# Singapore Court of Appeal Propounds Composite Approach to Determine Arbitrability of Disputes | A Tale of Matrimonial Discord Among Shareholders

The Singapore Court of Appeal (**Court of Appeal**) in *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 (***Anupam Mittal***) has propounded a composite two-tiered approach to determine the question of arbitrability of a dispute. This approach would entail applying, in the first instance, the law of the arbitration agreement and, in the second, the law of the seat of arbitration. Considerations of public policy would play an important role in the Singapore courts' approach to the issue of arbitrability. If, under either the law of the arbitration agreement or under Singapore law, the subject matter of the arbitration is non-arbitrable, then the parties would not be able to resolve their dispute *via* arbitration.

## Our Comments

Contemporary shareholders' agreements tend to provide for arbitration as the mechanism to resolve differences among shareholders. It is also common for the factual matrix of a shareholders' dispute to give rise to two distinct legal remedies – often, a contractual remedy (for example, damages granted by an arbitral tribunal) and a statutory remedy (for example, winding-up of a company by a court). In both, ordering a share buy-out is usually available. When there are different remedies available, forum shopping and/or parallel proceedings tend to occur. The choice of forum (arbitration versus court) and the remedy (damages versus winding-up, in the event neither party wishes to take over the other side's shares) is often determined on the basis of perceived strategic advantages of one over the other. To reduce the prospect of court proceedings challenging the commencement of arbitration, it is imperative that the arbitration agreement not only specify the seat of the arbitration but also the law of the arbitration agreement. If not, arbitrability of the subject matter of the dispute opens the door to additional litigation on the question of jurisdiction.

Considering Singapore's popularity as seat of arbitration for disputes with an Indian connection, it is important to be cognisant of differences between Indian law (which may govern the contract giving rise to the dispute) and Singapore law (which is the seat law) on what is arbitrable. In the realm of shareholder disputes, minority oppression is often a key claim, and Singapore and Indian law differ on whether such claims are arbitrable. Relief from oppression and mismanagement claims (**O&M claims**) is usually available both statutorily and contractually, making national courts and arbitration tribunals equally adroit at determining such disputes. Under Indian law, O&M claims fall within the exclusive jurisdiction of the National Company Law Tribunal (**NCLT**), and are therefore not arbitrable. The position under Singapore law is, however, different; O&M claims are arbitrable. For these and other claims where subject matter arbitrability may differ between the law of the seat and the law governing the contract, specifying the law governing the **arbitration agreement** can ensure that the parties' intentions (whether to arbitrate or have a court determine such claims) are given effect to, without satellite litigation. The *Anupam Mittal* decision brings to the fore the importance of specifying the law of the arbitration agreement.

In this case, despite the presence of an arbitration clause which provided that a dispute relating to "*the management of the Company"* would be arbitrated, one of the parties took the position that such disputes were non-arbitrable. This argument was premised on the NCLT having exclusive jurisdiction over O&M claims under the (Indian) Companies Act, 2013, such that O&M claims were deemed non-arbitrable under Indian law (the law of the substantive contract). As the position under Singapore law (the law of the seat of arbitration) is that O&M claims can be arbitrated, parallel proceedings in India and Singapore were instituted by each side.

To avoid such situations, parties can consider the following tips while drafting arbitration agreements:

(a) Anticipate the kinds of disputes that are likely to arise in the performance of the contract.

(b) Draft the arbitration agreement in wide terms so as to include all types of disputes, including O&M claims.

(c) Specify the law of the arbitration agreement. General language contained in the choice of law of the substantive contract is not enough.

(d) Where the law of the arbitration agreement is specified, check whether the claims would be arbitrable under this law and under the law of the seat of the arbitration.

(e) Consider the jurisdictions where the award is likely to be enforced, especially what that jurisdiction considers arbitrable and non-arbitrable.

Importantly, in the case of parallel proceedings in relation to Singapore-seated arbitrations, the parties have a right to apply for anti-suit injunctions before the Singapore courts for breach of arbitration agreements. In the absence of a good reason not to do so, the Singapore courts are likely to uphold the arbitration agreements and hold the parties to their obligation to arbitrate.

## Background

The appellant was an Indian resident and the respondent, a Mauritian private equity fund. They were shareholders of an Indian company which ran the popular matchmaking website "shaadi.com". As shareholders, the parties' rights and responsibilities were governed by a shareholders' agreement (**SHA**). The SHA provided that disputes would be resolved by arbitration with the arbitral seat in Singapore. The arbitration agreement, in the relevant part, provided as follows:

> *This Agreement and its performance shall be* ***governed by and construed in all respects in accordance with the laws of the Republic of India****. In the event of a* ***dispute relating to the management of the Company*** *or relating to any of the matters set out in this Agreement…[the dispute] shall be referred to arbitration.*
>
> [emphasis added]

Notably, there was no express provision stipulating the law of the arbitration agreement.

Differences arose between the parties in relation to the respondent's exit from the company. Raising O&M claims, the appellant commenced proceedings in India before the NCLT against the respondent, among others. Soon after, the respondent commenced proceedings in the General Division of the Singapore High Court (**High Court**) which issued a permanent anti-suit injunction enjoining the appellant from pursuing the NCLT proceedings. The High Court held, among other things, that the commencement of the NCLT proceedings was in breach of the arbitration agreement.

The appellant challenged this decision before the Court of Appeal. He contended, among other things, that the law of the arbitration agreement was Indian law and because the dispute related to O&M claims, they were non-arbitrable under Indian law since the NCLT had exclusive jurisdiction over such disputes. This was a question of Indian law which was not challenged by either party. On the other hand, the respondent argued that subject matter arbitrability at the pre-award stage was governed by the law of the seat, which was Singapore. Alternatively, the respondent submitted that the law of the arbitration agreement was Singapore law and under Singapore law, O&M claims were arbitrable.

## The Court of Appeal's Decision

### *Composite approach to question of arbitrability*

The first question before the Court of Appeal was whether the question of arbitrability would be determined by: (a) the law of the seat; or (b) the law of the arbitration agreement.

Underscoring the importance of public policy in determining the question of arbitrability, the Court of Appeal observed that "*[n]ations … have an interest in what issues should only be determined in public forums because some issues have wider public impact beyond the individual interests of the disputants*." Instead of choosing one option over the other, the Court of Appeal propounded the "*composite approach*" to determine the issue of arbitrability.

It held that, in the first instance, the arbitrability of a dispute is to be determined by the law of the arbitration agreement. However, the issue will also turn on the law of the seat of the arbitration. For example, in a case where the law of the arbitration agreement provides that the dispute is arbitrable, but that dispute is non-arbitrable under the law of the seat of arbitration, then, a Singapore court would not allow the arbitration to proceed. Similarly, where under the law of the arbitration agreement the dispute is non-arbitrable, a Singapore court will not allow the arbitration to proceed. In both cases, it would be contrary to public policy for the Singapore courts to allow the arbitration to proceed. Therefore, under the composite approach, the question of arbitrability will entail an analysis from the perspective of the law of the arbitration agreement as well as the law of the seat.

### *Whether Singapore or Indian law was the law of the arbitration agreement?*

Second, as the arbitration agreement did not specify the law of the arbitration agreement, the Court of Appeal had to determine whether Singapore or Indian law was the law of the arbitration agreement.

To analyse this issue, the Court of Appeal applied the three-stage test laid down in *BCY v BCZ* [2017] 3 SLR 357 (***BCY***). Relying on the terms of the contract that the SHA was to be "*governed by and construed in all respects in accordance with the laws of the Republic of India*", the appellant argued that the arbitration agreement was to be governed by Indian law. However, on the basis of *BNA v BNB and another* [2020] 1

SLR 456, the Court of Appeal rejected this argument and held that "*[a]n express choice of law for an arbitration agreement would only be found where there is explicit language stating so in no uncertain terms*." Generic language of the governing law clause is insufficient to constitute an express choice of law for the arbitration agreement.

In the present case, the law governing the SHA was Indian law and the seat of the arbitration was Singapore. Moving to the second stage of *BCY*, the Court of Appeal applied the test in *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102 which clarified that the governing law of the main contract is a strong indicator of the governing law of the arbitration agreement, unless there are clear indications to the contrary. Therefore, at this stage, Indian law would be the implied choice of the arbitration agreement. Relying on *BCY* at [65] and [74], the Court of Appeal observed that this presumption can be **displaced** in a situation when choosing Indian law as the law of the arbitration agreement "*would negate the arbitration agreement even though the parties have themselves evinced a clear intention to be bound to arbitrate their disputes*". Here, on the one hand, O&M claims were non-arbitrable under Indian law. However, on the other hand, the arbitration agreement clearly encompassed disputes "*relating to the management of the Company*". The Court of Appeal concluded that there were sufficient indications to negate the implication that Indian law was intended to govern the arbitration agreement.

Lastly, the Court of Appeal found that Singapore law had the most real and substantial connection with the arbitration agreement in the SHA. It therefore held that Singapore law was the law of the arbitration agreement.

### *Nature of the dispute: O&M claims or contractual claims?*

To determine whether the appellant breached the arbitration agreement by commencing the NCLT proceedings, the Court of Appeal considered whether the claims in the NCLT proceedings would be within the ambit of the arbitration agreement.

Noting that the arbitration agreement provided that disputes "*relating to the management of the Company or relating to any of the matters set out in [the SHA*]" must be submitted to arbitration, the Court of Appeal analysed each of the complaints raised in the NCLT proceedings. Ultimately, it concluded that "*[p]ractically all the complaints made by the [Appellant] in the NCLT Proceedings can be said to relate either to the management of the Company or to the SHA in some way*." In view of its finding, the Court of Appeal upheld the grant of the anti-suit injunction.

## Concluding Observations

The position under Indian law that O&M claims are non-arbitrable as they are within the exclusive jurisdiction of the NCLT is an outlier, when compared with the position in other common law jurisdictions like Australia (see, for example, *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896), England (see, for example, *Fulham Football Club (1987) Ltd v Richards* [2011] CWCA Civ 855) and Singapore (see, for example, *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373). While the question whether the NCLT had exclusive jurisdiction over O&M claims was not disputed as a matter of Indian law (see the decisions in *Vidya Drolia v Durga Trading Corp*, 2020 SCC OnLine SC 1018 and *Rakesh Malhotra v Rajinder Malhotra* (2015) 2 CompLJ 288 (Bom)), the relevant legislative provisions under the Indian Companies Act 2013 (*i.e.*, sections 241 and 242 of the (Indian) Companies Act, 2013) are

not that different from that of other common law jurisdictions (*i.e.*, section 232 of the (Australian) Corporations Act 2001, section 994 of the UK Companies Act 2006, section 216 of the Singapore Companies Act 1967), which simply provide that a member may apply to the national courts (in the case of India, the NCLT) for relief in O&M claims. That arbitral tribunals may not be able to grant certain remedies (for instance, winding-up) does not *a fortiori* render the dispute non-arbitrable, as tribunals can decide on the question whether there has indeed been oppression.

India has been making rapid strides in ironing out the creases in its arbitration jurisprudence and it is hoped that Indian law will develop in line with that of other common law jurisdictions, and find that the legislative provisions giving the NCLT jurisdiction to decide on O&M claims do not necessarily render such claims non-arbitrable. In the meantime, to avoid any risk of shareholder disputes being found to be non-arbitrable, parties should consider adopting, as the law of the arbitration agreement, the law of a jurisdiction under which O&M claims are arbitrable. One must also bear in mind that, when it comes to enforcement in the relevant jurisdictions, the question of arbitrability might yet again arise, and the position taken by the seat court may have an impact on how the enforcement court decides this issue.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or the following:

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