# Unpacking the Singapore Court of Appeal's Determination of Proper Law of Arbitration Agreement in BNA v BNB

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In *BNA v BNB and another [2019] SGCA 84* ("***BNA***"), the Singapore Court of Appeal overturned the High Court's ruling and provided authoritative guidance on the applicable principles in determining the proper law of an arbitration agreement.

I discussed the High Court's decision and the factual background in an earlier post. This post unpacks the significance and ramifications of the findings that the Court of Appeal made in *BNA*, as well as those that the Court arguably could have made, but ultimately refrained from making.

## Court of Appeal's decision

The Court of Appeal allowed the appeal, finding that Shanghai was the arbitral seat, and that PRC law should be the implied proper law of the arbitration agreement (at [4] and [103]). In reaching this outcome, the court applied a three-stage analysis:

- the parties had not made an express choice of law for the arbitration agreement, as an express choice of the proper law of the underlying contract does not, in and of itself, also constitute a choice of the proper law of the arbitration agreement (at [56]–[61]);
- in the absence of an express choice of the proper law of the arbitration agreement, the implied choice of the proper law should presumptively be the proper law of the underlying contract, which is PRC law in the present case (at [47], [62] and [63]);
- the High Court erred in finding that the implied choice of PRC law was the law of the seat, being Singapore law, because: (i) the arbitration agreement, in providing for "arbitration in Shanghai", should naturally be read to be a choice of Shanghai as the seat (and not merely the venue) of the arbitration (at [65]–[69] and [91]–[93]); (ii) there having been a choice of the seat, Rule 18.1 of the SIAC Rules 2013, which provides that in the absence of the parties' agreement, the default seat of the arbitration shall be Singapore, does not come into play (at [64]); and (iii) there was nothing to displace the natural reading of the phrase "arbitration in Shanghai" (at [70]–[90]); and
- as the implied choice of the proper law has been found to be PRC law, there was no need to consider the third stage of the three-stage analysis, which considers the system of law with which the arbitration agreement has the "closest and most real connection" (at [94]).

**Analysis**

I discuss three significant issues raised by the Court of Appeal.

***Endorsing the proper law of the underlying contract as presumptive implied choice***

First, in applying the three-stage analysis, the Court of Appeal expressly endorsed the approach taken in *Sulamerica Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A.* [2012] EWCA Civ 638 ("*Sulamérica*") that in the absence of an express choice of the proper law of the arbitration agreement, the implied choice of law should presumptively be the proper law of the underlying contract (the

"***Sulamérica* Presumption**").

Previously, there had been a divergence in Singapore authorities in this regard. Whereas the Assistant Registrar in *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* favoured the law of the seat as the presumed implied choice of the proper law of the arbitration agreement (at [13]–[15]), the High Court in *BCY v BCZ* preferred the proper law of the underlying contract (at [49]–[65]). While recent High Court authorities appeared to have coalesced in support of the *Sulamérica* Presumption (see *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* at [31] and *BMO v BMP* at [38] and [39]), this technically remained an open question in Singapore law, given that Singapore's apex court had thus far not expressly opined on which approach should apply.

Notwithstanding that it was common ground in *BNA* that the *Sulamérica* Presumption should apply (*BNA* at [47] and [62]), the fact remains that the Court of Appeal finally ruled conclusively in favour of the *Sulamérica* Presumption.

### *Clarifying proper interpretation of the reference to a city*

Second, in holding that the natural meaning of the phrase "arbitration in Shanghai" should be that Shanghai is the seat (and not the venue) of the arbitration, the Court of Appeal introduced welcome clarity to the manner in which arbitration clauses containing such wording should be interpreted.

This interpretation accords with common sense. As the Court rightly pointed out, given the legal significance of a seat of an arbitration (which determines, among other things, the system of law that governs the arbitral process, the court having supervisory jurisdiction over the arbitration, and the jurisdiction where an award is considered to have been made), as compared to its venue (where the tribunal merely holds its hearings and meetings), it makes eminent sense for an arbitration clause to be read as having selected a seat instead of a venue where the clause specifies only a single geographical location.

This interpretation also reflects the more commercially sensible approach. This is clear from the sheer prevalence of commercial parties specifying cities (and not countries) in arbitration agreements, as seen from the case authorities (at [66]–[68]) and the model clauses of arbitral institutions (at [92]) referred to by the

Court in its analysis.

### *Declining to consider effect of PRC law on the arbitration agreement*

The Court of Appeal found that the invalidating effect of PRC law on the arbitration agreement was not a relevant consideration in determining the proper law of the arbitration agreement, given that there was no evidence that the parties were at least aware of the impact that the choice of PRC law could have on the validity of the arbitration agreement (at [90]). This holding warrants scrutiny for two reasons.

First, this approach appears contrary to the approach adopted in English law. In *Sulamérica*, the English Court of Appeal held that the *Sulamérica* Presumption may be displaced by two factors: first, the choice of a seat of arbitration that points away from the main contract's choice of law (at [29]); and second, the consequences that follow from the main contract's choice of law – specifically, where the proper law of the underlying contract would undermine the parties' clear intention to arbitrate, the *Sulamérica* Presumption will be rebutted (at [30]). This approach has been endorsed by the Singapore High Court in *BCY* (at [74]).

While the Court of Appeal suggests that if there had been evidence of the parties' awareness of the effect of PRC law on the arbitration agreement, then it would have been possible for the Court to take into account the potential invalidating effect of PRC law, this still appears to be a departure from the approach in *Sulamérica* and *BCY*. The courts in both of these decisions did not appear to require such evidence when opining on the effect of the consequences flowing from the main contract's choice of law on the parties' implied choice of proper law of the arbitration agreement.

Second, the Court of Appeal's approach appears problematic as a matter of principle. The requirement that parties must be shown to have considered, or at least be aware, of the invalidating effect of a particular choice of law on the arbitration agreement appears to be inconsistent with the fundamental consideration underlying the finding that the potential invalidating effect of a main contract's choice of law can displace the *Sulamérica* Presumption. This consideration is that in a situation where parties have clearly evinced an intention to refer disputes to arbitration, parties should not be taken to have impliedly chosen for the arbitration agreement to be governed by a system of law that

invalidates the arbitration agreement and nullifies their intention to arbitrate. Hence, when parties have evinced a clear intention to arbitrate in the form of an operative arbitration agreement that is capable of being performed, specific evidence of the parties' contemplation of the potential invalidating effect of the main contract's choice of law is arguably unnecessary.

As such, assuming that PRC law will invalidate the present arbitration agreement, the Court of Appeal arguably should not have concluded that PRC law was the implied proper law of the arbitration agreement, given that the *Sulamérica* Presumption has been rebutted. The Court ought to have gone on to consider the third stage of the three-stage analysis. While this stage would likely yield the same substantive outcome (*i.e.*, that PRC law is the proper law of the arbitration agreement), the Court should have embarked on this inquiry to preserve analytical clarity between the second and third stages of the three-stage analysis.

## Conclusion

The Court of Appeal's decision in *BNA* is a landmark judgment in many ways, with the apex court settling conflicting strands of authorities regarding the application of the three-stage analysis, and clarifiying a key point of interpretation that might have otherwise continued to promote uncertainty in the Singapore arbitration scene. However, as regards the other findings that the Court of Appeal declined to make, it remains to be seen if future corams of the apex court would reconsider the approach taken in *BNA*, if such an opportunity so arises.