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SINGAPORE COURT STRIKES BLOW AGAINST GUERRILLA TACTICS IN KEY DECISION FOR ARBITRATION

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Legal Briefings

The judgment confirms 'law of seat' determines if a dispute goes to arbitration in a significant ruling for contracting parties

In an ugly corporate divorce related to an online matrimonial website, the Singapore Court of Appeal decided the ability to arbitrate a dispute will be determined at the pre-award stage by reference first to the law governing the arbitration agreement (*Anupam Mittal v Westbridge Ventures II Investment Holdings* [2022] SGCA, available here).

Claiming a dispute is non-arbitrable is a classic 'guerrilla tactic' deployed by parties seeking to avoid arbitration. This is often seen in disputes arising from Asian jurisdictions that take a less bright-line policy view as to what disputes are incapable of being resolved by arbitration compared to safe arbitral seats such as Singapore or Hong Kong. The potentially non-arbitrable issues may overlap with contract issues, such as minority oppression claims that can overlap with contractual rights under a share purchase agreement or subscription agreement, creating practical problems for parties seeking to exercise their contractual rights.

This case involved minority oppression claims brought by the promotor and founder of an Indian company against a private equity fund seeking to exit its investment. Minority oppression disputes are arbitrable under Singapore law (see our blog here) but may not be arbitrable under Indian law.

While the Court of Appeal took a different approach to the High Court in identifying the law governing arbitrability, the Court of Appeal ultimately upheld the decision from the High Court that Singapore law applied, and therefore the dispute was able to be arbitrated. This was because the law of the arbitration agreement and the law of the seat were both Singapore law, even though the contract was governed by Indian law.

The key practical takeaway for negotiating the governing law of a contract is to pair a safe arbitration seat (such as Singapore or Hong Kong) with Singapore or Hong Kong law governing the arbitration agreement, regardless of the governing law of the main contract.

BACKGROUND

The company operated a well-known online and offline matrimonial service called "shaadi.com". A dispute arose between its shareholders, an offshore private equity fund and the Indian promotor, when the fund sought to exit its investment by selling to an alleged competitor of the company. The Indian promotor alleged the fund's conduct during the attempted exit constituted minority oppression under Indian law and filed a petition with the Indian National Company Law Tribunal (NCLT).

The PE fund objected on the basis disputes about its exit from the company should be decided in arbitration and applied to the Singapore courts for an anti-suit injunction restraining the Indian promotor from continuing the NCLT claim on the grounds it breached a Singapore-seated arbitration clause in their shareholders' agreement. However, the Indian promotor argued Indian law, which considers mismanagement claims to be non-arbitrable, governed the arbitration agreement and therefore the question of arbitrability.

The Singapore High Court granted the anti-suit injunction finding the arbitrability of a dispute should be determined by the law of the seat.

The Court of Appeal decided the arbitrability of a dispute will be determined in the first instance by the law governing the arbitration agreement. The Court also held that where a dispute is arbitrable under the law governing the arbitration agreement, but Singapore law as the law of the seat considers the dispute to be non-arbitrable, then the Singapore courts will not allow the arbitration to proceed.

The Court of Appeal determined the law governing the arbitration agreement was Singapore law, following the three-stage test laid down in *BCY v BCZ* [2017] 3 SLR 357 (see our blog here).

Although no express or implied choice of law for the arbitration agreement could be discerned, Singapore law had the most "real and substantial connection" with the arbitration agreement. The Court of Appeal agreed with the High Court that the specific complaints made by the Indian sponsor fell within the categories of disputes that the shareholders' agreement expressly provided should be submitted to arbitration.

POINTS TO NOTE

Choosing a seat and governing law for an arbitration agreement:

Safe arbitral seats such as Singapore and Hong Kong take a narrow view as to what disputes are non-arbitrable (and consider minority oppression claims to be arbitrable, for example). Minority oppression and mismanagement disputes are likely to be arbitrable in Japan, Hong Kong, and mainland China too, provided they fall within the scope of the arbitration agreement.

However, that approach is not universally followed in Asia. The Bombay High Court ruled in 2014 that minority oppression and mismanagement claims are non-arbitrable, unless brought in bad faith, vexatious and "dressed up" (*see Rakesh Malhotra v Rajinder Kumar Malhotra* MANU/MH/1309/2014), which is a standard that may be hard to apply in practice where the oppression claims overlap with contractual claims.

The position is also not clear in Korea and Malaysia:

- In Korea, minority oppression and mismanagement issues are not expressly excluded as non-arbitrable by the Korean Arbitration Act and the scope of arbitrable disputes was expanded in 2016 to include non-monetary disputes. However, the scope of arbitrable disputes is limited to private law disputes.
- In Malaysia, as we have discussed here, where there are statutory provisions that exhaustively set out procedures involving the rights and remedies of parties, then that subject matter will most likely not be arbitrable. Depending on what sort of remedy is requested, a minority oppression and mismanagement dispute may be arbitrable.

Where it is unclear whether such disputes are arbitrable, the *Anupam Mittal* decision shows it is important for the contracting parties to select both a seat and governing law for the arbitration agreement:

- with a pro-arbitration policy and limited non-arbitrability doctrine such as Singapore; and
- whose courts have the power to issue anti-suit injunctions to uphold their arbitration agreement.

Choosing different governing laws for the main contract and the arbitration agreement:

Accepting a compromise over the governing law of a contract is often sensible, or necessary where local law is mandatory. However, international parties should require offshore arbitration in return. The *Anupam Mittal* decision shows it is possible – and often necessary – to choose a different, more pro-arbitration governing law for the arbitration agreement if parties want it to cover a broader range of disputes.

It is also best to expressly specify the chosen law for the arbitration agreement. Without an express choice of law, the question of which law should govern the arbitration agreement can be finely balanced. This was the case in *Anupam Mittal*, where there was protracted litigation about whether the governing law of the arbitration agreement was Singapore law (the law of the seat) or Indian law (the law governing the main contract). The Court, in deciding Indian law did not govern the arbitration agreement even though it governed the main contract, carefully distinguished its prior decision in *BNA v BNB* where it decided the governing laws were the same (resulting in the arbitration agreement potentially being deemed invalid; see here). An express choice will avoid this litigation risk.

Parties should consider where enforcement would take place:

Parties should still be careful about referring oppression and mismanagement disputes to arbitration if enforcement of the award is likely to take place in a jurisdiction where such disputes are non-arbitrable. They will run the risk of the enforcing court refusing enforcement on the grounds the dispute is non-arbitrable under its own state's laws. The Court of Appeal in *Anupam Mittal* expressly acknowledged this risk of non-enforcement, though it considered that the process of arbitration may be valuable to parties in any event, for example, because it would compel parties to collect and test their evidence and legal arguments.

This article first appeared in our blog series, Arbitration Notes

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