# *Anupam Mittal v Westbridge Ventures II* [2023] SGCA 1
## - *One Step Forward or Two Steps Back?*

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## Introduction

As a dispute resolution hub, the Singapore Courts often considers arbitration-related issues. In *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 ("***Anupam***"), the Court of Appeal clarified that – pre-award stage – arbitrability of commercial disputes is determined by the proper law of the arbitration agreement and the law of the seat. Yet, deciding on the proper law may not be entirely straightforward. We share our insights below.

## Factual Background

The dispute is between a senior executive and a private equity investor over the management of a company in India. The parties were bound by a shareholders' agreement providing for Indian law as the governing law of the contract and arbitration to be seated in Singapore.

The senior executive commenced proceedings before the Indian Courts alleging corporate oppression. In response, the investor sought an anti-suit injunction from the Singapore Courts on the basis that the Indian proceedings were commenced in breach of the arbitration agreement between the parties.

The issues before the Singapore Courts are: (a) is the dispute arbitrable (which turned on whether the law of the seat or the law of the arbitration agreement determines arbitrability); and (b) what is the law governing the arbitration agreement (i.e., the 'proper law')?

## Which Law to Apply to Determine Whether a Dispute is Arbitrable?

In *Anupam*, the parties disagreed on the arbitrability of the dispute. The senior executive argued that corporate oppression disputes are not arbitrable under Indian law. The investor countered that arbitrability depends which law applies to determine arbitrability.

The Singapore Court determined that the essential criterion of non-arbitrability is whether the subject matter of the dispute makes it contrary to public policy for that dispute to be resolved by arbitration. Public policy is not limited to that of the seat of the arbitration (i.e., Singapore) but extends to foreign public policy as well.

As for which public policy is in play, this is determined by a two-step process. First, arbitrability is determined by the law governing the arbitration agreement. Second, after passing the first step, the arbitrability is determined by the law of the seat of the arbitration. If the dispute is

not arbitrable according to public policy of either the governing law of the arbitration agreement *or* the proper law of the seat, then the arbitration cannot proceed.

**What is the Law Governing the Arbitration Agreement (I.e., the Proper Law)?**

In *Anupam*, it is clear that the law of the seat is Singapore law. However, the proper law of the arbitration agreement is less clear. The Singapore Court applied the three-stage test:

1. Express choice. The Court decided there was no express choice of law. Just because parties have expressly provided for the governing law of the *contract* does not mean that this constitutes an express choice of law for the arbitration agreement.

2. Implied choice. Typically, Singapore Courts will hold that the proper law of the arbitration agreement is the same as that of the contract. In a previous decision of *BNA v BNB* [2019] SGCA 84 ("***BNA***") (see our earlier briefing note), the Court decided that Chinese law, the proper law of the contract, is implied as the governing law of the arbitration agreement. In *Anupam*, however, the Court decided that although Indian law was the governing law of the contract, the law of the seat – Singapore law – was implied as the proper law of the arbitration agreement. The Court opined that parties in *BNA* did not appear to be aware that the proper law of the arbitration agreement would impact the validity of the arbitration agreement whereas parties in *Anupam* appeared to have demonstrated more thought in drafting the arbitration agreement (when including management disputes in the arbitration agreement).

3. Closest and most real connection. The Court decided that this is Singapore law, being the seat of the arbitration.

**Commentary**

The *Anupam* decision is certainly a positive step forward; it is the first time a Singapore Court has considered the question of arbitrability during the pre-award stage. That said, commercial parties should still take care when drafting arbitration agreements. Specifically, to include a proper law clause in the arbitration agreement to avoid unnecessary uncertainties.

As arbitration specialists, we advise on arbitration agreements and the conduct of arbitration proceedings. To find out how we may assist, please do not hesitate to contact our lawyers.

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