Singapore Court of Appeal rules that “arbitration in Shanghai” naturally refers to arbitral seat

February 3, 2020  Author: Nandakumar Ponniya, Ashish Chugh, Gary Seib, Paul Teo and Philipp Hanusch

The Singapore Court of Appeal recently reversed the ruling of the Singapore High Court in *BNA v BNB and Another* ([2019] SGCA 84). It found that Shanghai, not Singapore, was the parties’
chosen arbitral seat and thus PRC law was the governing law of the arbitration clause. The decision of the Singapore High Court was earlier covered on Global Arbitration News, here.

**Brief background to the appeal**

The dispute arose out of a Takeout Agreement ("TA") between the appellant and the respondents. The appellant buyer failed to make certain payments under the TA to the respondent sellers. The TA stated that it was governed by PRC law. The arbitration clause in the TA provided for disputes to be finally "submitted to the Singapore International Arbitration Centre ("SIAC") for arbitration in Shanghai", but it did not include any provision specifying the proper law of the arbitration clause. The latter governs the formation, validity, effect and discharge of the agreement to arbitrate.

The High Court ruled that the parties implicitly chose Singapore as the arbitral seat and thus Singapore law governed the arbitration clause.

**The Court of Appeal’s decision**

The Court of Appeal disagreed with the High Court and held that “arbitration in Shanghai” should be naturally read as a reference to Shanghai as the seat of the arbitration.

In arriving at its decision, the Court of Appeal accepted that contrary indicia could displace the natural reading that “arbitration in Shanghai” meant that Shanghai was intended to be the seat of the arbitration.

The Court of Appeal considered several indicia raised by the respondent but concluded that on the facts, none of them could be taken into account. First, evidence of the parties’ pre-contractual negotiations, particularly their concern that the arbitration be seated in a neutral forum, i.e. Singapore, was inadmissible because of the parol evidence rule. The Court of Appeal confirmed that the court is bound to apply the parol evidence rule and its exceptions, even in cases arising out of...
an arbitration. Therefore, pre-contractual evidence that had not been admitted before an arbitral tribunal will be inadmissible in subsequent judicial proceedings.

Secondly, that the arbitration clause could potentially be invalid if governed by PRC law was also not considered, as there was no evidence that the parties were even aware that the proper law of the arbitration clause could impact its validity.

Finally, the Court of Appeal regarded the fact that Shanghai is not a law district (as compared to Singapore) as irrelevant, since the court felt that it was common for commercial parties to only specify in their arbitration clause either a city or a country as arbitral seat. Accordingly, where parties had specified only one geographical location in an arbitration clause, and particularly where the choice had been expressed as “arbitration in [that location]”, that ought most naturally to be construed as a reference to the parties’ choice of seat.

**Implications of this ruling**

The Court of Appeal concluded that the “parties’ manifest intention to arbitrate is not to be given effect at all costs.” If parties choose to arbitrate in a certain way, in a certain place and under the administration of a certain arbitral institution, then those choices have to be given effect by a process of construction. The words chosen have to be given their natural meaning unless there is sufficient contrary indicia to displace that reading. If the result of this process is that the arbitration clause is unworkable, then the parties will be bound by the consequences of their decision.

The Court of Appeal’s decision is yet another important reminder for parties to carefully lay out the groundwork at the contracting stage for a valid arbitration in the future by clearly stating their intention in the arbitration clause, including its proper law, the seat and arbitral institution. While properly drafted arbitration clauses will leave little room for disputes over their construction, poorly drafted arbitration clauses may result in the invalidity of the arbitration clause or unenforceability of an award. If the arbitration clause is invalid, the parties might find themselves before one or more national courts which is arguably what the parties would have sought to avoid when adopting an arbitration clause in their contract in the first place.
Conclusion

This ruling is an important reminder to all parties to ensure that their arbitration clauses explicitly and unambiguously specify both the arbitral seat and proper law of the arbitration clause. Lengthy litigation and the costs involved are avoidable if proper and adequate care is taken at the initial contracting stage, towards drafting an arbitration clause which expressly and unambiguously specifies the arbitral seat and proper law of the arbitration clause.

Nandakumar Ponniya

Nandakumar Ponniya is a Principal in the Dispute Resolution Practice Group Baker & McKenzie in Singapore. Nandakumar is seasoned in international arbitration with a focus on building, infrastructure and construction law. He regularly advises on infrastructure projects such as rail systems, oil and gas facilities, and utilities plants, as well as commercial and residential developments across the Asia Pacific region. Nandakumar can be reached at Nandakumar.Ponniya@bakermckenzie.com and +65 6434 2663.

Ashish Chugh

Ashish Chugh is a Local Principal in the Dispute Resolution Practice Group of Baker & McKenzie in Singapore. Ashish represents clients in a range of industries including aviation, commodities, construction, hospitality, investment funds, office stationery, oil and gas, power, shipping, technology and telecommunications. He has broad experience in international arbitrations with seats in Dubai, Hong Kong, India, London, Malaysia, New York and Singapore under a variety of ad hoc and institutional arbitration rules, including AAA, DIFC-LCIA, HKIAC, ICC, KLRCA, LCIA, SIAC and UNCITRAL. Ashish is experienced in supervising, coordinating and managing complex court-based commercial litigation in Asia Pacific. Ashish regularly speaks on topical dispute resolution issues at leading industry conferences, events and in-house client seminars throughout Asia, particularly India. He actively speaks cutting-edge technology such as distributed ledger technology (including
blockchain) and smart contracts. Ashish also receives arbitrator appointments. Ashish can be reached at Ashish.Chugh@bakermckenzie.com and +65 6434 2233.

Gary Seib

Gary Seib is a partner in the Dispute Resolution team at Baker McKenzie Hong Kong. Gary previously served as the global chair of the Firm's Dispute Resolution practice (2009 - 2014) and before that as Asia Pacific chair of the practice (2006 - 2009). He is one of the first lawyers to be granted Solicitor Advocate status before the Hong Kong courts and is ranked as Eminent Practitioner and one of the leading lawyers in his field by top legal directories, including Chambers Asia, Chambers Global, Asia Pacific Legal 500 and IFLR 1000. Gary has written numerous articles for publications in Australia and Hong Kong on topics ranging from insolvency and corporate rescue, corporate compliance investigations and enforcement to fraud risk, insider trading and market misconduct. He has also written and spoken extensively on corporate compliance, risk management and cross-border dispute resolution. Gary can be reached at Gary.Seib@bakermckenzie.com and +85228462112.

Paul Teo

Paul Teo is a partner at Baker McKenzie in Hong Kong. Paul Teo leads Baker McKenzie's Arbitration Practice in Greater China. He handles disputes related to corporate and commercial transactions, energy, mining and resources, infrastructure and construction, offshore and marine, and telecommunications. Prior to joining Baker McKenzie, he jointly led a top-tier global law firm's international arbitration practice in Southeast Asia. Paul Teo is regularly appointed as arbitrator. He is a Chartered Arbitrator and is listed on the Presidential Panel of Arbitrators of the Chartered Institute of Arbitrators and he serves on the panels of many leading arbitral institutions. Paul Teo has 20 years of experience advising and representing parties in arbitration, adjudication, alternative dispute resolution including negotiation, mediation and med-arb, and litigation proceedings in Asia and Europe. He has advised and acted on many landmark projects in Hong Kong, China, Macau, Taiwan and the rest of the region, including Mongolia, Philippines, Vietnam, Thailand, Malaysia, Singapore, Indonesia, India and Bangladesh. Further afield, He has particular experience of acting
for clients on disputes arising out of major projects in the Gulf Region, Central Asia, Africa and Latin America. Paul Teo can be reached at Paul.Teo@bakermckenzie.com and + 852 2846 2581.

Philipp Hanusch

Philipp Hanusch is a Special Counsel at Baker McKenzie in Hong Kong. His practice focuses on international commercial arbitration. He has represented parties in arbitrations under the rules of the Hong Kong International Arbitration Centre (HKIAC), the International Chamber of Commerce (ICC), the China International Economic Trade Arbitration Commission (CIETAC), the Vienna International Arbitral Centre (VIAC), and the International Centre for Dispute Resolution (ICDR), and in ad hoc arbitrations under the UNCITRAL Arbitration Rules. Philipp Hanusch can be reached at Philipp.Hanusch@bakermckenzie.com and +852 2846 1665.