SUBJECT MATTER ARBITRABILITY
Singaporean seat

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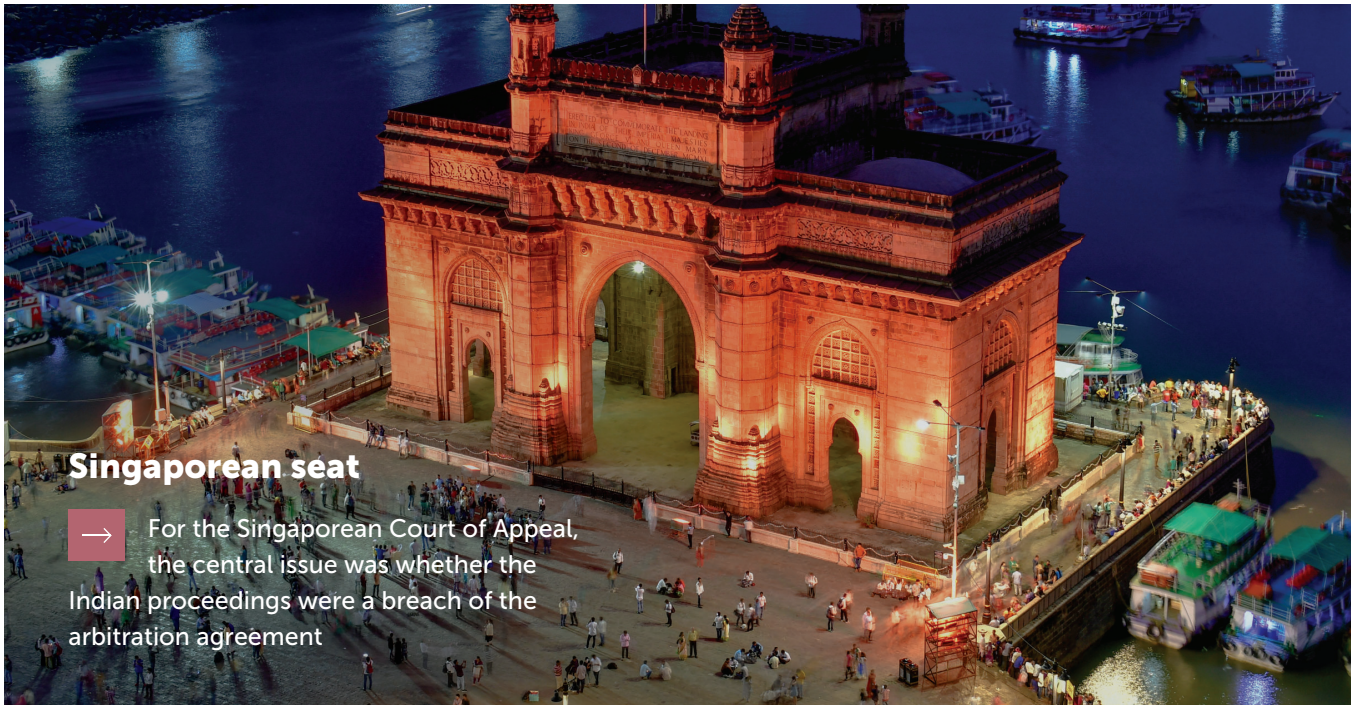
In *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1, the Singaporean Court of Appeal settled on a new composite approach to addressing pre-award arbitrability, namely review of the public policy position of the subject of the arbitration for the jurisdiction of the seat of arbitration then likewise for the jurisdiction of the choice of law for the arbitration agreement before determining if the arbitration can proceed in Singapore.

Background

Westbridge Ventures II Investment Holdings (**Westbridge**) was a minority corporate shareholder in a company, People Interactive (India) Private Limited (the **Company**) which Anupam Mittal (**Mittal**) and two of his cousins had established. The Mittals were resident in India and Wellbridge was incorporated in Mauritius.

The Company owned an on-line and off-line marriage-arrangement service which was well-known in India.[1] Wellbridge and the three cousins (who were all originally shareholders in the Company) had entered into two shareholders' agreements, which both had identically worded governing law and ICC arbitration clauses identifying Indian law as the law

1 *Anupam Mittal v Westbridge Ventures II Investment Holdings [2023] SGCA 1 at [4].*



Singaporean seat

→ For the Singaporean Court of Appeal, the central issue was whether the Indian proceedings were a breach of the arbitration agreement

of the substantive contract, and Singaporean law for the seat of the arbitration.[2] One agreement was a Shareholder Subscription and Share Purchase Agreement under which the shares were issued, and the other was a Shareholders' Agreement which regulated the parties' rights and responsibilities as shareholders.

Wellbridge raised an expression of interest to exit the company in 2017, alleging minority shareholder oppression by Mittal and other shareholders of the Company.

Indian proceedings

On 3 March 2021, Mittal issued proceedings in Mumbai, in breach of the arbitration clause, and obtained an injunction restraining Wellbridge and related persons from disrupting the management of the Company and conducting the Company's affairs in a manner which was oppressive or prejudicial, together with a number of declarations and a further injunction restraining Wellbridge and related persons from hindering Mittal's performance of his corporate duties.[3]

As a matter of public policy, the corporate mismanagement and shareholder oppression remedies which Westrbridge sought were the exclusive domain of the National Company Law Tribunal (**NCLT**) in India, so Westbridge would be deprived of including such complaints in the arbitration if it was conducted under the laws of India.

Singaporean High Court

On 15 March 2021, Westbridge obtained an interim anti-suit injunction against Mittal, on a without notice basis, together with leave to serve Mittal out of jurisdiction (in India). This injunction restrained Mittal from bringing any court proceedings in contravention of the arbitration clause, with Singapore as seat of the arbitration. The anti-suit injunction was made

2 At [5]–[8].
3 At [15] (a)–(e).

permanent on 26 October 2021 after Mittal took unsuccessful steps to set the interim injunction aside.

The High Court Judge set out that the threshold question before him was: which system of law governs the issue of subject matter arbitrability at the pre-award stage? The alternative answers to this question were (a) the law of the arbitration agreement (India); or (b) the law of the seat, which in this case is Singapore.[4]

The High Court judge granted the anti-suit injunction in *Westbridge Ventures II Investment Holdings v Anupam Mittal* [2021] SGHC 244, on the basis the arbitration agreement was breached by the commencement of the Indian proceedings and there were no good reasons to withhold the injunction. The judge held that (a) the law that governed the issue of arbitrability at the pre-award stage was the law of the seat; (b) that the disputes between the parties were arbitrable under Singaporean law being the law of the seat; and (c) assuming Indian law governed the arbitration agreement, the disputes fell within the scope of the arbitration agreement.[5]

In the face of the proceedings in the Singaporean High Court, Mittal issued further proceedings in the Mumbai Court on 18 March 2021, seeking orders that the NCLT had sole jurisdiction and restraining both enforcement of the anti-suit injunction and Wellbridge continuing with the Singaporean proceedings. That proceeding (with the above NCLT proceeding, collectively the **Indian proceedings**) had not been fixed at the date of the delivery of the Singaporean Court of Appeal's decision (6 January 2023).

Singaporean Court of Appeal

Mittal appealed the granting of the permanent antisuit injunction in the Court of Appeal. The Court of Appeal dismissed the appeal and maintained the anti-suit injunction, albeit for different reasons than in the High Court. Wellbridge argued that the main issue was whether the subject matter of the disputes is arbitrable, and which law governs this question.

The Court of Appeal found that the central issue was whether the Indian proceedings were a breach of the arbitration agreement.[6]

Wellbridge argued that the subject matter of the disputes in the NCLT was arbitrable under Singaporean law as the law of the seat of arbitration; alternatively, Singaporean law still covered the arbitration if the Indian proper law applied, further and alternatively, as the Mittal complaints were effectively contractual dressed up as corporate oppression, an arbitration could occur under Indian law. *The disputes referred to the NCLT are essentially issues relating to the exercise of contractual rights under the [shareholder's agreement] and fall within the scope of the arbitration agreement.*[7] In rebuttal to the Mittal claims, Wellbridge also argued the *arbitration agreement is displaced by the fact that, on the appellant's case, the disputes would be non-arbitrable under Indian law*, which counts against the implication Indian law was the proper law of the arbitration agreement.[8]

The position Mittal took in the Court of Appeal was (a) the Indian proceedings relate to oppression and the mismanagement of the Company and:[9]

> *such disputes are non-arbitrable under the law of the arbitration agreement which is Indian law; and (b) in any case, the disputes do not fall within the scope of the parties' arbitration agreement. Even if they do, the appellant says the arbitration agreement is null and void for covering disputes which are non-arbitrable under the governing law of the arbitration agreement.*

The Court of Appeal reasoned that it was necessary to undertake a "composite" approach, and that the High Court view that the law of the seat determined pre-award arbitrability took insufficient cognisance of public policy factors. Thus, if it is contrary to Singaporean

4 At [3].
5 At [23].
6 At [2].
7 At [21].
8 At [30] and [31].
9 At [2] and [22].

or relevant foreign public policy to determine a dispute under an arbitration agreement, the dispute cannot proceed under Singaporean law. The composite approach proceeds as follows:

- The arbitrability of a dispute prima facie proceeds by the law governing the arbitration agreement,[10] but if it is contrary to *foreign* public policy, Singaporean law will prohibit enforcement due to public policy. The arbitration will not proceed in Singapore.
- Section 11 of the International Arbitration Act 1994 (Singapore) (**IAA**)[11] holds that any dispute which parties have agreed to submit to arbitration may be determined in this way *unless it is contrary to public policy to do so*. Further, if the foreign law deems it arbitrable but Singaporean law does not, because of section 11 of the IAA, arbitration will not proceed in Singapore.

The composite approach means that both the law of the seat and the law of the arbitration agreement are relevant to determining arbitrability at pre-award stage.

The Court of Appeal went on to hold that the law of the arbitration agreement was Singaporean law and the dispute was therefore arbitrable. The appellate court relied on the three stage test in *BCY v BCZ* [2017] 3 SLR 537:[12]

1. the parties made no express choice of law for the arbitration agreement;
2. it was unlikely Indian law was impliedly the choice of law as corporate oppression and mismanagement are subjects barred from arbitrability by public policy in India; and
3. Singaporean law had the most real and substantial connection with the arbitration agreement, Singapore being the seat.[13]

The appeal was therefore determined on the basis that Singaporean law was the proper law of the arbitration agreement as well as Singapore being the seat with ICC rules and that choosing Indian law would frustrate the parties' pre-award intentions to arbitrate. There was strong evidence in this case that the parties wanted *all* of their disputes resolved by arbitration.[14] Under Singaporean law, claims of corporate oppression are arbitrable.[15]

> *Accordingly, we agree with the Judge that the institution of the NCLT Proceedings was a breach of the arbitration agreement. On that basis, there is no ground on which to discharge the anti-suit injunction granted by the Judge.*[16]

The Court also found there should be no stay of the permanent injunction, that is, not to wait for the Indian proceedings to be finalised,[17] *…we have concluded that the appellant should be held to his obligations under the arbitration agreement and no limited stay of these proceedings should be granted*.[18]

Conclusion

The drafters of arbitration clauses should take legal advice as to the public policy factors of the seat of the arbitration and expressly provide for the choice of law for the arbitration agreement itself. It is likely to be helpful to choose the same laws for the arbitration and the seat of arbitration, to avoid problems of non-enforceability. The facts of the case may also enable the choice of law for the substantive contract to be displaced.

All these factors for consideration are valid warnings against possible frustration of the parties' desire to settle their differences by arbitrating cross-border, international disputes.

10 At [55].
11 At [46]–[50], citing *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373.
12 At [62]–[71], which followed the English approach in *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2013] 1 WLR 102.
13 At [75].
14 At [72], [74].
15 At [90].
16 At [96].
17 At [99]–[109].
18 At [107].