Wilberforce Arbitration insight

Mittal v Westbridge: Singapore Court of Appeal charts a novel course for pre-award arbitrability

Article by Stuart Isaacs KC and Jia Wei Lee, 9th May 2023

Arbitrability is a hot topic in international commercial arbitration. There is a developing body of recent case-law, of which the most interesting and important is perhaps the decision of the Singapore Court of Appeal ("**SGCA**") in *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 ("*Mittal*"). As the case shows, there is also increasing cross-fertilisation between English law and Singapore law on the subject and in the arbitration space generally.

Only arbitrable disputes can be referred to arbitration. The UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**") makes clear that, at least post-award, the law of the forum (normally the law of the arbitral seat) governs the issue of arbitrability. However, it is silent as to what law governs arbitrability at the *pre*-award stage. Different jurisdictions approach the matter in different ways, and the choice is typically between the *lex fori* and the law of the agreement. In *Mittal*, the SGCA had the opportunity to consider this issue, and adopted a novel, "composite" approach, which entails effectively taking into account both the *lex fori* and the law of the agreement.

Background facts

The Appellant, Anupam Mittal, is an Indian resident, and founder of People Interactive (India) Private Limited (the "**Company**"), which operates an online matrimonial service called "Shaadi.com". Until November 2019, Mr Mittal was the Company's managing director. The respondent, Westbridge Ventures II Investment Holdings ("**Westbridge**"), is a Mauritian private equity fund.

Westbridge invested in the Company in early 2006, and pursuant to that investment, on 10 February 2006, Mr Mittal and his cousins entered into two agreements with Westbridge: (i) a Share Subscription and Share Purchase Agreement, pursuant to which shares in the Company were to be issued to Westbridge; and (ii) a Shareholders' Agreement ("**SHA**"), governed by Indian law, which regulated their rights and responsibilities as shareholders. As at 30 March 2021, Westbridge held 44.38% of the shares in the Company. Mr Mittal held 30.26% of the shareholding, while the remaining 13.13% was held by Mr Mittal's cousins.

The SHA contained an arbitration clause, which provided that any "*dispute relating to the management of the Company or relating to any of the matters set out in [the SHA]*" were to be referred to arbitration, such arbitration to be seated in Singapore and subject to the rules laid down by the ICC.

The parties' relationship soured in or around 2017, when Westbridge sought to sell its shares to a third party known as Info Edge. Mr Mittal alleged that Westbridge had colluded to oppress him (being a minority shareholder), with the intention of wresting control of the management of the Company's operations, in a manner contrary to his and the Company's interests. The dispute culminated in Mr Mittal filing a petition in the National Company Law Tribunal in India (the "**NCLT Proceedings**"), accusing Westbridge of minority oppression.

Westbridge applied to the Singapore courts for an anti-suit injunction, on the basis that commencement of the NCLT Proceedings was a breach of Mr Mittal's obligation under the SHA arbitration agreement, to refer all disputes relating to the management of the Company to a Singapore-seated arbitration. Mr Mittal resisted this injunction, contending that Indian law ought to determine arbitrability at the pre-award stage, and as a matter of Indian law, minority oppression claims were not arbitrable.

The Singapore High Court granted the application for a permanent anti-suit injunction. In so doing, it found that the law governing the question of arbitrability should be the law of the *seat*, and that the law of the seat was Singapore. As a matter of Singapore law, the dispute between the parties was arbitrable, and therefore, the arbitration agreement had been breached. Mr Mittal sought – unsuccessfully - to appeal the High Court's decision.

The Court of Appeal's decision

The SGCA dismissed the appeal, agreeing with the High Court that the applicable law governing the issue of arbitrability was Singapore law and, as a matter of Singapore law, the dispute was clearly arbitrable. However, it is the different route by which the SGCA reached this conclusion that makes *Mittal* of particular interest.

The SGCA's starting point was to determine what law governed the arbitrability of a dispute in the pre-award phase. It concluded that it was the law of the arbitration agreement itself. Prakash JCA, delivering the judgment of the Court, reasoned that the arbitration agreement was the "*fount of the tribunal's jurisdiction*". Accordingly, the law of the seat simply does not enter the conversation– the law of the seat concerns matters of procedure, which are only engaged if the arbitration agreement comes into effect. But the question of whether the agreement comes into effect is a matter of jurisdiction and if jurisdiction stems from the arbitration agreement itself, the law which applies to determine the scope of that jurisdiction must be the law of that agreement: [53] – [54].

Strikingly, however, Prakash JCA clarified that, even if the governing law was foreign law and foreign law considered the dispute arbitrable, Singapore law might nevertheless be relevant, because by operation of s.11 of the International Arbitration Act 1994 (2020 Rev Ed), any arbitration which was contrary to *Singapore* public policy would not be able to proceed: [58] – [60].

Having decided that the law of the arbitration agreement would govern the question of arbitrability, the SGCA found that in the absence of an express or implied choice of law, Singapore was the system of law with which the arbitration agreement had its closest connection, it being the law which would govern the procedure of the arbitration ([75], applying *BCY v BCZ* [2017] 3 SLR 357).

Comment

The SGCA's approach to the law governing issues of arbitrability parts company with the approaches in several other jurisdictions, including the USA, Switzerland, Holland, Belgium, Italy, Austria and Sweden, all of which apply the *lex fori* at the pre-award stage (see Born, *International Commercial Arbitration* 3rd edn (Kluwer Law International, 2021), at p. 644).

In England, there does not appear to be a definitive answer as to what the applicable law at the pre-award stage should be. Should the issue arise for determination in England, as it surely will before long, it is suggested that there is considerable merit in the approach taken in *Mittal*. Two points are of note.

First, *Mittal* sets out a "composite" approach to pre-award arbitrability. The judgment makes clear that, as a matter of Singapore law, the Court is *first* required to consider arbitrability under the governing law of the agreement; but, *second*, as a matter of Singaporean law as the *lex fori* (codified in s.11). This two-stage approach is novel, and while it appears unwieldy, the logic behind it is compelling. Arbitrability as a concept is predominantly a question of public policy. As Bernard Hanotiau put it in *The Law Applicable to Arbitrability* (2014) 26 SAcLJ874, at [1]:

> *Although judicial power is an essential prerogative of States, the parties may, if they express the wish to do so, give jurisdiction to arbitrators to settle their disputes. However, the State retains the power to prohibit settlement of certain types of dispute outside its courts. It is then claimed that the dispute is not arbitrable. If an arbitration agreement is entered into, it will not be valid. Arbitrability is indeed a condition of validity of the arbitration agreement and, consequently, of the arbitrators' jurisdiction.*

In short, party autonomy can be limited because national policy justifies such a limitation. Which begs question – which country's policy should apply? On the one hand, it makes sense that the *lex fori* should prevail. After all, the parties agreed to adopt the procedures, principles and rules of the forum, and as a consequence, can avail themselves of the domestic court structures in that jurisdiction. It makes sense for the policy of that jurisdiction to determine if a dispute can be arbitrated. This lay at the heart of Mohan J's first instance judgment in *Mittal* ([2021] SGHC 244, at [34] – [44]).

But there are also good reasons to justify the application of the governing law of the agreement. Suppose the parties had included, in the agreement, a provision excluding certain issues from arbitration. Determination of the scope of that provision is a matter of governing law. Why should the position be any different when it comes to arbitrability? As Hanotiau says, arbitrability is a "*condition of validity*" of the arbitration agreement. Therefore, even if policy rules are extrinsic to their agreement, arbitrability is about how these extrinsic rules affect the validity *of the underlying agreement*. In turn, the law which

governs whether an agreement is valid ought to be the law which governs the agreement itself.

These are both valid positions to adopt, and it is difficult, indeed illogical, to choose between them. The SGCA's "composite" approach elides that choice. It makes clear that while the starting point is to approach this as a question of contractual validity, and thus apply the law of the agreement, there is a *second* stage to the analysis which entails the application of Singaporean law and public policy. In so doing, it preserves the public policy imperatives of both the *lex fori* and the national laws governing the agreement itself.

The second arm of this "composite" approach is said to entail an application of s.11 of the International Arbitration Act 1994. There is no equivalent provision in England & Wales. However, s.11 is a codification of what were common law rules on arbitrability. In the absence of statutory provision, in England the common law remains, and there are clear (albeit narrower) guidelines which determine whether or not a dispute is arbitrable (recently considered by Foxton J in *Riverrock Securities Ltd v International Bank of St. Petersburg (Joint Stock Co)* [2020] 2 CLC 547, [67] *et seq*). Should a composite approach be taken in England, these rules would be applied at the second stage of analysis.

Second, as explained earlier, the Model Law states that, post-award, arbitrability is assessed by reference to the *lex fori*. The concern has been expressed that, if the governing law of the agreement were to apply in determining arbitrability pre-award, there would be differing approaches taken depending on whether arbitrability was addressed before or after the award was made. A similar concern was expressed in respect of the law governing the validity of an arbitration agreement, in *Enka v Chubb* [2020] 1 WLR 4117, at [136]:

> *"it would be … illogical if the law governing the validity of the arbitration agreement were to differ depending on whether the question of validity is raised before or after an award has been made. To ensure consistency and coherence in the law, the same law should be applied to answer the question in either case."*

The SGCA's composite approach resolves this problem. As Prakash JCA pointed out at [59]:

> *"the conclusion that we have come to avoids these anomalous results because it means that at the pre-award stage, whenever the subject matter of the dispute is not arbitrable either under the proper law of the arbitration agreement or under Singapore law, the arbitration would not be able to proceed in Singapore (or*

anywhere else for that matter) and thus the outcome that the Judge finds objectionable would never arise."

For these reasons, *Mittal* provides an interesting and practical way forward. It establishes a clear framework for the pre-award arbitrability assessment. While it departs from the apparent international consensus on the issue, it represents a satisfactory compromise position. The lesson to take away from this is that care should be taken when drafting the terms of an arbitration agreement, and in choosing and spelling out the law governing it. As is made clear at [60]:

> *"There is no reason why during the contract negotiation process, they should not be able to investigate possible differences in public policy between the two systems and craft an arbitration agreement which in its choices of proper law and seat would prevent such difficulties from frustrating the parties' desire to settle disputes by arbitration."*

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