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"EFFECTIVE INTERPRETATION OF ARBITRATION CLAUSES"

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1 It is a pleasure to address this gathering of leading arbitration practitioners under the auspices of GAR Live, an event which takes place as part of Singapore Convention Week. The Singapore International Commercial Court ("SICC") deals with a large volume of international arbitration matters, including applications that concern questions of jurisdiction of arbitral tribunals. In determining questions of jurisdiction, it is frequently necessary to interpret the arbitration agreement. It is a truism that courts facilitate and protect party autonomy by striving to make arbitration agreements workable and effective. As Gary Born has written: "… courts from virtually all jurisdictions have displayed a pronounced willingness to disregard or minimize imperfections in the parties' arbitration agreement, to imply missing terms and/or to adopt liberal interpretations in order to supply omitted terms or to reconcile apparently inconsistent terms": Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014), at pp 775–776. The principle of effective interpretation certainly marks a sea change from the days of yore when the paradigm and default mode of dispute resolution was thought to be the courts and so any drafting flaw would more likely be resolved the other way, *ie*, against there being an effective reference to arbitration.

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2 Arbitration clauses are notoriously midnight clauses, written when the lawyers drafting the contract are tired and sleepy. There is a high incidence of obscurity and inconsistency in arbitration clauses. This is so even when standard forms are involved for which all that must be done is insert a seat and a governing law into the right cell in the form. Unsurprisingly then that more arcane questions are neglected, such as those of what the procedural law at the seat might in fact be, or the substantive law relating to arbitrability under different governing laws.

3 Understanding language is not merely an everyday task for all of us but also a largely instinctive, natural, and unconscious one. When someone speaks to us, we hear and understand at the same time. When we see the name of a bakery on a shop front, we read and absorb its meaning as quickly as our noses sniff the bakery smells.

4 For similar reasons, even when we read a book, the texts beyond the text, namely the context, subtext, and pretext, are not ordinarily parsed separately, but come to us as a unitary meaning or impression. Words uttered in a sarcastic tone mean something different to the same words uttered plainly, and this too we usually comprehend at once, and not in two stages – *not* first, the literal meaning of the words and then second, their different meaning resulting from the tone the speaker has adopted. There are many expressions in common parlance when the literal meaning is completely sublimated to the metaphorical meaning the expression holds: when someone asks me to keep my hat on, I do not reach for my head, still less for a sock when someone tells me to put a sock in it.

5 This foray into everyday life helps underline that contractual interpretation is an artificial exercise. Not only must we understand the words correctly, but we

must also explain why we understand them in a particular way so that our readers can in turn understand why we have decided the way we have.

6 And this is where effective interpretation comes in. At its heart, it is no more and no less the point that the language of an arbitration clause must be considered in the light of the parties' manifested intention that their disputes relating to the contract are to be determined in arbitration and so not by a court. Someone who has an intention to do X would not typically mean to say something that would thwart that intention. Let me offer an example. Jack intends to have a nice, romantic evening walk with his new girlfriend, Jill. Jack says to Jill that he needs her help with a pail of water. Jill should readily understand that this is a mere pretext for a romantic evening walk. She should not interpret those words as meaning that Jack has a utilitarian mindset and is only asking her to walk with him because he needs the help of her strong and somewhat unfeminine arm. The same words said by her brother, Tom, might however mean precisely only that he needs her help, and worse that he doesn't really need her help, but is annoyed that their mother set him this task and he thinks Jill should suffer along with him up the hill too. I will discuss the commonsense precept that arbitration clauses should be interpreted with the parties' intention and desire to arbitrate in mind by reference to three cases, two from the Singapore Court of Appeal and then one of my own decisions.

7 My first example is the Court of Appeal decision in *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936. This case concerned an arbitration clause where the arbitral reference was prescribed to be the Singapore International Arbitration Centre ("SIAC"), for it to administer the arbitration under International Chamber of Commerce ("ICC") Rules. The question was whether this clause was workable and capable of operation or instead,

"pathological" and so null and void. The Court of Appeal upheld the clause, notwithstanding that it raised practical questions of how the SIAC would administer a set of rules that is larded with references to processes internal to a different institution. On the assumption that parties had deliberately chosen this odd hybrid, it had to be taken that if the SIAC accepted the arbitration for its administration, then what the parties intended was that the arbitration would be administered by the SIAC in the way it thought best corresponded to the ICC Rules. The Court of Appeal made four observations.

(a) An arbitration agreement is to be construed like any other form of commercial agreement, so as to give effect to the intention of the parties as expressed in the document.

(b) By analogy to the principle of effective interpretation, where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars (see Halsbury's Laws of Singapore, vol 2 (LexisNexis, 2003 Reissue, 2003) at para 20.017) so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party."

(c) An arbitration agreement should not be interpreted restrictively or strictly.

(d) A commercially logical and sensible construction is to be preferred over another that is commercially illogical.

8 At [34], the Court of Appeal explained its approach as follows:

> This approach to the interpretation of an arbitration agreement is necessary to uphold the underlying and fundamental principle of

> party autonomy as far as possible in the selection of the kind of arbitration and the terms of the arbitration. Given the inherently private and consensual nature of arbitration, our courts will ordinarily respect the principle of party autonomy and give effect to (workable) agreed arbitration arrangements in international arbitration, subject only to any public policy considerations to the contrary.

9 The next Court of Appeal decision I refer to is that of *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 ("*Mittal v Westbridge*"). This case concerned a shareholders' dispute relating to an Indian company under contracts governed by Indian law with a choice of Singapore as the arbitration seat. Indian and Singapore laws differ when it comes to what types of company disputes are arbitrable.

10 The parties in *Mittal v Westbridge* were shareholders of an Indian-incorporated company founded by Anupam Mittal ("Mittal"), who is a well-known Indian entrepreneur. Westbridge Ventures II Investment Holdings ("Westbridge") is a Mauritian private equity fund that had invested in the company.

11 Under the shareholders' agreement ("SHA"), the governing law was Indian law, and *all* disputes arising between the parties that could not be resolved by good faith discussion were to be referred to arbitration seated in Singapore. At this point, I should mention two things about the wording of the governing law and arbitration clauses. The clause stating the choice of Indian law expressly added the phrase "in all respects". As for the arbitration clause, it did not just make the typical reference of applying to disputes relating to the contract but

specifically also made mention of disputes "relating to the management of the Company".

12 In 2017, Westbridge expressed its wish to exit the company. The parties' relationship soured. In 2021, Mittal commenced proceedings before the National Company Law Tribunal ("NCLT") in Mumbai, India, seeking remedies for corporate oppression ("NCLT Proceedings").

13 In response, Westbridge commenced proceedings in Singapore and obtained an *ex parte* interim anti-suit injunction against Mittal. Mittal then commenced a suit in the Bombay High Court seeking, among other things, a declaration that the NCLT was the only competent forum to hear and decide the disputes raised in the NCLT Proceedings.

14 The Singapore High Court granted a permanent anti-suit injunction against Mittal on the basis that the commencement of the NCLT Proceedings was in breach of the arbitration agreement between the parties. In so finding, the Judge held that subject matter arbitrability is governed by the law of the *seat*, being Singapore law, under which the dispute was arbitrable.

15 On appeal, Mittal submitted that arbitrability is determined by the law of the *arbitration agreement*, and that this was Indian law. The disputes raised in the NCLT Proceedings related to oppression and the mismanagement of the company. Under Indian law, such disputes are not arbitrable.

16 A key issue dealt with by the Court of Appeal was which law governs the issue of arbitrability – is it the law of the *seat* or the *arbitration agreement*. In the process of its determination, the Court of Appeal also commented on the

relationship between arbitrability and public policy. In particular, the Court of Appeal considered that the drafters of the Model Law and past decisions of national courts in various jurisdictions had placed insufficient weight on the importance of public policy in determining questions of arbitrability. Reiterating its *dicta* from the earlier decision of *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*") at [75], the Court of Appeal stated that "the essential criterion of non-arbitrability is whether the subject matter of the dispute is of such a nature as to make it *contrary to public policy* for that dispute to be resolved by arbitration" [emphasis in original].[1] In *Tomolugen*, the Court of Appeal held that a dispute over minority oppression or unfairly prejudicial conduct by the majority in a company is arbitrable even though some of the relief available to a court in such matters, such as winding up, cannot be granted by an arbitrator. The fact that the relief sought might be beyond the power of the arbitral tribunal to grant did not in and of itself make the dispute non-arbitrable. There was nothing to preclude the underlying dispute from being resolved by an arbitral tribunal, with the parties remaining free to apply to the court for the grant of any specific relief which might be beyond the power of the arbitral tribunal to award. In so far as any findings had been made in the arbitration in such a case, the parties would be bound by such findings and would, at least as a general rule, be prevented from re-litigating those matters before the court.

17 Returning to *Mittal v Westbridge*, the Court of Appeal in that case then elaborated that "public policy", as stated in s 11 of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA"), refers not only to Singapore's public policy, but also "extends to foreign public policy where this arises in connection with

[1] *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 at [47].

essential elements of an arbitration agreement".[2] This interpretation of "public policy" is supported by the underlying purpose of the IAA – *ie*, to "facilitate international commercial arbitration based on the principles embodied in the Model Law".[3] The authority of an arbitration agreement derives from parties' consensus. Accordingly, the Court of Appeal held that subject matter arbitrability is determined first by reference to the law of the *arbitration agreement*.

18 Logically, the making of a valid arbitration agreement precedes the choice of seat. The seat is chosen as one of the incidents of the arbitration agreement. If the arbitration agreement is not valid, then there would be no effective choice of seat.

19 The effect of the Court of Appeal's decision is that where a subject matter is non-arbitrable under the law of the arbitration agreement but would be arbitrable under Singapore law, the Singapore court, as the seat court, would not permit the arbitration proceedings to proceed as it would be contrary to foreign public policy to enforce the arbitration agreement.

20 Now what about if the dispute is of a type that is arbitrable under the law governing the arbitration agreement but not under the law of Singapore as the seat? This question did not arise for decision, but the Court of Appeal considered that such a dispute could not proceed to arbitration in Singapore.[4] This is also by virtue of s 11 of the IAA. In the Court of Appeal's judgment, this section limits the determination of disputes by arbitration to those where it is not contrary to Singapore public policy to do so.

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2 *Id*, at [48].
3 *Id*, at [49].
4 *Id*, at [55].

21 This means that for an arbitration to proceed in Singapore it must be arbitrable *both* under the law of the arbitration agreement *and* under the law of Singapore, as the law of the seat – a doctrine of "double arbitrability" if you will.

22 Turning to the proper law of the agreement, the Court of Appeal applied the three-stage test, previously laid out in *BCY v BCZ* [2017] 3 SLR 357 following the English case of *Sulamerica Cia Nacional da Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102. At the first stage, the court considers whether there was an express choice of the law governing the arbitration agreement. At the second stage, if there was no express choice, the court then considers whether there was an implied choice. At the third stage, if there was no express or implied choice of governing law, the court considers which law has the most real and substantial connection with the arbitration agreement.

23 On the question of express choice, the Court of Appeal considered the governing law clause that "[the SHA] and [its] performance shall be governed by and construed in all respects in accordance with the laws of the Republic of India" [emphasis omitted]. The Court of Appeal found that the phrase "in all respects" was insufficient to constitute an express choice for the arbitration agreement as well as the SHA proper. Accordingly, the parties had not expressed a choice of law to govern the arbitration agreement.

24 Turning to implied choice of law to govern the arbitration agreement, this ordinarily follows the express choice of the law governing the contract unless there are circumstances negating that conclusion. Here, the law governing the SHA was Indian law. However, the usual inference to be drawn from this was negated by the fact that applying Indian law would have frustrated the parties'

intention to arbitrate *all* their disputes. The parties had clearly spelt out their desire to arbitrate disputes relating to management of the company. It was a commercial agreement for which the parties had plainly given considerable thought. It would not make sense for the parties to impliedly choose a law to govern their arbitration agreement that would not enable their intention to arbitrate to be fulfilled. The Court of Appeal hence moved to the third stage of the inquiry and found that Singapore law had the most real and substantial connection with the arbitration agreement, given that Singapore had been expressly chosen as the seat. Thus, the proper law of the arbitration agreement was Singapore law.

25 Consequently, the Court of Appeal dismissed the appeal and upheld the grant of the permanent anti-suit injunction on a different legal analysis to that of the court below. In this example, we see the principle of effective interpretation operating in relation to the implied choice of the governing law for an arbitration agreement. Parties were unlikely to have impliedly chosen Indian law to govern the arbitration agreement given that such a choice would thwart their intention to arbitrate disputes relating to management of the company.

26 I cannot leave this decision without mentioning the Court of Appeal's optimistic plea for more thoughtful and considered drafting of arbitration clauses:[5]

> [t]here is no reason why during the contract negotiation process, [the parties and their legal advisors] should not be able to investigate possible differences in public policy between the two systems and craft an arbitration agreement which in its choices of

5 *Id*, at [60].

> proper law and seat would prevent such difficulties from frustrating the parties' desire to settle disputes by arbitration.

27 Till the next time.

28 The third case I turn to is one of my own, *Re Shanghai Xinan Screenwall Building & Decoration Co, Ltd* [2022] 5 SLR 393. There, I dismissed an application to set aside the registration of an award. One of the arguments raised by the applicant was that the parties had agreed that the dispute be referred to a non-existent arbitral institution, namely, the "China International Arbitration Center". As it happened, the respondent submitted the dispute to the China International Economic and Trade Arbitration Commission ("CIETAC"). CIETAC had accepted the arbitral reference and administered the parties' dispute. The applicant did not participate in the arbitration, asserting that it had not been properly notified of it, a separate ground of challenge which did not succeed on the facts. My task was to construe the arbitration agreement between the parties to determine whether CIETAC was right to conclude that it was the selected arbitral institution. I noted that an important principle in construing the agreement was the principle of effective interpretation in the law of arbitration. I had to consider whether parties in fact intended to refer to CIETAC given the similarity in name, or whether they had in mind different institutions. As a matter of commonsense parties would not have deliberately referred knowingly to a non-existent institution so as to both choose arbitration and in the same breath make their choice unworkable. I concluded that the parties intended to resolve their dispute by arbitration, and had CIETAC in mind when naming the arbitral institution to administer their arbitration (at [48]–[54]).

29 I put the point like this in my opening paragraph:

> When I bump into my childhood friend Ben and call him Bill, I am not inventing an imaginary friend, but simply mistaking his name. In the same way, when the name of the arbitral institution in an arbitration agreement does not precisely correspond with that of any existing arbitral institution, it is not that parties have chosen a non-existent institution. Rather, the question is whether they intended the same institution, whether they had in mind different ones or whether it is impossible to tell either way. Only in the latter two cases does the misnomer affect the validity of the arbitration agreement.

30 Students of Roman law will hear the echoes of the question of interpretation beloved of Roman jurists: whether a contract for the sale of a white horse in Blackacre, when there is only a black horse in Whiteacre, may be enforced. *Plus ça change, plus c'est la même chose*.

31 In conclusion, I express the hope that this brief exposition of the principle of effective interpretation has been of value to you and may seed further discussion. Let me also congratulate the organisers of this conference on a terrific day of learning and debate. For those who have travelled to be here this week, I wish you a fruitful and enjoyable time here in Singapore and a safe journey home.