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Case Comment

THE LAW GOVERNING ARBITRABILITY AT THE PRE-AWARD STAGE: A WELCOME STARTING POINT

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

[2023] SAL Prac 5

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I. Introduction

1 Choice of law issues are not uncommon in proceedings concerning international arbitrations, where the applicable laws are frequently in dispute. In particular, parties may dispute the applicable law of the forum, the law of the seat, the law of the main contract, or the law of the arbitration agreement (which is distinct from the law of the main contract due to the separability principle).

2 In *Anupam Mittal v Westbridge Ventures II Investment Holdings*,[2] the Singapore Court of Appeal had to consider which law governed the issue of arbitrability of a dispute before the seat court at the pre-award stage. The Court of Appeal held that the law of the arbitration agreement should govern the issue of arbitrability at the pre-award stage,[3] which is distinct from the

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2 [2023] SGCA 1.
3 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [55].

approach at the post-award stage where the applicable law is the law of the forum.[4]

3 To determine the law of the arbitration agreement, the court applied the three-stage test in *BCY v BCZ*[5] ("*BCY* Test"). The Court of Appeal clarified that under the second stage of the *BCY* Test, where the court locates an implied choice of law by parties (if any), an express choice of law for the main contract need not always lead to the implication that the same law applies to the arbitration agreement.[6]

4 The Court of Appeal's holding in relation to the *BCY* Test is an equally important one, but this article will focus on the court's holding in relation to the law governing pre-award arbitrability, with a view to providing a deeper analysis of the court's holding on this issue.

II. Background facts

A. Dispute between the parties

5 The respondent invested in the appellant's company in India in early 2006. Pursuant to that investment, the appellant and his cousins entered into, *inter alia*, a shareholders' agreement[7]

4 For instance, Articles 34(2)(*b*)(i) and 36(2)(*b*)(i) of the UNCITRAL Model Law of International Commercial Arbitration, which deal with setting aside and refusal of enforcement of an arbitral award on the ground of non-arbitrability respectively, make reference to "the law of this State" as the governing law for the issue of arbitrability, which is a clear reference to the law of the forum.

5 [2017] 3 SLR 357. The *BCY* Test is a three-stage test that first considers whether parties had expressly chosen the law of the arbitration agreement. If there is no express choice, the court considers whether parties had made an implied choice of the proper law to govern the arbitration agreement, with the starting point for determining the implied choice being the law of the contract. If neither an express nor implied choice can be discerned, the court considers which system of law has the closest and most real connection with the arbitration agreement. See *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [62].

6 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [72]–[74].

7 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [4]–[5].

("SHA"). The SHA prescribed that the SHA was governed by Indian law, and that disputes were to be resolved first by good faith negotiations and, failing that, by arbitration.[8]

6 The SHA envisaged an initial public offering within five years but that did not materialise. Consequently, the respondent could not only redeem its own shares but also compel the appellant and his cousins to sell their shares to a third-party buyer.[9] The respondent's proposed sale of the shares to a competitor company created unhappiness between the parties,[10] which resulted in the appellant filing a petition in the National Company Law Tribunal ("NCLT") in India seeking remedies for corporate oppression. The respondent retaliated by filing an application in the Singapore High Court for an anti-suit injunction[11] ("ASI") to prohibit the appellant from continuing proceedings in the NCLT.[12]

7 The basis of the ASI was a breach of the arbitration agreement in the SHA. While disputes relating to oppression and mismanagement were not arbitrable under Indian law because the NCLT had exclusive jurisdiction to adjudicate those disputes,[13] the respondent argued, *inter alia*, that Singapore law applied, either as law of the seat or the proper law of the arbitration agreement, and such claims were arbitrable under Singapore law.[14] Hence, the disputes should have been resolved in arbitration.

8 The appellant resisted the ASI on the basis that, *inter alia*, the law of the arbitration agreement, which was argued to be Indian law, should govern the issue of arbitrability. Hence, the

8 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [6].
9 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [9]–[11].
10 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [11]–[13].
11 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [15]–[16].
12 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [26].
13 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [22].
14 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [21].

dispute was not arbitrable and consequently the petition before the NCLT was not in breach of the arbitration agreement.[15]

B. High Court's decision

9 The judge granted the ASI because, *inter alia*, he held that the law of the seat governed the issue of arbitrability at the pre-award stage, hence the disputes were arbitrable under Singapore law and there was consequently a breach of the arbitration agreement.[16]

10 The judge's reasons for holding that the law of the seat applied were as follows:[17]

(a) subject matter arbitrability at the pre-award stage is an issue of the tribunal's jurisdiction and the law of the seat should apply to decide when the tribunal's jurisdiction should be limited;

(b) the same law should apply to arbitrability at both the pre- and post-award stages;

(c) Singapore has a policy of supporting international commercial arbitration and giving effect to foreign non-arbitrability rules might undermine this policy; and

(d) the weight of authority leans in favour of the law of the seat being applied.

III. Court of Appeal's decision on arbitrability

11 The Court of Appeal disagreed with the judge and instead held that questions of arbitrability are determined by the proper law of the arbitration agreement.[18] This may be contrasted

15 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [22].
16 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [23] and [26].
17 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [24].
18 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [55].

with the position taken by the Model Law drafters and the UK Supreme Court, who have applied the law of the forum, which would usually be the law of the seat, at the pre-award stage because the same law should be applied at the pre- and post-award stages to ensure consistency in the applicable law.[19] The Court of Appeal declined to follow these authorities because they did not place sufficient weight on public policy.[20]

12 Public policy and arbitrability are intertwined because the essential criterion of non-arbitrability is whether the subject matter of the dispute is of such a nature as to make it contrary to public policy for that dispute to be resolved by arbitration.[21] This is derived from s 11 of the International Arbitration Act 1994[22] ("IAA"), which states that "[a]ny dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration *unless it is contrary to public policy to do so*" [emphasis added]. The link between arbitrability and public policy is inevitable as nations may wish to prescribe issues which should only be determined in public forums because those issues have wider public impact beyond the individual interests of the disputing parties.[23]

13 However, s 11 of the IAA does not explicitly define whose public policy the courts should give effect to. The Court of Appeal held that "public policy" in s 11 of the IAA is "not limited to the public policy of Singapore but extends to foreign public policy where this arises in connection with essential elements of an arbitration agreement".[24] Consequently, if it is contrary to local or relevant foreign public policy to determine a dispute by arbitration, that dispute cannot proceed to arbitration in

19 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [41]–[43].
20 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [44].
21 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [71]; *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [46]–[47].
22 2020 Rev Ed.
23 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [45].
24 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [48]–[49].

Singapore.[25] Where the arbitration agreement is indisputably governed by foreign law, such as where parties have expressly chosen foreign law to govern the arbitration agreement, the dispute cannot proceed to arbitration so long as the foreign law finds the dispute non-arbitrable. This is so even if the parties have a connection with Singapore and Singapore law finds the dispute arbitrable.[26]

14 The Court of Appeal supported the above conclusion with the premise that the arbitration agreement forms the basis of the tribunal's jurisdiction. While the law of the seat deals with matters of procedure, the law of the arbitration agreement deals with matters of the validity of the arbitration agreement and is anterior to the actual conduct of the arbitration. Hence, if the matter is non-arbitrable under the law of the arbitration agreement which parties had agreed upon, the matter cannot be arbitrated regardless of what the seat law or other law provides because "the agreement from which the jurisdiction of the arbitrators is derived is governed by a law that provides that those parties cannot arbitrate the [issue]".[27]

15 However, this does not mean the law of the seat, or Singapore law in this case, is irrelevant. The law of the seat would be relevant at the post-award stage as an additional obstacle since the award might be set aside under Art 34(2)(*b*)(i) of the Model Law or refused enforcement under s 31(4)(*a*) of the IAA on the basis of non-arbitrability.[28]

16 From the foregoing, the Court of Appeal laid down a "composite" approach, which involves a two-stage analysis. First, the arbitrability of a dispute is determined with reference to the law of the arbitration agreement. If that law is a foreign governing law which finds that dispute non-arbitrable, the

25 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [52].
26 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [52] and [54].
27 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [53].
28 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [54].

Singapore court will not allow the dispute to proceed to arbitration because it will be contrary to foreign public policy. Second, even if the dispute is arbitrable under the law of the arbitration agreement, if Singapore law, as the law of the seat, finds the dispute non-arbitrable, the arbitration would not be able to proceed because it is contrary to Singapore public policy.[29]

17 The Court of Appeal disagreed with the criticism that the "composite" approach was not in line with the general tendency to favour arbitration because encouragement of arbitration cannot override principles of comity.[30] The court also held that there would not be anomalies arising from the application of different laws at the pre- and post-award stages because the law of the seat would still be considered under the "composite" approach at the pre-award stage.[31]

IV. Analysis of the Court of Appeal's decision

18 The Court of Appeal's decision is welcomed as it provides finality and certainty regarding the issue of pre-award arbitrability. This would allow parties to structure their arbitration agreements with the way to approach arbitrability in mind. Having said that, this section now seeks to briefly elucidate some implications that the Court of Appeal's decision has on parties and arbitration law in general.

A. Drafting of arbitration agreements

19 The Court of Appeal has given clear guidance to parties that the Singapore courts will not assist parties in resolving issues in subject matter arbitrability by adjusting the applicable test. Instead, during contract negotiation, parties should investigate possible differences in public policy between the proper law of the arbitration agreement and the law of the seat, and craft an

29 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [55].
30 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [60].
31 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [59].

arbitration agreement under which the parties' desire to settle disputes by arbitration would not be frustrated by the public policy of the law of the arbitration agreement or law of the seat.[32]

20 This is a clear signal to parties that arbitration is founded upon party autonomy and parties themselves are ultimately the biggest decision-makers in arbitration. Therefore, the onus is on them to ensure that the arbitration proceeds in the manner that they intend it to.

B. Arbitrability goes to the tribunal's jurisdiction

21 The Court of Appeal's ruling appears to be consistent with the judge's decision that arbitrability relates to the tribunal's jurisdiction instead of admissibility.[33] The Court of Appeal held that if the matter is non-arbitrable under the law of the arbitration agreement, it cannot proceed to arbitration because the tribunal would have no jurisdiction to hear the dispute.[34] This ruling has several implications.

22 First, the Court of Appeal's decision has settled the jurisdiction *versus* admissibility distinction for arbitrability. The jurisdiction *versus* admissibility distinction is one that has been gaining traction, both in the courts and academically, in recent years. "Jurisdiction" refers to whether parties have consented to the particular claim being arbitrated, whereas "admissibility" refers to whether a tribunal may decline to render a decision for reasons other than a lack of jurisdiction.[35] This distinction has important implications because only matters that go towards jurisdiction can be reviewed *de novo* by the courts.[36] While the court did not have the jurisdiction *versus* admissibility distinction in mind, the Court of Appeal's ruling appears to confirm the position that arbitrability is related to the jurisdiction of the

32 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [60].
33 *Westbridge Ventures II Investment Holdings v Anupam Mittal* [2021] SGHC 244 at [36]–[42].
34 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [53]–[54].
35 *BBA v BAZ* [2020] 2 SLR 453 at [74]–[79].
36 *BBA v BAZ* [2020] 2 SLR 453 at [73].

tribunal. Consequently, any decision on arbitrability by the tribunal can be reviewed *de novo* by the courts.

23 Second, in terms of practical implications, parties must now raise issues of arbitrability at the pre-award stage. Under Art 16(2) of the Model Law, a "plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence". Since arbitrability goes towards the tribunal's jurisdiction, objections based on arbitrability must be raised before the submission of the statement of defence (assuming the grounds for objection are clear to the party objecting and the party knew of the objection).[37] A failure to do so may constitute a waiver of the right to object under Art 4 of the Model Law[38] and parties would be precluded from raising objections based on arbitrability at the post-award stage.[39]

24 Parties would also have to keep in mind the procedures stipulated in Art 16(3) of the Model Law and s 10 of the IAA if the tribunal rules on its jurisdiction at any stage of the arbitral proceedings. These provisions allow parties to appeal against the tribunal's ruling on its jurisdiction and, as mentioned above, any review by the courts would be *de novo*. A failure to invoke the

37 Article 16(2) of the Model Law allows the tribunal to admit a later plea if it considers the delay justified. See also *BAZ v BBA* [2020] 5 SLR 266 at [59], [80]–[82]; *BBA v BAZ* [2020] 2 SLR 453 at [49]. In Howard M Holtzmann & Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 1989) p 481, the authors observed that in many cases, it might be difficult to determine at an early stage that a matter was beyond the tribunal's authority since the governing law, including restrictions on arbitrability, might not yet be known.

38 Article 4 of the Model Law states that "[a] party who knows that any provision of [the Model] Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object".

39 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [51], where the Singapore Court of Appeal observed that it was clear that "the drafters [of the Model Law] intended Art 16(2) to have a preclusive effect" such that "a party who failed to raise the plea at the appropriate time provided by Art 16(2) should be precluded from raising such objection later". See also *CPU v CPX* [2022] 4 SLR 314 at [74]–[76] and *BBA v BAZ* [2020] 2 SLR 453 at [49].

appeal mechanism may preclude reliance on arbitrability as a ground for setting aside.[40]

25 Therefore, parties must now be conscious of arbitrability at the pre-award stage as a failure to do so would have profound implications on the party's ability to rely on arbitrability at later stages. This should also be a factor that parties should have in mind when drafting their arbitration agreements.

C. The "composite" approach

26 Another aspect of the Court of Appeal's decision that has important implications is the "composite" approach. The "composite" approach appears to be the Court of Appeal's method of incorporating foreign law and public policy while not compromising on domestic law and public policy. As evident from the decision itself, the approach is not free from criticism, and is not an uncontroversial approach.[41] This section seeks to take a deeper look at the "composite" approach to highlight some implications of the approach as well as issues that may require clarification in the future.

27 First, the approach towards determining a foreign governing law may not be so clear. For starters, it is apparent that the *BCY* Test applies. Indeed, the Court of Appeal had applied the third stage of the *BCY* Test to derive Singapore law as the applicable law, being the law with the closest connection with the arbitration agreement.[42]

28 However, when the Court of Appeal was considering the scope of foreign public policy that can be recognised under s 11 of the IAA, the court defined a "foreign arbitration agreement" as one which is "indisputably governed by foreign law", which would be the case if the "[foreign] law… [had] been expressly

40 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [130].
41 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [60].
42 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [75].

chosen by the parties as its governing law".[43] Indeed, the court further observed that "if by the *express choice* of a governing law of the arbitration agreement, the parties have made part of or all their disputes non-arbitrable, there can be no question of an arbitration coming into effect" [emphasis added].[44] This was the rationale and basis upon which the court decided that the law of the arbitration agreement should be the governing law for issues of pre-award arbitrability.

29 It is clear from the foregoing that the basis for the court's decision was that the dispute cannot be arbitrated if parties had expressly chosen a governing law, albeit foreign law, under which the dispute was non-arbitrable. Yet, the Court of Appeal had applied the third stage of the *BCY* Test, which is only applied when the court recognises that there is no express or implied choice of the law of the arbitration agreement by parties. Therefore, it remains unclear whether foreign law under the first stage of the "composite" approach is only confined to parties' express choice, or whether a law imputed by the court at the third stage of the *BCY* Test will suffice.

30 Second, the Court of Appeal laid down the "composite" approach immediately after considering that the law of the seat remained relevant at the post-award stage as an additional obstacle. However, the "composite" approach itself applies the law of the seat at the pre-award stage as a facet of public policy under s 11 of the IAA.[45] There therefore appears to be a gap as to why the law of the seat should be transposed from the post-award stage to the pre-award stage. Nonetheless, there are good reasons for such an approach.

31 One reason would be to avoid the wastage of resources. An award can be set aside or refused enforcement on the ground of non-arbitrability, and there should be no logical reason for

43 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [52].
44 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [54].
45 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [54] and [55].

the court to permit an arbitration to proceed at the pre-award stage despite knowing that it would likely be set aside or refused enforcement at the post-award stage.

32 Further, as observed by the Court of Appeal, anomalous results may arise where different laws are applied at the pre- and post-award stages.[46] The "composite" approach was the only way of resolving this issue since the court had decided to apply the law of the arbitration agreement as the governing law.

33 Third, parties must be prepared to consider arbitrability under both the law of the arbitration agreement and the law of the seat if they intend to raise arbitrability issues in Singapore at the pre-award stage as the "composite" approach sets out the relevant choice of law rule for pre-award arbitrability. Where either, or both, law is foreign law,[47] parties must also adduce evidence of foreign law since questions of foreign law are questions of fact.[48] Parties must, however, be conscious that resolving issues of foreign law may not be straightforward as the foreign law experts may be conflicted and diametrically opposed with regard to the content of the foreign law,[49] which results in the expert evidence being unhelpful to the court in making an informed decision with respect to the foreign law.[50]

46 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [56]–[59].

47 However, the Court of Appeal only dealt with the position when the law of the seat was Singapore law. It remains unclear what the position would be if (a) the law of the seat was foreign law and the law of the arbitration agreement was Singapore law; or (b) both the law of the arbitration agreement and the law of the seat are foreign law. The latter may occur in, for instance, stay proceedings, where parties challenging a stay on the basis of an arbitration agreement may raise non-arbitrability as a ground for the court to refuse a stay. In *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [73]–[74], the Singapore Court of Appeal held that an arbitration agreement would be "inoperative" or "incapable of being performed" in relation to a dispute which involves a subject matter that is not arbitrable, and this would invoke an exception under s 6(2) of the International Arbitration Act 1994 (2020 Rev Ed) such that the court can refuse to grant a stay of court proceedings.

48 *The Hung Vuong-2* [2000] 2 SLR(R) 11 at [16].

49 *The Hung Vuong-2* [2000] 2 SLR(R) 11 at [16].

50 *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd* [2006] 4 SLR(R) 451 at [14].

34 Finally, there is an apparent conflict between the Model Law and New York Convention provisions[51] and s 11 of the IAA. The "composite" approach envisages foreign law and foreign public policy being considered at the pre-award stage, with the basis being s 11 of the IAA. Section 11 does not distinguish between the pre- and post-award stages. Indeed, the Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd*[52] defined arbitrability with reference to s 11[53] and applied that conception of arbitrability to both the pre- and post-award stages.[54] If so, the definition of "public policy" under s 11 should be applied at both the pre- and post-award stages such that the law of the arbitration agreement should apply at both stages. Yet, due to the Model Law and the New York Convention, it would be difficult to apply this definition of "public policy" at the post-award stage as those provisions only allow for annulment or non-enforcement on the grounds of non-arbitrability under Singapore law.

35 In sum, while the "composite" approach represents a good starting point for the approach towards pre-award arbitrability (and any step taken forward is better than none), more clarification may be required to define precisely the contours of this approach.

V. Conclusion

36 While the Court of Appeal's decision is a welcome clarification in the area of pre-award arbitrability, this article takes the view that more clarifications may be required to further refine the approach adopted by the Court of Appeal. In the meantime, parties should take heed of the Court of Appeal's warnings concerning drafting of the arbitration agreement to ensure that they do not run into arbitrability issues at the pre-award stage.

51 As given effect by Part 3 of the International Arbitration Act 1994 (2020 Rev Ed).
52 [2016] 1 SLR 373.
53 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [75].
54 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [72].