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Singapore Court determines proper law of arbitration clause

In its recent decision in *BNA v BNB and another* [2019] SGHC 142, the Singapore High Court had to determine the law governing an arbitration clause in order to decide whether or not the tribunal in the arbitration lacked jurisdiction because the arbitration clause was invalid. The decision is a strong reminder for parties to give careful attention to the drafting of their arbitration clauses and to state their intentions clearly.

Background

The parties' dispute arose out of a Takeout Agreement ("**TA**"). The agreement expressly stated that it was governed by PRC law. The arbitration clause provided for disputes to be finally "submitted to the Singapore International Arbitration Centre ("**SIAC**") for arbitration in Shanghai", which would be conducted in accordance with the SIAC Arbitration Rules. However, the arbitration clause did not contain an express choice of law provision.

The defendants commenced SIAC arbitration proceedings against the plaintiff. The plaintiff challenged the tribunal's jurisdiction on the basis that the arbitration agreement was invalid under PRC law. PRC law prohibits a foreign arbitral institution such as the SIAC from administering PRC-seated arbitration. The majority of the tribunal held that the tribunal had jurisdiction in the arbitration as the arbitration was seated in Singapore and the arbitration clause was thereby governed by Singapore law. PRC law was irrelevant to the question of jurisdiction.

The plaintiff commenced proceedings in Singapore under section 10(3) of the International Arbitration Act seeking a declaration that the tribunal lacked jurisdiction as the arbitration clause was invalid under PRC law.

The Singapore High Court's Decision

In determining the proper law of the arbitration clause, the Court applied the three-stage inquiry found in the English Court of Appeal decision in *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102. It comprises the following stages:

1. Have the parties expressly chosen the proper law of their arbitration agreement?
2. If not, have the parties chosen the proper law impliedly?
3. If not, with what system of law does their arbitration agreement have its closest and most real connection?

On the first stage, the Court held that the mere fact that the parties expressly chose PRC law to govern the TA was not enough, in itself, to constitute an express choice of law for the arbitration clause. The first stage would only be satisfied if the parties had expressly provided that the law of the arbitration clause was PRC law.

On the second stage, the Court found that the starting point was that the proper law of the arbitration clause was PRC law being the proper law of the TA but that the parties had also chosen Singapore to be the seat of arbitration. However, since the Court accepted that it was likely that the arbitration clause was invalid if governed by PRC law, it found that the strong indication in favour of PRC law as the proper law of the arbitration clause was displaced in favour of Singapore law.

In determining the seat of arbitration chosen by the parties, the Court found that the arbitration clause referred to two geographical locations, namely Singapore and Shanghai. The arbitration clause did not expressly state whether Shanghai was the legal seat or merely the venue. The seat determines which law governs the arbitration proceedings and which courts supervise them. By contrast, the factual venue is merely the geographical location in which hearings and other proceedings take place.

The Court went on to note that the SIAC Rules, which had been incorporated into the arbitration clause by reference, provided that in the absence of a contrary agreement by the parties or a contrary determination by the tribunal, the seat of any arbitration under the SIAC Rules was Singapore. The Court concluded that the express reference to the SIAC Rules was the clearest possible manifestation of the parties' intention to have all future arbitrations under their arbitration clause seated in Singapore.

Notably, the Court placed significance on the fact that the parties' arbitration clause merely referred to Shanghai, being a city, instead of the PRC, being a "law district" which could be construed as a reference to a venue rather than a seat. The Court contrasted this with the (indirect) reference to Singapore, a law district, as the seat under the SIAC Rules.

Since the Court concluded on the second stage that Singapore law was the proper law of the arbitration clause, it was unnecessary to go to the third stage. Nonetheless, the Court noted that if had to analyse the third stage, it would have concluded that the arbitration clause had the closest and most real connection with Singapore law.

What this means for you

It seems that the Court's findings as to the parties' agreement on Singapore as a seat and Shanghai as a factual venue were strongly driven by the fact that the arbitration clause was likely to be invalid if governed by PRC law. It remains to be seen whether this outcome will be upheld on appeal.

In any event, the problems that arose in this case can be avoided as follows:

1. Designate the proper law of the arbitration clause. The law of the arbitration clause governs important matters such as the validity and interpretation of the clause. Absent an express designation, it will be for a tribunal or court to determine the proper law. This can be a complex, time-consuming and costly exercise that should be avoided.
2. Designate the seat of arbitration and do so in clear terms: e.g., "*The seat of arbitration shall be Singapore*". Avoid mere references to geographical locations without designating them as the "seat": e.g., "*arbitration in Shanghai*".

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