ENTRY FOR CHRISTOPHER BATHURST PRIZE 2023

Introduction

1. Two parties in Jurisdiction A agree to arbitrate in Jurisdiction B. Which jurisdiction's public policy governs the dispute's subject matter arbitrability? Under the "composite approach" established in *Westbridge Ventures II v Anupam Mittal*[1], the answer is "both" – the dispute must be arbitrable under the law of the arbitral seat and of the arbitration agreement.[2]

2. The dispute in *Westbridge* concerned a shareholder agreement governed by Indian law, between a Mauritius-incorporated investor and an Indian founder of a company operating an online matchmaking service. In their battle for jurisdiction, the question was which of Singapore and Indian law should apply its non-arbitrability rules to the dispute.

3. While the High Court decided that only Singapore law mattered,[3] the Court of Appeal ("CA") disagreed. It applied a composite approach, comprising (1) a rule applying the non-arbitrability rules of both the law of the seat and the law of the arbitration agreement, and (2) a choice-of-law inquiry, under the *BCY v BCZ*[4] test, to determine the latter. The former principle might aptly be termed a "double arbitrability rule", which name this essay adopts to distinguish it from the choice-of-law inquiry and the composite approach as a whole.

4. In conducting the choice-of-law inquiry, the CA also accounted for the non-arbitrability rules of each of the possible laws of the arbitration agreement: a choice of law should be disregarded if such a choice would render the dispute non-arbitrable. Thus, despite disagreeing with the High Court in principle, the CA eventually selected Singapore law to

[1] [2023] SGCA 1 ("Westbridge")
[2] Ibid, at [55]
[3] [2021] SGHC 144 ("Westbridge (HC)"), at [34]
[4] [2016] SGHC 249 ("BCY")

govern the arbitration agreement, and applied Singapore law to both prongs of the double arbitrability rule.

5. The CA correctly recognised that arbitrability, or more correctly, non-arbitrability[5], has a public policy dimension that overrides party autonomy, and cannot be determined solely by the parties' choice,[6] whether that choice be of the governing law, the legal seat, or the law of the arbitration agreement. However, it is unfortunate that the composite approach embraces this logic only in part.

6. Criticisms of *Westbridge* often attack its application of the *BCY* choice-of-law test[7], and rightly so. Avoiding an implied choice of law if its non-arbitrability rules would invalidate the arbitration agreement undermines the composite approach's purported deference to national public policy. It is telling that despite the CA expressing concern for the essentially Indian character of the dispute,[8] its final choice-of-law analysis completely excluded Indian law.

7. However, there is a graver and more fundamental flaw in the composite approach, arising not in the choice-of-law inquiry, but in the logically anterior double arbitrability rule[9]. Indeed, this flaw makes the choice-of-law inquiry irrelevant – arguably, the law of the arbitration agreement should not be applied at all.

8. By selecting two systems of law each derived from the parties' agreement, the CA has given the double arbitrability rule an overly contractual character that permits parties to oust an

[5] Under some legal systems, notably US law, "arbitrability" includes issues of contractual formation, capacity, and validity. The author adopts "non-arbitrability" to avoid potential confusion.
[6] Westbridge, at [44]
[7] See Karmakar, *Anupam Mittal v Westbridge: Potential Paradox of the Singapore Court of Appeal's 'Composite Approach' on the Law Applicable to Arbitrability* <https://arbitrationblog.kluwerarbitration.com/2023/05/26/anupam-mittal-v-westbridge-potential-paradox-of-the-singapore-court-of-appeals-composite-approach-on-the-law-applicable-to-arbitrability/> (accessed 30 June 2023)
[8] Westbridge, at [51]
[9] Ibid, at [40].

unfavourable non-arbitrability regime by careful drafting. This offers inadequate protection to the public policy interests engaged by the dispute.

9. Instead, this essay submits that rather than the law of the arbitration agreement, courts should apply both Singapore law and the law of the state with the closest connection to the underlying dispute, determined by the same tests as the *lex causae* in private international law. It is this state, which would prima facie have civil jurisdiction but for the arbitration agreement, which experiences the greatest derogation from its adjudicative sovereignty by the dispute's removal to private arbitration.

Principles underlying inter-state non-arbitrability

10. The correctness of a choice-of-law rule on non-arbitrability can only be evaluated against its relevant policy justifications. We must therefore begin by asking: why does any particular state's non-arbitrability regime matter?

11. As the Court in *Westbridge* recognised, an arbitration agreement is an agreement to *remove a dispute from adjudication by national courts.*[10] This is a derogation from the jurisdiction of the national court in question. An international dispute multiplies this derogation. Just as more than one national court may assume jurisdiction over a dispute under its own jurisdictional rules, so does each court suffer a derogation from its jurisdiction when that dispute is removed to arbitration.

12. Each state therefore has a public policy interest in permitting or prohibiting such derogations from its jurisdiction, whether or not the parties ultimately invoke that jurisdiction. Seen in this way, the question is how far Singapore law should limit **its own** arbitral jurisdiction, in

[10] Westbridge, at [45]

recognising and giving effect to foreign states' non-arbitrability regimes. This echoes the central question underlying the conflict of laws.[11]

13. The need for mutual respect of judicial processes and jurisdiction applies equally to arbitration. As observed by the US Supreme Court, "The utility of the [New York] Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own."[12] A choice-of-law rule on arbitral jurisdiction must therefore respect the public policy safeguards of other national courts with curial jurisdiction, including their limits on arbitrability. Party autonomy is not enough.

14. Even under the Model Law, national courts' New York Convention obligations to respect parties' consent to arbitration remain subject to public policy, which is the foundation of non-arbitrability rules.[13] One must construct a rule that justifies removing international disputes from adjudication by national courts with good claims to jurisdiction, *even if these courts deem such disputes non-arbitrable.* The relevant question is therefore: *which national legal systems have a sufficiently close connection with the dispute, to justify applying their arbitrability regimes?*

15. The foregoing analysis, if extrapolated, might suggest that the answer to "which jurisdictions' non-arbitrability regimes should apply to a dispute?" is "all of them" – but that is not a practical solution. That a state *could potentially* exercise jurisdiction over a dispute, is necessary but insufficient to justify applying its non-arbitrability rules. The question may also be inverted thus: whose non-arbitrability rules can be justifiably ignored? It is submitted that

[11] Dicey, Morris, & Collins, on the Conflict of Laws (16ed, 2022) ("*Dicey*"), 1-006
[12] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 639 (USSC, 1985)
[13] Born, International Arbitration: Law & Practice (3ed, 2021) ("*IALP*"), 3.04B

it is the *connection with the dispute* that determines if a legal system's non-arbitrability regime should be recognised or ignored.

16. So far, the first principles described cohere with the CA's analysis in *Westbridge,* which rightly identified the public policy factors governing the issue of non-arbitrability. It is thus regrettable that, due to a semantic sleight-of-hand, the court took the wrong path in determining the "relevant foreign public policy." This initial mis-step has coloured the CA's analysis on non-arbitrability in overly contractual tones, undermining the respect for public policy that animated the composite approach to begin with.

Where Westbridge went wrong

17. *Westbridge* took a wrong turn at paragraph [52], where it held that "*if it is contrary to local or relevant foreign public policy to determine* ***a dispute arising under an arbitration agreement*** *by arbitration, that dispute cannot proceed to arbitration in Singapore*." [emphasis added] The error lies in conflating the public policy engaged by a dispute with the public policy engaged by an arbitration agreement. Disputes do not arise under arbitration agreements; the disputed cause of action has an independent legal existence from the arbitration agreement itself.[14]

18. Consider an agreement to arbitrate a tort. Although a tortious claim often arises from a contractual relationship governed by an arbitration clause, this is not necessarily true: a common example is maritime collision. The arbitration agreement may post-date the tort, but the tort does not exist in a legal vacuum: it is subject to the civil jurisdiction of one or more states connected to the tort.

19. When the parties agree to remove the dispute from national curial jurisdiction, it is the legal system that would prima facie have jurisdiction over the dispute but for the arbitration

[14] Fiona Trust & Holding Corp v Privalov & Ors [2007] UKHL 40, at [11-12].

agreement, whose public policy is put at risk, and not the legal system with jurisdiction over the *agreement*. The latter jurisdiction is consensually created; the former is not.

20. With respect, the CA was wrong to presume that the "relevant foreign public policy" was that of the law of the arbitration agreement. While the arbitration agreement is indeed the "fount of the Tribunal's jurisdiction"[15], and its validity is determined by its governing law, the same is not true of non-arbitrability. Non-arbitrability is not an aspect of validity, but an independent vitiating factor that defeats an otherwise valid arbitration agreement; its focus is on the nature of the claim, not the effect of the agreement.[16]

21. Mohan JC (as he then was) correctly apprehended this point in the High Court, when he concluded that non-arbitrability was not determined by the effect or scope of the parties' agreement.[17] Non-arbitrability deprives the tribunal of jurisdiction to hear a matter "even if the parties wish for it to be heard".[18] However, the public policy interests potentially infringed by arbitration are not restricted to those of the seat.

22. The facts of *Westbridge*, with some hypothetical tweaks, illustrate the practical implications of the double arbitrability rule. Had the shareholder agreement been governed by English law instead, the applicable laws would be Singapore law, as the law of the seat, and either English or Singapore law, as the law of the arbitration agreement. In neither case would Indian law apply, despite its clear connections with the subject matter of the dispute, and a clear Indian public policy against arbitration.

23. Although in *Westbridge*, the parties' chosen governing law matched the law most closely connected with the dispute, this will not be so in all cases. If the parties' home jurisdiction

[15] Westbridge, at [53]
[16] Born, International Commercial Arbitration (3ed 2021), 6.01
[17] Westbridge (HC), at [31]
[18] Ibid, at [36].

does not permit arbitration of a particular category of dispute, they may choose an unrelated governing law or arbitral seat, precisely to outflank this public policy.

24. This is not a novel question; such difficulties have arisen before in private international law. The rule in *Foster v Driscoll,* for example, invalidates an otherwise legal contract entered with the intention to violate the law of a foreign state.[19] Judicial comity demands that Singapore law not become a tool to circumvent the legal regimes of friendly states.[20] Yet such is the practical effect of the double arbitrability rule: two parties may circumvent a mandatory rule of non-arbitrability by choosing a different law to govern the arbitration agreement. It is respectfully submitted that Singapore law should not facilitate such efforts.

The Close Connection Test

25. Instead, it is submitted that the relevant non-arbitrability rules are those of the jurisdiction with the closest and most real connection to the dispute. The close connection test is frequently applied in the conflict of laws, including as the third stage of the *BCY* test[21]. It is a well-recognised private international law principle that mandatory rules of law of jurisdictions *closely connected to a particular legal situation* must be applied irrespective of the parties' agreement.[22] Rules prohibiting arbitration of particular disputes must surely qualify.

26. The close connection test is not applied uniformly across all fields of private international law, which raises the question of which test to use. Contract law asks which law has the "closest and most real connection" to the *transaction*, as opposed to the contract itself.[23] In contast, tort law's test has changed over time. The common law historically prescribed the law of the

[19] Dicey, 32-265
[20] Dicey, 32-255
[21] BCY, at 40.
[22] Convention on the Law Applicable to Contractual Obligations 1980, Art 7.
[23] Dicey, 32-006

place of commission of the tort,[24] which remains the law in Singapore. [25] This rule, devised when most torts involved physical damage only, ill-suits a commercial landscape dominated by economic torts, which can be inflicted from every corner of the world. Thus, the Rome II Regulation has modified the common law in England in favour of the law of the place where damage was suffered.[26]

27. Insofar as it is necessary to choose between these tests, it is submitted that the Rome II Regulation's test is the most appropriate starting point to find the "closest and most real connection". The place where damage is suffered is most likely to reflect the place where the public interests protected by the non-arbitrability regime are infringed. This will frequently also be the place of performance of the contract, which the common law has historically deemed the most significant connecting factor for determining the *lex contractus*;[27] the distinctions between the contractual and tortious close connection tests are thus more apparent than real.

28. Admittedly, whichever test is used, it will not always be easy or straightforward to determine which jurisdiction has the "closest and most real connection", especially in complex multi-jurisdictional disputes. The practical difficulties should not be understated. Such a test, with its amorphousness and subjectivity, may be said to be inappropriate to a rule determining jurisdiction[28], which requires greater certainty and predictability than a choice-of law rule that does not impugn jurisdiction. Against this, two responses can be made.

29. Firstly, identifying a close connection is not necessarily any more subjective than a judicial search for the parties' implied intentions. The history of the three-stage test of the *lex*

[24] Dicey, 35-004
[25] EFT Holdings Inc v Marinteknik Shipbuilders (S) Pte Ltd [2014] 1 SLR 860, at [53].
[26] Dicey, 35-024
[27] Dicey, 32-120
[28] Westbridge at [53]

contractus, from which the *BCY* test itself derives[29], amply demonstrates this. As the interpretation of an implied choice of law becomes mired in interpretive principles and presumptions, it ceases to be a rule of construction and becomes an exercise in applying rules of law.[30]

30. Indeed, the common law often uses the close connection itself to justify an implied choice of law of the arbitration agreement. In *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd*[31] Hamblen J did precisely this, holding that "the system of law of the country seat will usually be that with which the arbitration agreement has its closest and most real connection".[32] In *Sulamerica*[33], Moore-Bick LJ, while favouring the law of the main contract, ultimately used similar language and reasoning,[34] endorsed in turn by Steven Chong J (as he then was) in *BCY*[35]. Absent an express choice of law (which is frequently the case), there is little real difference between using a close connection to justify an implied choice of law, and simply applying the law with the closest connection.

31. Secondly, and perhaps more importantly, non-arbitrability rules are mandatory rules protecting public interests that are potentially at risk. While contracting parties may bargain around uncertainty and unpredictability, the general public cannot; their interests therefore may not be undermined for the sake of commercial certainty. Practical difficulties in identifying the interests at stake cannot justify abandoning the search. Nor can they justify applying a different rule on non-arbitrability, even if it is easier to apply in practice. A rule that is uncertain is still preferable to one that is wrong.

---

[29] BCY at [40]; Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors [2012] EWCA Civ 638 ("Sulamerica"), at [25].
[30] Dicey, 32-007
[31] [2013] EWHC 4071
[32] Ibid, at [101(3)]
[33] [2013] 1 WLR 102
[34] Ibid, at [26(a)]
[35] BCY, at [44] and [49]

The remaining prongs of double arbitrability

32. While the interests of the state with the closest connection cannot be neglected, they are not the only interests deserving recognition. The author submits that the correct tests under the double arbitrability rule should be the law of the jurisdiction with the closest connection to the dispute, and Singapore law; the law of the arbitration agreement should be excluded.

33. Although a dispute may have no Singaporean connection besides the arbitral seat, there are two important reasons to apply Singapore's non-arbitrability rules nonetheless. Firstly, it was the Model Law's legislative intention that the seat court apply its rules on non-arbitrability in a setting-aside application under Rule 34(2)(b)(i).[36] Secondly, ignoring Singapore's arbitrability rules when determining jurisdiction at the pre-award stage, but permitting them to impugn jurisdiction post-award, undermines the finality of arbitration and hangs a sword of Damocles over the tribunal's head: even if it assumes jurisdiction, whichever party loses may have the award set aside on non-arbitrability grounds.

34. As for the law of the arbitration agreement, there is force in the CA's observation that if parties choose a law to govern their arbitration agreement that vitiates the tribunal's jurisdiction, Singapore should recognise this want of jurisdiction.[37] However, a "triple arbitrability rule", applying the laws of the seat, the arbitration agreement, and the state with the closest connection, should be rejected, on three grounds.

35. Firstly, it is not self-evident that an implied choice of law of the arbitration agreement necessarily includes its non-arbitrability rules. Commercial reality indicates otherwise – the law of the arbitration agreement is itself more often decided by rebuttable presumptions than

[36] Westbridge, at [41]
[37] Westbridge, at [53]

by parties' express choice.[38] The CA's observation loses considerable weight when the law of the arbitration agreement is not chosen by, but imputed to the parties.

36. Extending these inferences to include the effect of non-arbitrability rules is respectfully submitted to be one step too far. Firstly, this is an inference thrice over: parties are deemed to have (1) made an implied choice of law, (2) included its non-arbitrability rules as part of that implied choice, and (3) considered, *with the benefit of hindsight,* the effect of these non-arbitrability rules, in making their decision under (1).

37. Secondly, the effect of non-arbitrability rules may be clear for some but not all legal systems. Even in *Westbridge*, Indian law may have been more amenable to shareholder arbitration than the Court had presumed.[39] Although the effect of Indian law was common ground before the Court there, it will not always be so, and even then the Court only reached its conclusion after receiving expert evidence from both sides.[40] To impute such a degree of knowledge of the effect of foreign law to the parties borders on demanding precognition.

38. Thirdly, and most crucially, choosing the law of the arbitration agreement confers no jurisdiction upon that state over either the arbitration or the dispute; the relevant supervisory jurisdiction remains that of the arbitral seat.[41] Nor are that state's public interests put at risk. There is thus no policy justification for applying its non-arbitrability rules, beyond a tenuous inference of parties' intentions. To draw such inferences amounting to a deeming rule, would require an independent justification for doing so, but here there is none.

---

[38] Blackaby & Partasides, Redfern and Hunter on International Arbitration (7ed 2021) ("*Redfern*"), 3.10; IALP, 2.06A

[39] Jha, *Anupam Mittal v Westbridge Ventures II Investment Holdings—a Missed Opportunity?* https://blogs.law.ox.ac.uk/oblb/blog-post/2023/03/anupam-mittal-v-westbridge-ventures-ii-investment-holdings-missed (accessed 30 June 2023)

[40] Westbridge, at [61]

[41] BNA v BNB [2019] SGCA 84, at [97]

39. The law of the arbitration agreement is itself no more than an interpretive code for the submission to arbitration. Under delocalisation principles, it need not even correspond to a national system of law.[42] The CA's approach conflates the dispute with the agreement to arbitrate the disputes, and misconstrues non-arbitrability as a component of validity, rather than an independent vitiating factor.

40. Ultimately, applying the non-arbitrability rules of the arbitration agreement requires too many imputations of intent to establish any satisfactory conceptual justification, and is at odds with international arbitral jurisprudence on the purpose of both the law of the arbitration agreement, and of non-arbitrability rules.

Conclusion

41. With the greatest respect to the Court of Appeal, it is submitted that an initially minor act of legal legerdemain ultimately led the court to adopt the wrong assessment of which jurisdictions' public policies are threatened by arbitration. The double arbitrability rule as laid down defers too much to party autonomy, and fails to adequately protect the public policy interests of foreign states.

42. For these reasons, it is submitted that the two laws to be applied under the double arbitrability rule should be the law of the state with the closest connection and the law of the seat; the law of the arbitration agreement should be jettisoned as both a concession to practicality, and in recognition of the conceptual limits to compounding inference upon inference.

[42] Redfern, 3.36-3.39

END