implied choice of law governing the arbitration agreement on the basis that the parties' implied choice cannot be to invalidate the arbitration agreement. The SCA therefore proceeded to the third stage of the test and found that the law of the seat (*i.e.*, Singapore law) had the most real and substantial connection with the arbitration agreement and was therefore the law of the arbitration agreement. This conclusion appears fundamentally contrary to the underlying rationale of the SCA's composite approach, *i.e.*, to give effect to foreign non-arbitrability rules. As a result, notwithstanding the 'composite approach' outlined in the *Westbridge* Judgment, Singapore courts may end up not applying foreign non-arbitrability rules at all.

The paradox becomes more evident when one looks at the outcome of the *Westbridge* Judgment. Using the composite approach, the SCA only applied Singapore law to decide arbitrability. This would have been the result even under the *lex fori* approach, which the SCA consciously chose not to apply.

It appears that the SCA would likely have applied Indian law to determine arbitrability in the *Westbridge* Judgment only if the parties had expressly specified in their arbitration agreement that the arbitration agreement was governed by Indian law. However, in practice, such express choice is rare.

Nonetheless, one caveat is that the SCA in *Westbridge* explained that determining the parties' implied choice of law governing the arbitration agreement is fact intensive, and in this case, Indian law could not be the parties' implied choice of law in light of the language of the arbitration clause, the company's country of incorporation, and nationality of shareholders, which all pointed to the parties' intention to arbitrate *all* disputes (para 72). Therefore, depending on the facts, the Singapore courts may (at least, theoretically) apply foreign law to determine arbitrability at the pre-award stage, even if such foreign law may render a dispute non-arbitrable (see *BNA v BNB*).

The 'materially close connection' test

Taking a different approach to the law applicable to arbitrability may solve the paradox.

In addition to the three main options stated in the introduction, some authors have argued in favour of applying the law of a jurisdiction that has a materially close connection to the dispute to determine subject matter arbitrability at the pre-award stage.[1)] This approach has certain advantages and could also potentially resolve the paradox arising from the *Westbridge* Judgment.

First, applying the law of a jurisdiction that has a materially close connection to the dispute to determine subject matter arbitrability at the pre-award stage can prevent contradictory national court decisions on arbitrability dependent on where proceedings are brought. For instance, in an arbitration between parties from States A and B, seated in State C where the dispute only concerns

matters in State A, there is a possibility that proceedings at the pre-award stage may be brought in the courts of State A, B, C or even other states. If all of these state courts uniformly apply the non-arbitrability rules of the jurisdiction with a materially close connection (*i.e.*, State A), as opposed to their national laws (which would be the case if they uniformly adopted the *lex fori* approach), this would result in consistent national court decisions on arbitrability.

Second, this approach is also logically coherent. Subject matter arbitrability should be determined by an objectively close connection (if any) of the dispute to a jurisdiction, not unlike the approach for applying foreign mandatory rules in a traditional conflicts of law analysis where questions of public policy arise. This is aligned with the link between public policy and arbitrability that the SCA pointed out.

By finding that there is room for consideration of foreign public policy under section 11, the *Westbridge* Judgment opens the door for applying foreign non-arbitrability rules. However, it only permits application of non-arbitrability rules of the law governing the arbitration agreement. This is limiting and requires application of the three-step test, resulting in the paradox identified above.

In contrast, if the SCA had chosen to adopt the materially close connection test, it would likely have decided that Indian law applies to determine arbitrability at the pre-award stage, which would arguably have been more faithful to the SCA's interpretation of "public policy" under section 11 of the IAA as encompassing foreign public policy.

Conclusion

In conclusion, the *Westbridge* Judgment is certainly forward-looking. It creates possibilities for applying foreign non-arbitrability rules at the pre-award stage and advocates for the potential application of two sets of laws to determine arbitrability. Yet, it remains to be seen how courts will interpret and apply the SCA's composite approach to specific facts, and whether the paradox identified above will manifest.

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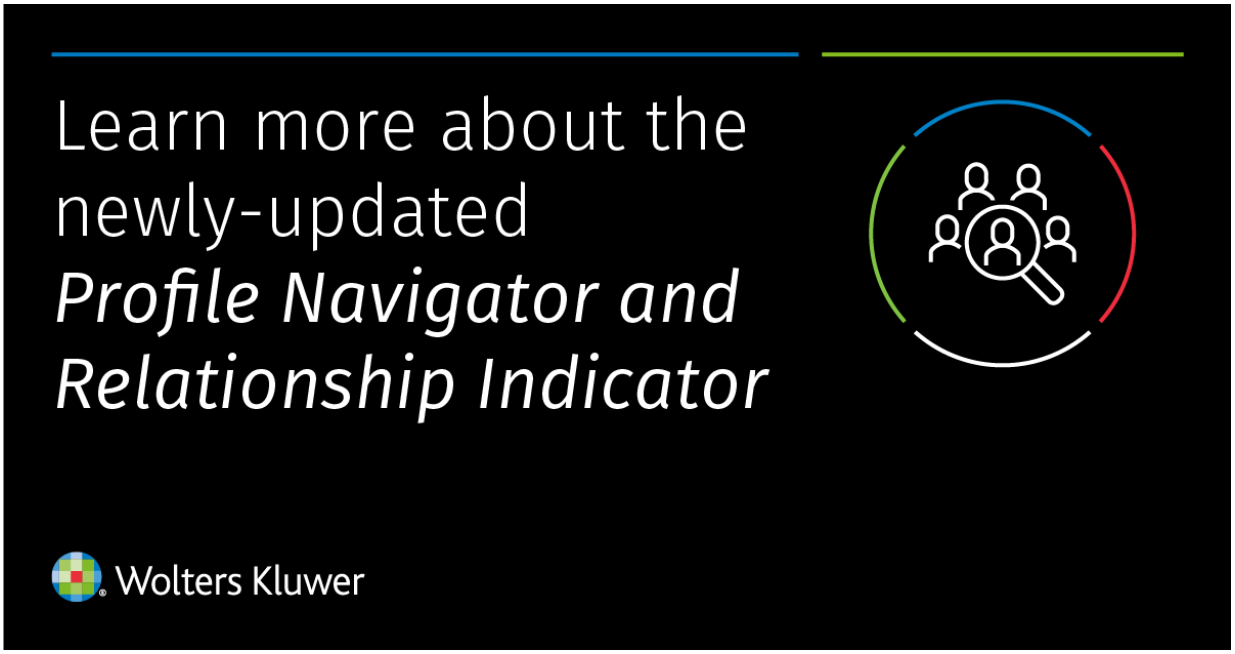

References

?1 See Gary Born, *International Commercial Arbitration* (3rd Ed, Kluwer Law International 2021) (Updated January 2023), §4.05[C][2].

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