

International Arbitration

# What is the Applicable Law to Determine Whether a Dispute is Arbitrable at the Pre-Award Stage?

## Introduction

While it is widely accepted that in principle there are certain types of disputes that are, by their nature, not arbitrable, there is no global consensus on the exact scope of what constitutes non-arbitrable disputes. As such, when a party submits that a dispute is not arbitrable, an important threshold question arises: should the issue of arbitrability be considered under the law governing the arbitration agreement or the law of the seat of the arbitration?

We previously issued a Client Update in November 2021 (available [here](#)), which discussed the High Court decision of *Westbridge Ventures II Investment Holdings v Anupam Mittal* [2021] SGHC 244. In the aforesaid decision, the High Court found that subject matter arbitrability is determined by the law of the seat of arbitration at the pre-award stage.

The High Court decision went on appeal and the Singapore Court of Appeal issued the landmark decision of *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 (the "**CA Decision**") earlier this year.

In the CA Decision, the Singapore Court of Appeal adopted a "composite approach", which effectively requires the matter to be arbitrable under both the law of the arbitration agreement and the law of the seat. The court would first look to the law of the arbitration agreement to determine if the dispute is arbitrable. If the law of the arbitration agreement is foreign law, and the dispute is arbitrable under the foreign law, the court would then look to the law of the seat – a dispute that is not arbitrable under Singapore law as the law of the seat would also not be allowed to proceed. In this regard, the Court of Appeal reasoned that it would be contrary to public policy to permit an arbitration that is not arbitrable under either the foreign law governing the arbitration agreement or Singapore law as the law of the seat to proceed.

This Update provides a summary of the Court of Appeal's decision and highlights the key holdings in the judgment.

## Brief Facts

The Appellant and the Respondent were shareholders in a company registered in Mumbai, India (the "**Company**"). The parties had entered into a Shareholders' Agreement ("**SHA**"), which contained an arbitration clause providing that any dispute "*relating to the management of the Company or relating to*

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*any of the matters set out in this Agreement... shall be referred to arbitration".* Singapore was specified as the seat of arbitration.

The parties' relationship began to deteriorate, culminating in the Appellant initiating court proceedings in Mumbai against the Respondent seeking remedies for corporate oppression.

The Respondent then applied to the Singapore Courts for an anti-suit injunction against the Mumbai proceedings on the ground that the dispute fell within the arbitration clause in the SHA and should instead be submitted to arbitration. The Appellant opposed the injunction, arguing that the law governing the arbitration agreement was Indian law, and that disputes relating to oppression and mismanagement are not arbitrable under Indian law.

The High Court found in favour of the Respondent, granting a permanent anti-suit injunction against the Appellant. One of the main issues facing the High Court was whether, at the pre-award stage, the applicable law for determining subject matter arbitrability was: (a) the law of the arbitration agreement (which the Appellant argued to be Indian law); or (b) the law of the seat of arbitration (which the Respondent established to be Singapore law). The High Court determined the answer to be (b).

## Holding of the Court of Appeal

The Court of Appeal upheld the anti-suit injunction against the Appellant. However, the Court of Appeal disagreed with the High Court regarding the applicable law for determining subject matter arbitrability at the pre-award stage.

### Applicable law for subject matter arbitrability

The Court of Appeal adopted a composite approach for the pre-award stage that, takes into account both the law of the arbitration agreement and also the seat of arbitration. The composite approach is briefly as follows:

- (a) **Law of the arbitration agreement as the applicable law** – The arbitrability of a dispute is, in the first instance, determined by *the law of the arbitration agreement*. If this is a foreign governing law under which the subject matter of the dispute is not arbitrable, the Singapore Court will not allow the arbitration to proceed because it would be contrary to foreign public policy.
- (b) **Relevance of law of the seat** – If the dispute is arbitrable under the law of the arbitration agreement but is not arbitrable under Singapore law as the law of the seat, the arbitration would similarly not be able to proceed, as it would be contrary to Singapore public policy under section 11(1) of the International Arbitration Act ("**IAA**").
- (c) **Pre-award vs post-award stage** – The Court acknowledged the concern of inconsistency if the

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law determining arbitrability at the pre-award stage is the law of the arbitration agreement, but the law determining arbitrability at the post-award stage is the law of the seat of arbitration. However, under the composite approach at the pre-award stage, there would not be any inconsistent outcome as a dispute that is not arbitrable either under the law of the arbitration agreement or under Singapore law would not be able to proceed.

In reaching its decision, the Court of Appeal reasoned as follows:

- (a) **Public policy as the criterion for non-arbitrability** – Pursuant to section 11(1) of the IAA, any dispute which parties have agreed to submit to arbitration may be determined by arbitration *unless it is contrary to public policy* to do so. The Court of Appeal endorsed the corollary that the essential criterion of non-arbitrability is whether it is contrary to public policy for the subject matter of the dispute to be resolved by arbitration.
- (b) **Both foreign and Singapore public policy** – The Court of Appeal held that the public policy referred to above 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.
- (c) **Law of the agreement as the determinant of jurisdiction** – The Court of Appeal highlighted that the arbitration agreement is the source of an arbitral tribunal's jurisdiction. The law of the arbitration agreement deals with matters of the validity of the agreement and is thus anterior to the actual conduct of the arbitration. It is only when an arbitration agreement does come into effect that the law of the seat becomes relevant.

### Application to the facts

The Court of Appeal found that the proper law of the arbitration agreement was Singapore law for the following reasons:

- (a) The SHA did not contain an express choice of law for the arbitration agreement.
- (b) The parties could not be said to have made an implied choice that Indian law should govern the SHA.
- (c) In the absence of an express or implied choice of law, Singapore law (as the law of the seat of the arbitration) was found to be the proper law of the arbitration agreement as it had the most real and substantial connection with the arbitration agreement in the SHA.

Applying the approach set out above, the Court of Appeal held that the arbitrability of the subject matter of the dispute at the pre-award stage would be determined by Singapore law. Since Singapore law does not consider corporate oppression claims to be non-arbitrable, the Court of Appeal rejected the Appellant's argument that the disputes in the Mumbai proceedings were not arbitrable.

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Accordingly, the Court of Appeal found that the institution of the Mumbai proceedings was a breach of the arbitration agreement in the SHA and upheld the anti-suit injunction that was granted by the High Court.

## Concluding Words

The Court of Appeal's decision is novel and notable in its conclusive pronouncement of the applicable law for determining the arbitrability of a dispute. The composite approach adopted by the Court of Appeal sets out a practical approach built on foundations of public policy, while also achieving a degree of consistency in the outcome of challenges raised against the arbitrability of a dispute, whether at the pre-award or post-award stage.

For further queries, please feel free to contact our team below.

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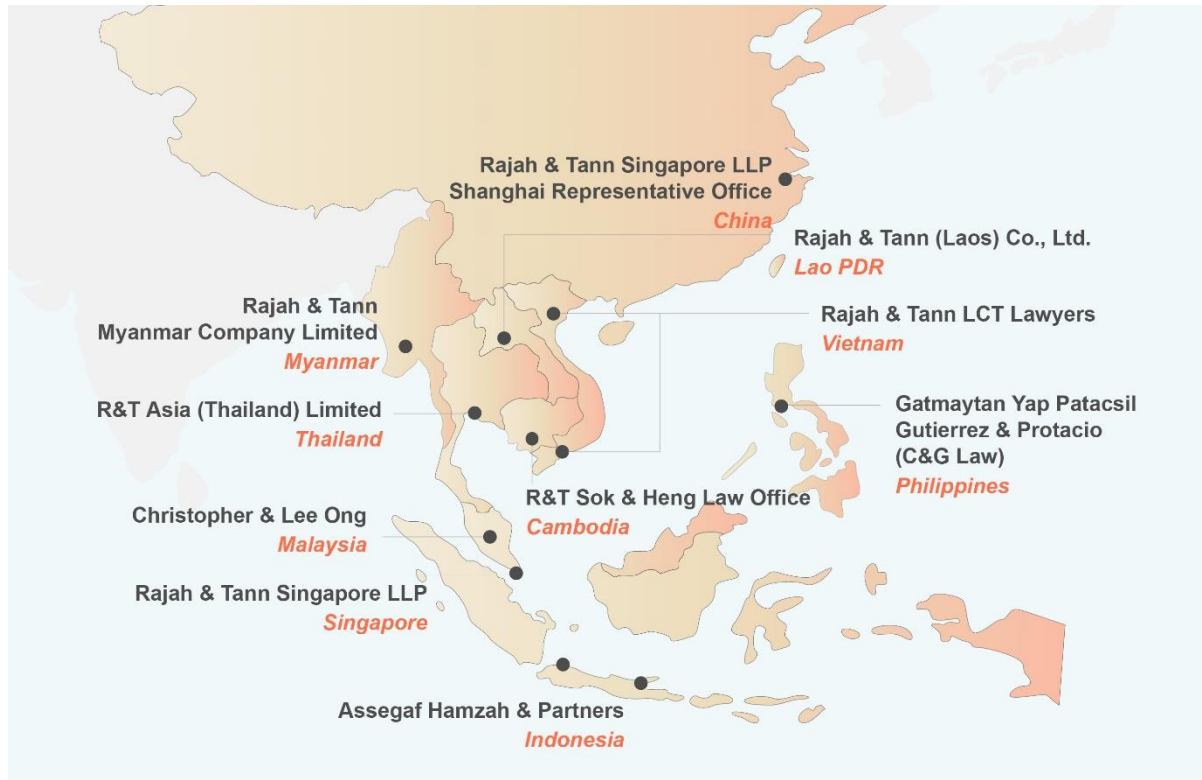
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