Baker McKenzie.

Arbitration
Singapore & Hong Kong

Client Alert

January 2020

For more information, please contact:

Singapore

Nandakumar Ponniya
Principal
+65 6434 2663
Nandakumar.Ponniya@bakermckenzie.com

Ashish Chugh
Local Principal
+65 6434 2233
Ashish.Chugh@bakermckenzie.com

Hong Kong

Gary Seib
Partner
+ 852 2846 2112
Gary.Seib@bakermckenzie.com

Paul Teo
Partner
+ 852 2846 2581
Paul.Teo@bakermckenzie.com

Philipp Hanusch
Special Counsel
+ 852 2846 1665
Philipp.Hanusch@bakermckenzie.com

Court of Appeal rules that "arbitration in Shanghai" naturally refers to arbitral seat

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. You can read our report of the High Court's decision in our previous client alert here. 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.

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 dispute is part of a recent trend of cases where complex and lengthy litigation have occurred over poorly drafted arbitration clauses (see, for example, our recent client alert on *ST Group Co Ltd and others v Sanum Investments Limited and another appeal* [2019] SGCA 65). These cases and the costs involved were largely avoidable had proper and adequate care been taken at the initial contracting stage towards drafting an arbitration clause which expressly and unambiguously specified the arbitral seat and proper law of the arbitration clause.

For more information on this ruling or any advice on dispute resolution clauses, please do not hesitate to reach out to the team.

www.bakermckenzie.com

Baker McKenzie Wong & Leow
8 Marina Boulevard
#05-01 Marina Bay Financial Centre
Tower 1
Singapore 018981

Tel: +65 6338 1888
Fax: +65 6337 5100