

Arbitrability: The “Composite” Approach

Introduction

What happens when the law of the arbitration agreement and the law of the seat diverge on the matter of arbitrability of a dispute? This was considered very recently by the Singapore Court of Appeal in **Anupam Mittal v Westbridge Ventures II Investment Holdings**¹ (“Anupam Mittal”). The Court held that the arbitrability of a dispute, at the pre-award stage, is determined by both the law governing the arbitration agreement and the law of the seat.

Significance of the “Composite” approach

The “composite” approach requires that the dispute is arbitrable by the law governing the arbitration agreement. Nonetheless, if the law of the seat considers the dispute to be non-arbitrable, the Singapore courts will not permit the arbitration to proceed on grounds of public policy. The Singapore courts are guided by the following considerations in determining the arbitrability of a dispute pre-award:

1. The three-stage test in **BCY v BCZ**² determines the law of the arbitration agreement; and
2. In a Singapore-seated arbitration, the dispute is arbitrable where the law of the seat is consistent with the law of the arbitration agreement.

This decision serves as a timely reminder to parties to take charge of the matter of arbitrability; one suggestion is for parties to select arbitration friendly laws to govern the seat and the arbitration agreement because:

“[t]he solution to problems that may arise due to differences in subject matter arbitrability between the proper law and the law of the seat lies in the hands of the parties themselves and their legal advisors.”

The Malaysian courts have not had the opportunity to consider **Anupam Mittal**. It will be interesting to see if national courts from Malaysia and other jurisdictions will continue to apply

Arbitration Update

FEBRUARY 2023

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their *lex fori*³ to determine the question of arbitrability, or follow suit, or fashion an entirely new set of considerations that will address the potential rigidity of the “*composite*” approach.

¹[2023] SGCA 1.

²[2017] 3 SLR 357.

³Law of the forum or local law.

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