

# Which Law Governs Subject Matter Arbitrability in International Commercial Disputes?

*Written by Kamakshi Puri[1]*

Arbitrability is a manifestation of public policy of a state. Each state under its national laws is empowered to restrict or limit the matters that can be referred to and resolved by arbitration. There is no international consensus on the matters that are arbitrable. Arbitrability is therefore one of the issues where contractual and jurisdictional natures of international commercial arbitration meet head on.

When contracting parties choose arbitration as their dispute resolution mechanism, they freely choose several different laws that would apply in case of disputes arising under the contract. This includes (i) the law that is applicable to the merits of the dispute, (ii) the institutional rules that govern the conduct of the arbitration, (iii) law that governs the arbitration agreement, including its interpretation, generally referred to as the 'proper law of the arbitration agreement'. Similarly, contracting parties are free to choose the court that would exercise supervisory jurisdiction over such arbitration, such forum being the 'seat' of arbitration.

Since there is no global consensus on the matters that are arbitrable, and laws of multiple states simultaneously apply to an arbitration, in recent years, interesting questions surrounding arbitrability have presented themselves before courts adjudicating cross-border disputes. One such issue came up before the Singapore High Court in the *Westbridge Ventures II v Anupam Mittal*, succinctly articulated by the General Court as follows:

*“which system of law governs the issue of determining subject matter arbitrability at the pre-award stage? Is it the law of the seat or the proper law of the*

*arbitration agreement?”*

In this piece, I will analyze the varied views taken by the General Court at Singapore (“**SGHC**”), Singapore Court of Appeal (“**SGCA**”) and the Bombay High Court (“**BHC**”) on the issue of the law(s) that would govern the arbitrability of the disputes in international commercial disputes.

The Westbridge Ventures-Anupam Mittal dispute began in 2021 when Mittal approached the National Company Law Tribunal in Mumbai (“**NCLT Mumbai**”) alleging acts of minority oppression and mismanagement of the company, People Interactive (India) Private Limited, by the majority shareholder, Westbridge Ventures. In response to the NCLT proceedings, Westbridge Ventures approached the Singapore High Court for grant of permanent anti-suit injunction against Mittal, relying on the arbitration agreement forming part of the Shareholders’ Agreement between the suit parties. Since 2021, the parties have successfully proceeded against one another before various courts in Singapore and India for grant of extraordinary remedies available to international commercial litigants *viz* anti-suit injunctions, anti-enforcement injunctions and anti-arbitration injunctions.

## **Singapore General Court Decision on Pre-award Arbitrability**

Oppression and mismanagement claims are arbitrable under Singapore law but expressly beyond the scope of arbitration under Indian law. To determine whether proceedings before the NCLT were in teeth of the arbitration agreement, the court had to determine if the disputes raised in the NCLT proceedings were arbitrable under the *applicable* law. Thus, the question arose as to the law which the court ought to apply to determine arbitrability.

At the outset, the SGHC noted that the issue of arbitrability was relevant at both initial and terminal stages. While at the initial stage, non-arbitrable subject matter rendered arbitration agreements *inoperative* or *incapable of being performed*, at the terminal stage, non-arbitrability rendered the award liable to be set aside or refused enforcement. Since at the post-award stage, arbitrability

would be determined by the enforcing court applying their own public policy, the lacuna in the law was limited to the issue of subject matter arbitrability at the pre-award stage.

Upon detailed consideration, the SGHC concluded that it was the *law of the seat* that would determine the issue of subject matter arbitrability at the pre-award. The court reasoned its decision broadly on the following grounds:

- Contracts are a manifestation of the party autonomy principle. States being asked to give effect to a contract ought to respect party autonomy but for very limited grounds, such as public policy considerations. Power of the seat court to limit the arbitral tribunal's jurisdiction, and consequently affect party autonomy, ought to be limited to necessary constraints posed by such seat State's public policy;
- Since seat courts their own law at the post-award stage (in setting-aside and enforcement proceedings), it would be a legal anomaly for the same court to rely on different systems of law to determine subject-matter arbitrability at pre and post-award stages. This could also result in a situation where a subject matter, being arbitrable under the law of the arbitration agreement despite being non-arbitrable under the law of the seat, is first referred to arbitration however later the resulting award is set aside;
- Courts should, as a general position, apply their own law unless specifically directed by law to another legal system. Public interest and state policy favoured the promotion of International Commercial Arbitration. It was neither necessary nor desirable for a court to give effect to a foreign non-arbitrability rule to limit an otherwise valid arbitration agreement. Arbitrability was therefore a matter to be governed by national courts by applying domestic law.

Interestingly, despite noting that arbitrability was an issue of jurisdiction and that non-arbitrability made an agreement *incapable of being performed*, the SGHC distinguished the scenarios where a party's challenge was based on arbitrability and where parties challenged the formation, existence, and validity of an agreement. The court held that for the former, the law of seat would apply, however, for the latter, the proper law of arbitration agreement could apply.

Accordingly, the SGHC held that oppression and mismanagement disputes were

arbitrable under the law of the seat, *i.e.*, in Singapore law, the arbitral tribunal had exclusive jurisdiction to try the disputes raised by the parties. An anti-suit injunction was granted against the NCLT proceedings relying on the arbitration agreement between the parties.

## **Appeal before the Singapore Court of Appeal**

Mittal appealed the SGHC judgment before the Singapore Court of Appeal. The first question of law before the SGCA was whether the SGHC was correct in their holding that to determine subject matter arbitrability, *lex fori* (*i.e.*, the law of the court hearing the matter) would apply over the proper law of the arbitration agreement. Considering the significance of the issue, Professor Darius Chan was appointed as *amicus curie* to assist the court.

Professor Chan retained the view that *lex fori* ought to be the law applicable to the question of arbitrability. This was for reasons of *predictability* and *certainty*, which weighed on the minds of the drafters of the UNCITRAL Model Law. Although the Model Law was silent on the question of pre-award arbitrability since it was clear on the law to be applied post-award, a harmonious reading of the law was preferable. The courts ought to generally apply *lex fori* at both, pre and post-award stages.

The SGCA disagreed. It held that the *essence* of the principle of arbitrability was public policy. In discussing issues of *predictability*, *certainty*, and congruence between law to be applied at pre and post-arbitral stages, the parties had lost sight of the core issue of public policy in considering the question of arbitrability. Public policy of which state? - it unequivocally held that it was public policy derived from the law governing the arbitration agreement. Where a dispute could not proceed to arbitration under the foreign law that governed the arbitration agreement for being contrary to the foreign public policy, the seat court ought to give effect to such non-arbitrability.

The SGCA relied on the same concepts as the General Court albeit to come to the opposite conclusion:

- Arbitration agreements are the manifestation of party consensus. When parties expressly adopt a system of law to govern their arbitration agreement, public policy enshrined under such law ought to be given effect. Further, if arbitrability is a question of jurisdiction, then it necessarily follows that the law of the agreement from which jurisdiction of the tribunal is derived be considered first.
- As regards the potential anomaly with the seat court applying different laws pre and post-award, SGCA held that non-arbitrability under the law of the seat would be an *additional* obstacle to the enforcement of the arbitration agreement. This could, however, not go to say that the law of the seat would be the *only* law to govern arbitrability. Accordingly, the SGCA upheld a *composite approach*:

*“55. Accordingly, it is our view that the arbitrability of a dispute is, in the first instance, determined by the law that governs the arbitration agreement. ... where a dispute may be arbitrable under the law of the arbitration agreement but Singapore law as the law of the seat considers that dispute to be non-arbitrable, the arbitration would not be able to proceed. In both cases, it would be contrary to public policy to permit such an arbitration to take place. Prof Chan refers to this as the “composite” approach.”*

- On the state policy to encourage International Commercial Arbitration, the court noted that principles of comity, requiring the court to respect public policy under foreign undoubtedly outweighed the policy to encourage arbitration. This was despite Prof. Chan’s concerns that expanding the grounds for refusal of reference of arbitration was *“unnecessarily restrictive and not in line with the general tendency to favor arbitration”*.

On facts, however, the court noted that the law of the arbitration agreement was in fact Singapore law itself, and Indian law was but the law of the substantive contract. Accordingly, arbitrability had to be determined under Singapore law and the appeal was dismissed.

## **Anti-Enforcement Injunction by the Bombay High Court**

Mittal approached the Bombay High Court seeking an anti-enforcement injunction against the SGHC decision, and for a declaration that NCLT Mumbai was the only forum competent to hear oppression and mismanagement claims raised by him.

The BHC did not directly consider the issue of the law governing arbitrability, however, the indirect effect of the anti-enforcement injunction was the court determining the same. The BHC's decision reasoned as follows - the NCLT had the exclusive jurisdiction to try oppression and mismanagement disputes in India, such disputes were thus non-arbitrable under Indian law. The enforcement of any ensuing arbitral award would be subject to the Indian Arbitration Act. An award on oppression and mismanagement disputes would be contrary to the public policy of India. Enforcement of an arbitral award in India on such issues would be an impossibility - "*What good was an award that could never be enforced?*". The court noted that allowing arbitration in a case where the resulting award would be a nullity would leave the plaintiff remediless, and deny him access to justice. An anti-enforcement injunction was granted.

The BHC's decision can be read in two ways. The decision has either added subject matter arbitrability under a third law for determining jurisdiction of the tribunal, *i.e.*, the law of the court where the award would inevitably have to be enforced or the decision is an isolated, fact-specific order, not so much a comment on the law governing subject matter arbitrability but based on specific wording of the arbitration clause which required the arbitral award to be enforceable in India, although clearly the intent for the clause was to ensure that neither parties resist enforcement of the award in India and not to import India law at the pre-award stage.

## **Concluding Thoughts**

The SGHC is guided by principles of party autonomy and Singapore policy to encourage International Commercial Arbitration, on the other hand, the Court of Appeal was driven by comity considerations and the role of courts applying foreign law to be bound by foreign public policy. Finally, the Indian court was

occupied with ensuring “access to justice” to the litigant before it, which according to the court overrode both party autonomy and comity considerations. Whether we consider the BHC decision in its broader or limited form, the grounds for refusing reference to arbitration stand invariably widened. Courts prioritizing different concerns as the most significant could potentially open doors for forum shopping.

[1] Kamakshi Puri is an LLM graduate from the University of Cambridge. She is currently an Associate in the Dispute Resolution Practice at Cyril Amarchand Mangaldas. Views and opinions expressed in the text are the author’s and not attributable to any organization.