IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 84

Civil Appeal No 159 of 2018

Between

BNA

… *Appellant*

And

(1) BNB
(2) BNC

… *Respondents*

In the matter of Originating Summons No 938 of 2017

Between

BNA

… *Plaintiff*

And

(1) BNB
(2) BNC

… *Defendants*

GROUNDS OF DECISION

[Arbitration] — [Agreement] — [Governing law]
[Arbitration] — [Arbitral tribunal] — [Jurisdiction]

TABLE OF CONTENTS

INTRODUCTION **1**

BACKGROUND **3**

THE PARTIES 3

THE TAKEOUT AGREEMENT AND ADDENDUM 3

THE ARBITRAL PROCEEDINGS **5**

THE DECISION BELOW **7**

THE PARTIES' CASES **12**

ISSUES TO BE DETERMINED **14**

THE BCY FRAMEWORK **14**

SIGNIFICANCE OF THE PROPER LAW OF THE ARBITRATION AGREEMENT **16**

ISSUE 1: DID THE PARTIES MAKE AN EXPRESS CHOICE OF PROPER LAW? **19**

ISSUE 2: DID THE PARTIES MAKE AN IMPLIED CHOICE OF PROPER LAW? **21**

THE MEANING OF THE PHRASE "ARBITRATION IN SHANGHAI" 22

WHETHER CONTRARY INDICIA POINT TO SHANGHAI BEING ANYTHING OTHER THAN THE SEAT 26

The admissibility of evidence of the parties' pre-contractual negotiations *26*

The effects of PRC law on the arbitration agreement *33*

The relevance of Shanghai not being a law district *34*

Version No 2: 27 Oct 2020 (22:41 hrs)

SUMMARY ON THE SEAT OF THE ARBITRATION 35

ISSUE 3: THE COURT'S ORDERS IN THE APPEAL 36

CONCLUSION 39

Version No 2: 27 Oct 2020 (22:41 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

BNA
v
BNB and another

[2019] SGCA 84

Court of Appeal — Civil Appeal No 159 of 2018
Sundaresh Menon CJ, Judith Prakash JA and Steven Chong JA
15 October 2019

27 December 2019

Steven Chong JA (delivering the grounds of decision of the Court):

Introduction

1 An arbitration agreement by definition is the product of negotiations between the parties. By incorporating an arbitration agreement into an underlying contract, the parties contemplate that should a dispute arise, it should be referred to arbitration strictly in accordance with the terms of the arbitration agreement and no more.

2 However, it does not follow that the parties' manifest intention to arbitrate must always be given effect to come what may. Ultimately, whether the parties' intention to arbitrate should be enforced invariably depends on the wording and proper construction of the arbitration agreement. What must not be overlooked is that arbitration agreements, despite the best of intentions of the parties, can at times be invalid for any one of a variety of reasons. After all, the

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 38 (entered into force 7 June 1959, accession by Singapore 21 August 1986) ("the New York Convention") expressly contemplates that arbitration agreements can be "*null and void, inoperative or incapable of being performed*".

3 Within the text of any arbitration agreement, parties may expressly provide for, *inter alia*, a seat for the arbitration, the arbitral institution, the arbitral rules and the governing law of the arbitration agreement. These choices would be informed by what each party perceives to be most advantageous or favourable to it. It is therefore not uncommon that the eventual text of an arbitration agreement involves some *compromise* between the parties' preferred positions.

4 This appeal arose from a dispute over the proper interpretation of an arbitration agreement that was indeed the product of negotiations and compromise between the parties. It came before the Singapore courts because the majority of the tribunal in its jurisdictional decision found Singapore to be the seat of the arbitration. This finding was affirmed by the High Court. We heard the appeal on 15 October 2019 and allowed it to the extent that we found that Shanghai was the seat of the arbitration instead. The impact of our decision made it inappropriate for us to decide whether the arbitration agreement was invalid under what we determined to be the governing law of the arbitration agreement, *ie*, the law of the People's Republic of China (the "PRC"). In our view, any such determination should rightly be decided by the relevant PRC court as the seat court applying PRC law.

5 At the time of giving our decision we stated that we would explain our decision with full grounds. This we do now.

Version No 2: 27 Oct 2020 (22:41 hrs)

Background

The parties

6 The appellant ("BNA") is a corporation organised and existing under the laws of the PRC, with its principal place of business in the PRC. It is the buyer under the Takeout Agreement.

7 The first respondent ("BNB") is a company organised and existing under the laws of the Republic of Korea, with its principal place of business in the Republic of Korea. It was the original seller under the Takeout Agreement.

8 The second respondent ("BNC") is a company organised and existing under the laws of the PRC, with its principal place of business in the PRC. It took on BNB's rights and obligations under the Takeout Agreement by way of an addendum to the Takeout Agreement.

The Takeout Agreement and Addendum

9 The Takeout Agreement was a contract for the sale of industrial gases ("the products") by the first respondent, BNB, to the appellant, BNA. BNA and BNB entered into the Takeout Agreement on 7 August 2012.

10 On 1 February 2013, BNA, BNB and BNC entered into an addendum to the Takeout Agreement (the "Addendum"). Clause 2 of the Addendum relevantly provided that "[BNA, BNB and BNC"] agree that the rights and obligations of [BNB] under the [Takeout Agreement] [would] be fully assigned to [BNC] effective from February 1, 2013". The Addendum was also specifically provided to be "an indivisible part of the [Takeout Agreement]", with the Addendum to prevail in the event of any conflict or discrepancy between it and the Takeout Agreement. Like the Judge below, we use the term

Version No 2: 27 Oct 2020 (22:41 hrs)

"Takeout Agreement" hereafter in this judgment to refer to the single indivisible agreement comprising both the original Takeout Agreement and the Addendum.

11 The primary obligation of BNA as the buyer under the Takeout Agreement was to buy specified quantities of the products from, at first, BNB, and later, BNC. The Takeout Agreement required BNA to pay the respondents on a monthly basis for the products purchased and delivered. The products which are the subject of the Takeout Agreement were manufactured in the PRC by the respondents. The products were to be sold and transported from the respondents' facilities to the appellant's facilities. The relevant facilities were all located in the PRC.

12 The critical provision in the Takeout Agreement is Art 14:

> ARTICLE 14: DISPUTES
>
> 14.1 This Agreement shall be governed by the laws of the People's Republic of China.
>
> 14.2 With respect to any and all disputes arising out of or relating to this Agreement, the [p]arties shall initially attempt in good faith to resolve all disputes amicably between themselves. If such negotiations fail, it is agreed by both parties that such disputes shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai, which will be conducted in accordance with its Arbitration Rules. The arbitration award shall be final and binding on both [p]arties.

As the Judge below noted, Art 14 serves two purposes. It records the parties' express choice of PRC law to govern the Takeout Agreement and it contains the parties' arbitration agreement.

Version No 2: 27 Oct 2020 (22:41 hrs)

The arbitral proceedings

13 BNA failed to make the necessary payments under the Takeout Agreement, and the respondents filed a Notice of Arbitration dated 2 March 2016. BNA responded by challenging the tribunal's jurisdiction.

14 The SIAC appointed a tribunal comprising three arbitrators. The tribunal first dealt with the appellant's challenge to its jurisdiction.

15 The crux of the jurisdictional dispute before the tribunal was whether the proper law of the arbitration agreement was Singapore law, or PRC law. The appellant took the position that PRC law was the proper law, but the respondents contended that it was Singapore law instead. The appellant argued that if PRC law was the proper law of the arbitration agreement, the arbitration agreement would be invalid. This was so for two reasons. First, because Shanghai was the seat of the arbitration, and PRC law did not permit a foreign arbitral institution such as the SIAC to administer a PRC-seated arbitration. Second, because the dispute was a purely domestic dispute, and PRC law did not permit a foreign arbitral institution such as the SIAC to administer such a dispute. It followed that the tribunal therefore could not have jurisdiction if PRC law was the proper law. We foreshadow that the potentially invalidating effect of PRC law on the arbitration agreement remained at the heart of the jurisdictional challenge in the High Court, and before us in the appeal as well.

16 The tribunal gave its decision on jurisdiction on 18 July 2017. The majority ruled that the tribunal *did* have jurisdiction. The dissenting arbitrator took the view that the tribunal did not.

17 It will suffice for us to make some brief observations of the reasons provided by the majority and the minority.

Version No 2: 27 Oct 2020 (22:41 hrs)

18 The majority's decision reveals a deep concern that it should find as the proper law of the arbitration agreement a law that would not invalidate the arbitration. After examining some authorities dealing with the "validation principle" and the principle of "effective interpretation", the majority summarised those authorities as standing for an overarching principle: "it makes no commercial or logical sense for parties to intentionally select a law to govern an arbitration agreement which would then invalidate it". This drove the majority to find Singapore to be the seat of the arbitration. The reference to Shanghai in Art 14.2 was insufficient to make it the seat of arbitration, because if Shanghai were the seat, PRC law would apply, and if PRC law applied, the arbitration agreement would be exposed to the risk of being held invalid and illegal. To avoid the possibility of the parties' manifest intention to arbitrate their dispute being nullified, the majority took the view that the reference to Shanghai was intended to be a reference to the venue of the arbitration. Singapore, instead, was the seat.

19 The majority accepted that the governing law of the Takeout Agreement, PRC law, would presumptively be the proper law of the arbitration agreement as well. But it considered that this presumptive choice of PRC law was displaced by Singapore law, because the application of PRC law might invalidate the arbitration agreement. On the other hand, the arbitration agreement would be valid if Singapore law, as the law of the seat, governed the arbitration agreement instead. The majority thus concluded that Singapore law was the proper law of the arbitration agreement.

20 The dissenting arbitrator issued a separate opinion. Her view was that Shanghai was the seat of the arbitration, and there was nothing to displace PRC law as the proper law of the arbitration agreement. It was significant to her that this dispute bore multiple connections to the PRC, in that the Takeout

Version No 2: 27 Oct 2020 (22:41 hrs)

Agreement was concluded in the PRC; the products were manufactured, supplied and delivered in the PRC; and the place of performance was the PRC. Further, the parties had expressly chosen PRC law as the applicable law governing the Takeout Agreement in Art 14.1. This choice naturally extended to the arbitration agreement as well, because the parties had specifically chosen arbitration "in Shanghai" in Art 14.2. The reference to the SIAC did not change the analysis; the domicile or nationality of an arbitral institution was irrelevant in the proper law analysis.

The decision below

21 The appellant applied to the High Court of Singapore for a declaration that the tribunal lacked jurisdiction to hear the dispute. This application was brought under s 10(3) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), which permits any party to apply to the High Court to challenge a tribunal's decision on jurisdiction.

22 The application was duly heard by a single Judge in the High Court in June and August 2018. The Judge dismissed the jurisdictional challenge in August 2018, giving brief oral grounds, and later supplemented those grounds with full written grounds on 1 July 2019 in *BNA v BNB and another* [2019] SGHC 142 ("the GD").

23 It was common ground before the Judge that the appropriate legal framework for determining the proper law of an arbitration agreement was the three-stage framework set out by the High Court in *BCY v BCZ* [2017] 3 SLR 357 ("*BCY*"). The Judge agreed and applied the *BCY* framework in his decision. Before he did so, however, he disposed of four preliminary points. We will revisit some of these in our judgment, so we briefly set them out here for context.

Version No 2: 27 Oct 2020 (22:41 hrs)

24 The Judge considered the respondents' invitation to him to rely on pre-contractual negotiations as evidence that the parties had intended for arbitration at a "neutral" seat, which the respondents contended meant Singapore, and not Shanghai. The respondents had not put forward the documents containing the parties' pre-contractual negotiations in the jurisdictional challenge before the tribunal, but sought to rely on them to buttress their case before the Judge. The Judge refused this invitation. In his view, the entire agreement clause at Art 16.3 of the Takeout Agreement precluded reliance on any pre-contractual negotiations: GD at [41].

25 The Judge rejected the respondents' submissions that there existed a specialised or unique principle of effective interpretation applicable only to arbitration agreements that required him to give the arbitration agreement in Art 14.2 an interpretation which, at the least, kept it alive. In his view, such a principle required two competing interpretations before it could apply; further, it had the nakedly instrumental objective of ensuring an arbitration agreement was effective: GD at [47] and [48].

26 The Judge also rejected the applicability of the validation principle in Singapore law. The validation principle provides that "if an international arbitration agreement is substantively valid under any of the laws that may potentially be applicable to it, then its validity will be upheld, even if it is not valid under any of the other potentially applicable choices of law": GD at [51]. The Judge considered that adopting the validation principle was impermissibly instrumental (at [53]); could be inconsistent with the parties' intentions (at [55]); was unnecessary because Singapore law already endorsed the *ut res magis* principle (at [62]); and could create problems at the enforcement stage (at [65]).

Version No 2: 27 Oct 2020 (22:41 hrs)

27 Finally, the Judge considered that the doctrine of separability applied even in this case, where the validity of the main contract (the Takeout Agreement) had not been challenged, to allow the arbitration agreement to stand apart from the Takeout Agreement and for each to have different governing laws. The Judge considered that separability also applied because the governing law clause of the Takeout Agreement, into which the arbitration agreement was integrated, operated to render the arbitration agreement invalid: GD at [73]–[74]. Thus, a broader reading of the doctrine of separability was necessary to save the arbitration agreement from being made invalid, and, correspondingly, to give effect to the parties' manifest intention to arbitrate their disputes: GD at [76].

28 The Judge then turned to apply the three-stage *BCY* framework. The first stage of the approach required the Judge to examine if the parties had expressly chosen a law to govern the arbitration agreement. The Judge considered that the parties had not made any such express provision. They had only expressly provided in Art 14.1 that PRC law was the proper law of the Takeout Agreement, but this did not by itself mean that PRC law was also the law of the arbitration agreement: GD at [80].

29 The Judge therefore had to turn to the second stage of the *BCY* framework, which required him to consider whether the parties had instead made an *implied* choice of proper law for the arbitration agreement. As is apparent from the GD itself, the Judge devoted the bulk of his analysis to this stage of the framework, but for convenience we consider that the Judge's decision can essentially be reduced to two steps.

30 The Judge found that Singapore was the seat of the arbitration. He considered that the phrase "arbitration in Shanghai" in Art 14.2 did not mean

Version No 2: 27 Oct 2020 (22:41 hrs)

that Shanghai was the seat of arbitration. Although the mere reference to a geographical location might have been sufficient in previous cases to make that location the seat of the arbitration, this was not a question to be resolved by resort to the precedents: GD at [98]. The parties had expressly incorporated the Arbitration Rules of the Singapore International Arbitration Centre (5th Edition, 2013) ("the SIAC Rules") as the relevant arbitral rules for their arbitration, and Rule 18.1 of the SIAC Rules provided that in the absence of parties' express provision, the default seat would be Singapore. This meant that the arbitration agreement in fact referred to two geographical locations, Shanghai and Singapore. Given that Rule 18.1 explicitly provided that the *seat* of an arbitration would, in the absence of express selection by the parties, be Singapore, the Judge interpreted "arbitration in Shanghai" to mean the selection of Shanghai as the *venue* of the arbitration: GD at [109]. The Judge found further support for this conclusion from the fact that the arbitration agreement in Art 14.2 did not refer to arbitration in the PRC, but instead only referred to "arbitration in Shanghai". The PRC was a law district, but Shanghai was only a city and not a law district. Because Singapore *was* a law district, and Shanghai was not, the Judge considered that the reference to Shanghai was more naturally construed as a reference to a venue rather than a seat: GD at [110].

31 As he found Singapore was the seat, the Judge held that Singapore law as the law of the seat could displace the implied choice of PRC law as the governing law of the arbitration agreement. The Judge recognised that it was not the mere fact that the law of the seat (Singapore law) was different from the governing law of the Takeout Agreement (PRC law), that the latter would be displaced. This followed from the statement of principle in *BCY* that the starting point is that the governing law of the substantive contract – in this case, PRC law – was the parties' implied choice as the proper law of their arbitration agreement. He considered that this was an appropriate case, however, for PRC

Version No 2: 27 Oct 2020 (22:41 hrs)

law to be displaced in favour of Singapore law because it was likely that the parties' arbitration agreement would be invalid if PRC law was its proper law: GD at [116]. On the other hand, the tribunal would have jurisdiction to hear the dispute under Singapore law. The Judge thus held that Singapore law was the proper law of the arbitration agreement, dismissed the appellant's jurisdictional challenge, and affirmed the majority's decision that the tribunal did have jurisdiction.

32 Under s 10(4) of the IAA, no appeal shall lie from a decision of the High Court on a s 10(3) IAA jurisdictional challenge except with leave of the High Court. The Judge did, however, grant the appellant leave to appeal to us. He explained that it was somewhat arbitrary that the mere choice of the SIAC's arbitral rules was decisive in this dispute, when the default provision making Singapore the seat was almost certainly an unintended effect of the selection of the SIAC rules: GD at [122]. He also considered that the three-stage inquiry might operate to give effect to the parties' intentions not at the time they entered into the arbitration agreement, but at the time the arbitration was commenced. The Judge observed that if PRC law had changed from the time the parties concluded the Takeout Agreement, such that the arbitration agreement would not have been invalid under PRC law, then it was "virtually certain" that no jurisdictional challenge would have been mounted, and the parties would have arbitrated in the PRC, with PRC law as the proper law of the arbitration agreement. It might therefore be said that in such a case, the three-stage inquiry, by following the shifting state of the law and transforming what would have been invalid at the time the parties contracted to instead be valid, was simply the validation principle in disguise: GD at [123].

Version No 2: 27 Oct 2020 (22:41 hrs)

The parties' cases

33 The parties agreed in the appeal, as they had before the Judge, that the *BCY* three-stage framework was the proper framework for determining the proper law of the arbitration agreement. Their arguments were therefore chiefly directed at addressing each of the three stages of the framework.

34 The appellant's case was that the dispute could be resolved at the first stage of the *BCY* framework. Its position was that an express choice of PRC law to govern the arbitration agreement had been made by the parties, because Art 14.1 expressly provided that the Takeout Agreement "shall be governed by the laws of the [PRC]", and Art 14 was a provision entitled "Disputes", thus extending that choice of law not only to the substantive contract, *ie*, the Takeout Agreement, but also to the arbitration agreement in Art 14.2. The appellant also disagreed with the Judge that separability had any role to play when neither party challenged the validity of the Takeout Agreement.

35 Alternatively, the appellant contended that the parties had made an implied choice of PRC law as the proper law at the second stage of the *BCY* inquiry. The starting point was that the law of the Takeout Agreement, PRC Law, applied to the arbitration agreement, and there was nothing to displace it. The seat of the arbitration was Shanghai, and the mere reference to the SIAC Rules did not make Singapore the seat. The appellant also agreed with the Judge's refusal to admit evidence of the parties' pre-contractual negotiations because these were excluded by the entire agreement clause and the evidence was, in any event, unreliable.

36 If it was necessary to go to the third stage of the *BCY* inquiry, the appellant also contended that the law with the closest and most real connection to the dispute was PRC law.

Version No 2: 27 Oct 2020 (22:41 hrs)

37 In addition, the appellant affirmed the position it had consistently taken throughout the proceedings that PRC law would operate to invalidate the arbitration agreement, for the same two reasons we have already set out above at [15].

38 The respondents, on the other hand, mounted a defence of the Judge's decision. They argued that the Judge was correct in finding at the first stage of the *BCY* inquiry that no express choice of the proper law of the arbitration agreement had been made.

39 At the second stage of the *BCY* framework, the respondents also aligned themselves with the Judge's analysis that the selection of the SIAC Rules had also incorporated the default choice of Singapore as the seat of the arbitration. The respondents went further, however, in also arguing that the Judge should have admitted the evidence of the parties' pre-contractual negotiations, which would have strengthened this finding. Citing *BQP v BQQ* [2018] 4 SLR 1364 ("*BQP*"), the respondents contended that there was, in fact, no prohibition against such material being admitted, because the exclusionary rule did not apply at all in a case arising out of arbitration such as this. The pre-contractual negotiations would show that the parties had always intended to have their disputes arbitrated in a neutral forum, which in this case meant Singapore.

40 Although the starting point was that PRC law, as the law of the Takeout Agreement, also extended to the arbitration agreement in Art 14.2, the respondents contended that there were strong factors to displace that starting point. They relied on the parties' emphasis on having a neutral forum and the fact that, at the time the parties entered into the Takeout Agreement, there was a "serious risk" that a choice of PRC law would completely undermine the parties' agreement. As such, the parties could not have made an implied choice

Version No 2: 27 Oct 2020 (22:41 hrs)

of PRC law as that would simply have invalidated their agreement to arbitrate.

41 In addition, the respondents took the position that the arbitration agreement would not be invalid under PRC law as it currently stands. The respondents contended that PRC law had changed from the time the parties entered into the Takeout Agreement, and the arbitration agreement was valid on the present state of PRC law.

Issues to be determined

42 The central issue before us involves the identification of the proper law of the arbitration agreement. In this regard, it is common ground between the parties that the three-stage inquiry in *BCY* applies to determine this question.

43 In the course of addressing this central issue, we will also touch on some of the preliminary issues dealt with by the Judge and raised by the parties. It will become apparent, however, that because of the way our analysis proceeds, not all of these call for determination in this judgment.

The *BCY* framework

44 Both parties accepted that the *BCY* framework is the appropriate framework to be applied in determining the proper law of the arbitration agreement. Thus, in coming to our decision, we proceeded on the basis of the parties' agreement to determine the proper law of the arbitration agreement as the Judge did below.

45 There are three steps, or stages, to the *BCY* framework, which mirrors the framework set out by the English Court of Appeal in *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102 ("*Sulamérica*"). Such a framework accords with the established

Version No 2: 27 Oct 2020 (22:41 hrs)

common law rules for ascertaining the proper law of any contract: see *Sulamérica* at [9].

46 At the first stage of the test, the Court examines whether the parties had expressly chosen the proper law of the arbitration agreement. If they have, the inquiry ends there. This is uncontroversial and is nothing more than giving effect to the parties' agreement that that law should govern the arbitration agreement.

47 At the second stage of the test, in the absence of an express choice, the Court examines if the parties had made an *implied* choice of the proper law to govern their arbitration agreement. We note that both parties accepted that the starting point in determining the implied choice ought to be the law of the substantive contract where the arbitration agreement was integrated into and formed part of the substantive contract. This is also in line with two other High Court decisions. In *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267 ("*Dyna-Jet*"), Vinodh Coomaraswamy J noted, with regard to an arbitration agreement found in a contract governed by English law, that that meant that the arbitration agreement, too, was governed by English law. Citing *Sulamérica*, Coomaraswamy J observed that "there [was] no reason… to move beyond the starting assumption that the parties intended their arbitration agreement to be governed by the proper law of the broader contract in which it is found": *Dyna-Jet* at [31]. Similarly, in *BMO v BMP* [2017] SGHC 127, Belinda Ang Saw Ean J aligned herself with *BCY* and considered that *BCY* provided "useful guidance for courts tasked with determining the law governing arbitration agreements": at [39]. Although the appeal against the *BMO* decision was allowed, our grounds did not question the correctness of *BCY*: see *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed)* [2018] 2 SLR 1207.

Version No 2: 27 Oct 2020 (22:41 hrs)

48 If neither an express choice nor an implied choice of the proper law of the arbitration agreement can be discerned, the third stage of the *BCY* framework provides that the system of law with which the arbitration agreement has its closest and most real connection will be the proper law: see *BCY* at [40], citing *Sulamérica* at [9] and [25]. We accept that this last step does involve the judicial imputation of a choice of law for the arbitration agreement, because the court only arrives at this stage of the analysis if it has found that the parties have entirely failed to select a proper law themselves, whether expressly or impliedly: GD at [56]. We agree with the Judge below that this judicial imputation is justified, however, because it rests on the underlying premise that the parties would have, if they had addressed their minds to it, selected the law which has the closest and most real connection to the arbitration agreement. The third stage permits the court to impute to the parties "only that law which can plausibly be imputed to the parties": GD at [56].

Significance of the proper law of the arbitration agreement

49 Before applying the *BCY* framework to the facts of this case, we make some brief observations as to the significance of the proper law of the arbitration agreement so as to forestall any confusion that might arise, particularly at the stage of setting aside an arbitral award though no such concern was raised in this appeal.

50 A concern that might arise at the stage of setting-aside proceedings is the prospect of the seat court having to apply some law other than its own in determining the application to set aside the arbitral award. This possibility would arise if, for example, the proper law of the arbitration agreement is determined under the *BCY* framework to be a law other than the law of the seat.

Version No 2: 27 Oct 2020 (22:41 hrs)

In that instance, must the seat court apply the proper law, or should it apply its own law, *ie*, the law of the seat?

51 In our view, the law that the seat court will apply in any setting aside application will ultimately depend on the grounds of challenge raised by the applicant. This is entirely consistent with the relevant statutory provisions, in particular s 24 of the IAA and Art 34(2) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), which together set out the grounds upon which an arbitral award might be set aside. Section 24 of the IAA reads:

> **Court may set aside award**
>
> **24.** Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —
>
> (*a*) the making of the award was induced or affected by fraud or corruption; or
>
> (*b*) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

52 Art 34(2) of the Model Law reads:

> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> (*a*) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

Version No 2: 27 Oct 2020 (22:41 hrs)

> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
>
> (*b*) the court finds that:
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
>
> (ii) the award is in conflict with the public policy of this State.

53 It is evident from the above statutory provisions that there are some grounds of challenge for which the seat court is mandated to apply its own law, most obviously, where the challenge is made on the grounds of arbitrability and of alleged conflict with the public policy of the seat: see Art 34(2)(*b*) of the Model Law.

54 On the other hand, there are grounds of challenge where the seat court in hearing the setting aside application is mandated to apply some law *other* than its own, most obviously, when the "said agreement is not valid under the law to which the parties have subjected it": see Art 34(2)(*a*)(i). In such a scenario, the proper law of the arbitration agreement, as determined under the *BCY* framework, will have to be applied by the seat court to decide whether the arbitral tribunal has *jurisdiction* over the dispute under the terms of the

Version No 2: 27 Oct 2020 (22:41 hrs)

arbitration agreement. However, Art 34(2)(*a*)(i) provides that the seat court will apply its own law in the event that there is no indication as to the law to which the parties had subjected the arbitration agreement.

55 For present purposes, it is not necessary for this court to express a definitive view as regards the law that is to apply to determine *each* of the grounds of challenge under s 24 of the IAA or Art 34(2) of the Model Law as they were not before us. It suffices to say that in general, the seat court will apply the law of the seat and where that law directs it to some other system of law, usually the proper law of the arbitration agreement, then it will apply that law. However, as we have illustrated above, in general, the proper law of the arbitration agreement will be most relevant to questions as to formation, validity, effect and discharge of the arbitration agreement: David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2015, 3rd Ed) ("*David Joseph*") at para 6.53. In the final analysis, the particular system of law that the seat court will apply is that which the relevant arbitration law in the seat directs it to.

Issue 1: Did the parties make an express choice of proper law?

56 As regards the first step of the *BCY* test, the Judge was right to find that the parties had *not* made an express choice of law for the arbitration agreement in Art 14.2 of the Takeout Agreement. The mere fact that Art 14.2 follows Art 14.1 does not mean that the governing law specified in Art 14.1 to govern the Takeout Agreement should be taken as the *express* governing law of the arbitration agreement in Art 14.2. This would be consistent with the treatment of such provisions in cases such as *BCY* and *Sulamerica*.

57 We reproduce Art 14 of the Takeout Agreement here for convenience:

Version No 2: 27 Oct 2020 (22:41 hrs)

> ARTICLE 14: DISPUTES
>
> 14.1 This Agreement shall be governed by the laws of the People's Republic of China.
>
> 14.2 With respect to any and all disputes arising out of or relating to this Agreement, the [p]arties shall initially attempt in good faith to resolve all disputes amicably between themselves. If such negotiations fail, it is agreed by both parties that such disputes shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai, which will be conducted in accordance with its Arbitration Rules. The arbitration award shall be final and binding on both [p]arties.

58 Article 14 of the Takeout Agreement bears strong parallels to the dispute resolution clause in *BCY* itself. Like Art 14, the *BCY* clause was also divided into two sub-clauses, the first expressly providing for the governing law of the main contract, and the second separately setting out the parties' arbitration agreement (see [14] and [16] of *BCY*):

> **9.13 Governing Law and Dispute Resolution**
>
> 9.13.1 This Agreement and any non-contractual obligations arising out of or in connection with it are governed by and shall be construed in accordance with the Laws of the State of New York of the United States of America.
>
> 9.13.2 All disputes (including a dispute, controversy or claim regarding the existence, validity or termination of this Agreement – a 'Dispute') arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one arbitrator appointed in accordance with the said Rules, such arbitration to take place in Singapore. The seat of the arbitration shall be Singapore.

59 The High Court in *BCY* considered that the arbitration agreement did not contain an express choice of governing law. Instead, the dispute had to be decided on the application of the second step of the *BCY* test: at [41]. This was despite cl 9.13.1, which specified that the governing law of the agreement was New York law. By parity of reasoning, merely specifying in Art 14.1 that the Takeout Agreement "shall be governed by the laws of the [PRC]" is, in our

Version No 2: 27 Oct 2020 (22:41 hrs)

view, insufficient to constitute an express choice of the proper law of the arbitration agreement in Art 14.2.

60 Similarly, the selection of Brazilian law as the governing law of the substantive contract, an insurance policy, in *Sulamérica* was insufficient to constitute an express choice of law governing the arbitration agreement. It is true that *Sulamérica* is less analogous to our case because the governing law clause and the dispute resolution clause were separate clauses. And it is also true that the parties in *Sulamérica* accepted that no provision had been made in the arbitration agreement itself as to the proper law of that agreement: see [10]. But Moore-Bick LJ also appears to have independently concluded that the express choice of Brazilian law in the policy was *not* an express choice of the proper law of the arbitration agreement, observing instead that it was only "a strong pointer towards an implied choice of the law of Brazil as the proper law of [the arbitration agreement]": *Sulamérica* at [27].

61 In our judgment, the approaches of the courts in *BCY* and *Sulamérica* reveal that an express choice of the proper law of the main contract does not, in and of itself, also constitute the proper law of the arbitration agreement. Instead, because it is possible for parties to expressly provide for a proper law of the arbitration agreement (*BCY* at [59]), and because it is only a "natural inference" – and not a legal conclusion in and of itself – that in the absence of such specific provision the law governing the substantive contract is also presumed to govern the arbitration agreement (*Sulamérica* at [11]), the express choice of the proper law of the main contract is only a "strong indicator of the governing law of the arbitration agreement unless there are indications to the contrary": *BCY* at [65].

Issue 2: Did the parties make an implied choice of proper law?

62 As we have observed above at [44]–[47], the parties accepted that the

Version No 2: 27 Oct 2020 (22:41 hrs)

starting point at this stage of the *BCY* framework is that PRC law, as the governing law of the Takeout Agreement, is also the governing law of the arbitration agreement in Art 14.2. This starting point can, however, be displaced. The choice of a seat that is different from the place of the law of the governing contract is not by itself sufficient to displace the starting point: *BCY* at [65].

63 The question therefore is whether there is anything to displace the implied choice of PRC law in this case. Such an inquiry only becomes relevant *if* the law of the seat is materially different from the law governing the arbitration agreement which, at this point in the analysis, is PRC law. In this connection, the phrase "arbitration in Shanghai" would have a significant impact on this inquiry.

The meaning of the phrase "arbitration in Shanghai"

64 Here, we respectfully part ways with the Judge. In our view, the Judge adopted a somewhat strained interpretation of Art 14.2 to arrive at his finding at [104] of the GD that two geographical locations were identified in Art 14.2 when there was in truth only a reference to one, *ie*, Shanghai. Rule 18.1 of the SIAC Rules was instrumental to the Judge's decision, and it provides that in the absence of the parties' agreement, the default seat of the arbitration shall be Singapore, unless the tribunal determines otherwise:

> The parties may agree on the seat of arbitration. Failing such an agreement, the seat of arbitration shall be Singapore, unless the Tribunal determines, having regard to all the circumstances of the case, that another seat is more appropriate.

The critical point, however, is that the default choice of Singapore as the seat only operates *in the absence of agreement by the parties*. In order to invoke the default choice of Singapore under Rule 18.1, the Judge first had to consign the

Version No 2: 27 Oct 2020 (22:41 hrs)

reference to Shanghai as a reference to the venue and not the seat. We consider that the Judge was wrong to do so.

65 In our judgment, the natural meaning of the phrase "arbitration in Shanghai" is that Shanghai is the seat of the arbitration. Counsel for the respondents, Mr William Ong, quite candidly and fairly accepted this. We think that he was right to do so. This court, as early as 2002, in *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR(R) 401 ("*Birgen Air*") expounded on the distinction between the seat of the arbitration, and the venue(s) where arbitration proceedings and hearings may be held. The *seat* of an arbitration is *essential* to arbitration law. Its significance lies in the fact that for legal reasons the arbitration will be regarded as situated in the state or territory of the seat, and the choice of seat also identifies the state or territory whose laws will govern the arbitral process, *ie*, the curial law of the arbitration: *Birgen Air* at [24]. The seat will also be considered to be the jurisdiction in which the arbitral award is "made" for the purposes of the New York Convention. The *venue(s)* where an arbitration might be held, on the other hand, have far less significance. The venue is simply the physical place where the arbitral tribunal will have to hold its hearings and meetings, if the parties so provide for it. It is not common for parties to do so, and it is certainly not *essential* that parties specify a venue; the choice of venue is likely to be motivated by mundane considerations of logistical and practical convenience and cost. For the same reason, venues of the arbitration, unlike a seat, can change in the life of any arbitral process. Given the stark contrast in the legal significance of the seat as compared to that of the venue, we think therefore that where parties specify only one geographical location in an arbitration agreement, and particularly where, as here, the parties express a choice for "arbitration in [that location]", that should most naturally be construed as a reference to the parties' choice of seat.

Version No 2: 27 Oct 2020 (22:41 hrs)

66 We are fortified in this approach by a line of authorities which have construed similar geographical references in substantially the same way. In *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116 ("*Naviera*") a decision of the English Court of Appeal, Kerr LJ at 119 essentially adopted the phrase "arbitration in London" as a colloquial way of referring to London as the seat of the arbitration, when he noted that the question was "whether the 'seat' … of any arbitration… was agreed to be London or Lima, or – to put it colloquially – whether this contract provided for arbitration in London or Lima". Indeed, this was how Clarke J read that sentence in the subsequent English High Court decision of *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24 ("*ABB Lummus*") at 31, where he observed that the expression "arbitration in London" or "arbitration in New York" had been treated by Kerr LJ in *Naviera* "as ordinary or colloquial language describing the seat of the arbitration". In line with these authorities, the use of the expression "arbitration in Shanghai" in our case ought similarly to be construed as a reference to the seat.

67 More recently, the English High Court in *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] 1 Lloyd's Rep 504 ("*Shagang*") had the occasion to consider an arbitration clause that provided: "Arbitration: Arbitration to be held in Hong Kong. English Law to be applied". Hamblen J considered a line of authorities, including *Naviera* and *ABB Lummus*, and took the view that the use of the phrase "to be held in Hong Kong" ordinarily carried with it an implied choice of Hong Kong as the seat of the arbitration, and of the application of Hong Kong law as the curial law. Clear words or significant contrary indicia would be necessary to establish that some other seat or curial law had been agreed, and the provision that English law was to be applied was insufficient to amount to such contrary indicia: at [38] and [39]. On our part, we can discern no meaningful difference between the phrases

Version No 2: 27 Oct 2020 (22:41 hrs)

"arbitration to be held in", and "arbitration in". Thus *Shagang*, too, supports the reading we have given to Art 14.2.

68 In addition, the approach we take also finds support in the academic commentaries. *David Joseph* at para 6.40 notes that "certain expressions such as 'arbitration in London' or 'arbitration in New York' will without more be taken as colloquial expressions for a choice of seat". Notably as well, Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2014, 2nd Ed) states the following (at pp 2074–2075):

> … [P]arties sometimes refer merely to a geographic location, without specifying for what purpose (*e.g.*, as the arbitral seat, location for hearings, location of an arbitral institution, or something else.) ***In general, courts and arbitral institutions interpret such references as specifying the arbitral seat.*** *For example, an arbitration clause which read "Arbitration: Hamburg" with no explanation, has been held to constitute an agreement on the place of arbitration.* [emphasis added in italics and bold italics]

The situation at hand is precisely that described in the extract above. Article 14.2 provides for "arbitration in Shanghai" without specifying the purpose of the reference to Shanghai. The general approach therefore is to interpret the reference as specifying Shanghai as the seat.

69 In summary, we think that the phrase "arbitration in Shanghai" in Art 14.2 of the Takeout Agreement is most naturally construed as a reference to the seat of the arbitration. This, however, is not the end of the analysis. We are prepared to accept, as Hamblen J did in *Shagang*, that the natural reading can be displaced by contrary indicia. We turn then to examine whether such contrary indicia exist on our facts.

Version No 2: 27 Oct 2020 (22:41 hrs)

Whether contrary indicia point to Shanghai being anything other than the seat

70 Having quite fairly accepted that "arbitration in Shanghai" would ordinarily and naturally be construed as a reference to the seat being in Shanghai, Mr Ong nevertheless urged us to find that there were contrary indicia that displaced the natural reading of this phrase. Mr Ong's argument that Shanghai was *not* the seat was two-fold. He argued that the background contextual material, including the earlier drafts of the Takeout Agreement, and the email correspondence between the parties, would show that the parties intended for their arbitration to be seated in a neutral forum which, in this case, could *not* be the PRC, and must instead be Singapore. He further argued that the potentially invalidating effects of PRC law on the arbitration agreement, on the state of PRC law as at the time the parties entered into the Takeout Agreement, militated against a finding that the parties had chosen Shanghai as the seat. This would have created the absurd result that the parties had expressed a manifest intention to arbitrate while simultaneously defeating it by their choice of seat. We will address these arguments in turn.

The admissibility of evidence of the parties' pre-contractual negotiations

71 The background contextual material upon which the respondents rely is essentially evidence of the parties' pre-contractual negotiations. This evidence was put forward by one Mr Kim, who negotiated the Takeout Agreement on behalf of the respondents. Mr Kim filed an affidavit in the court below setting out his recollection of the negotiations, and exhibiting the email correspondence between the parties in the negotiation. This email correspondence also enclosed various earlier drafts of the Takeout Agreement; these drafts contained the parties' markups and comments.

Version No 2: 27 Oct 2020 (22:41 hrs)

72 The thrust of Mr Kim's evidence is as follows: (a) the Takeout Agreement was one of a set of four agreements relating to a common facility; (b) the four agreements were related and were finalised at about the same time; (c) the respondents were clear throughout the negotiations that they would not agree to "local" arbitration in the PRC, and desired "international" arbitration conducted by a trustworthy, neutral third party such as Singapore; (d) the drafts of the Takeout Agreement and the other three agreements reflect the appellant proposing arbitration in China, with the respondents counter-proposing arbitration in Korea; and (e) the other three agreements were finally executed without reference to Shanghai as a location, and only mentioned the SIAC.

73 Mr Kim elaborated that the changes made to the arbitration clauses in the four agreements across the various drafts reveal that the "intentions of all parties were to have a neutral third party in the arbitration clauses". Mr Kim also explained that the reason why the reference to Shanghai was left in the Takeout Agreement, but not in the other agreements, was that he had read a Korean translation of the draft dated 15 March 2011 which read "the CIETAC Shanghai Arbitration Commission *located in* Shanghai" [emphasis added]. He therefore understood "for arbitration in Shanghai" to "simply mean the geographical location of the branch office of SIAC". He also emphasised that he personally did not realise the legal significance of an arbitral seat and what that entailed in respect of the court having supervisory jurisdiction over the arbitration. He reiterated that at the time of the negotiations "[a]ll parties wanted an independent or neutral forum like Singapore to conduct any arbitration, as opposed to say China or Korea".

74 The appellant did not put forward any witnesses of its own to attest to the parties' pre-contractual negotiations. As we have already noted above at [24], the Judge refused to admit this evidence, holding that the entire

Version No 2: 27 Oct 2020 (22:41 hrs)

agreement clause in Art 16.3 of the Takeout Agreement operated to exclude such evidence.

75 Before us, the respondents contended that the Judge was wrong to have disregarded this evidence. They submitted that there was no prohibition against the admissibility of such evidence whatsoever, because the parol evidence rule does not apply at all for cases arising out of an arbitration. They cited the High Court decision in *BQP* as authority for this proposition. They further asserted that the Judge wrongly interpreted the entire agreement clause in Art 16.3 of the Takeout Agreement; the correct interpretation would have revealed that that clause allowed evidence to be admitted to aid in the interpretation of the Takeout Agreement, but not to contradict, vary, add to, or subtract from it.

76 We consider that the respondents' reliance on *BQP* was misplaced. The parol evidence rule and its exceptions find statutory expression in ss 94 to 99 of the Evidence Act (Cap 97, 1997 Rev Ed) (the "Evidence Act"). These sections are contained within Part II of the Evidence Act. Section 2(1) of the Evidence Act mandates that Part II applies to all judicial proceedings in the courts, but it does not apply to proceedings before an arbitrator:

> **2.**—(1) Parts I, II and III shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator.

77 *BQP* was a case where the High Court did make reference to the parties' pre-contractual negotiations for the purposes of interpreting a clause in the agreement. But in that case, neither party objected to the admissibility of the evidence. Even more crucially, the evidence had already been admitted before the tribunal: *BQP* at [42], [43], [45] and [98]. Thus, by the time the High Court heard the jurisdictional challenge, the evidence had already formed part of the

Version No 2: 27 Oct 2020 (22:41 hrs)

record of the proceedings before the tribunal. The High Court itself did not have to consider the question of admissibility of the evidence.

78 In our case, however, Mr Kim's evidence was only proffered in the jurisdictional challenge in the High Court. It was not evidence placed before the tribunal. This, in our view, makes all the difference. The hearing of the jurisdictional challenge in the High Court simply did not fall within the province of "proceedings before an arbitrator", for which s 2(1) of the Evidence Act provides that the exclusionary rule does not apply. The High Court, unlike an arbitrator, was bound by s 2(1) read with ss 94 to 99 of the Evidence Act to apply the parol evidence rule and its exceptions. Further, the High Court heard the jurisdictional challenge *de novo*: see *BCY* at [36] and *BXY and others v BXX and others* [2019] 4 SLR 413 at [18]. Thus, no deference was due to the arbitral tribunal that would have required some attenuation of the rules of evidence so as to align the High Court's review proceedings with the first instance proceedings before the tribunal.

79 The point we have just made also disposes of the respondents' arguments that the parties had effectively contracted out of the exclusionary rule, by incorporating the SIAC Rules and agreeing that the tribunal would be guided by the International Bar Association Rules on the Taking of Evidence in International Arbitration 2010. While that argument might have some force if it were made in relation to the admissibility of evidence before the tribunal, the High Court was bound, as are we, to give effect to the parol evidence rule and its exceptions in the Evidence Act.

80 The respondents are therefore wrong to contend that *BQP* is authority for the proposition that the parol evidence rule does not apply at all in cases that arise out of an arbitration. *BQP* is, if anything, only authority for the far more

Version No 2: 27 Oct 2020 (22:41 hrs)

limited proposition that the High Court can consider evidence of pre-contractual negotiations that have already been admitted by the arbitral tribunal.

81 The question that follows is whether the High Court, applying the law relating to the admissibility of evidence of pre-contractual negotiations as it presently stands, should have admitted Mr Kim's evidence. Our law does not mandate a *blanket* prohibition against the admissibility of pre-contractual negotiations, as our decision in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 makes clear at [132(d)]. But this does *not* mean that such evidence is freely to be admitted as a general rule either. Instead, the issue as to whether evidence of pre-contractual negotiations should generally be freely admissible remains open: see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") at [75] and *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 ("*Xia Zhengyan*") at [62]. For the time being, we have cautioned in *Sembcorp Marine* at [75] that any attempt to rely on such evidence should be made with full consciousness of the concerns we expressed and the pleading requirements we prescribed in that judgment, which requirements accord with the limits set down in *Zurich Insurance* at [132(d)] that extrinsic evidence will only be admitted if it is "relevant, reasonably available to all the contracting parties, and relates to a clear or obvious context".

82 We consider that this is not the appropriate occasion to grapple with the complex and difficult question whether evidence of pre-contractual negotiations should generally be freely admissible. The parties did not make arguments to that effect and the respondents, in particular, were content in oral argument before us to proceed on the basis that the criteria set out in *Zurich* had to be, and were, satisfied.

Version No 2: 27 Oct 2020 (22:41 hrs)

83 In our judgment, Mr Kim's evidence was neither reasonably available to all the contracting parties nor did it relate to a clear and obvious context. In *Xia Zhengyan* at [65], we cautioned that draft agreements would rarely establish the clear and obvious context necessary for the evidence of pre-contractual negotiations to be admitted:

> … In most circumstances, the reliance on draft agreements, without more, cannot amount to a clear and obvious context in so far as the court is very much left in the dark with regard to the actual bargaining process undertaken by the contracting parties in the course of negotiations. The addition, removal, or variation of any contractual term is, more often than not, the result of bargains and exchanges struck between the parties. It is a dynamic process and the surrounding context is likely to be as important as, if not more so than, the actual words found in the draft agreements. Furthermore, the court is not likely to be acquainted with such evidence as these bargains and exchanges are often oral in nature. Therefore, any reliance on these draft agreements alone, without more, may give rise to the risk of construing these documents *out* of context.

84 The situation we are faced with here fits the description set out in *Xia Zhengyan*: a "clear and obvious context" is absent. The respondents seek to admit earlier drafts of the Takeout Agreement and the email correspondence enclosing those drafts, but, as Mr Kim himself attests, some of the negotiations took place in person, so the discussions at those meetings that led to the draft agreements being amended is not before the court. Indeed, our perusal of the email correspondence enclosing the drafts shows that it was generally brief and succinct, which suggests that the bulk of the negotiations did not take place in the written correspondence. The drafts and the email correspondence therefore do not give us the full picture of the parties' positions, concessions, bargains, and compromises in the course of the negotiations.

85 In addition, we find it difficult to see how admitting Mr Kim's affidavit evidence attesting to his recollection of the negotiations would assist the

Version No 2: 27 Oct 2020 (22:41 hrs)

respondents. The purpose of admitting this evidence is to show that Shanghai was *not* intended by the parties to be the seat, and the evidence purportedly establishes this by showing that the parties wanted to have a neutral forum in which to arbitrate their dispute. But Mr Kim's own affidavit evidence undermines that argument entirely, because he quite candidly admits that "[he] did not understand the concept of the seat of the arbitration" at the time he was negotiating the Takeout Agreement on behalf of the respondents. Mr Ong appreciated the weakness of that admission to his case, and emphasised that although Mr Kim did not understand the *legal* significance of the seat, it was nevertheless his evidence that it was the parties' common understanding and agreement that they required a neutral forum like Singapore, which was, in substance and effect, "not much different" from the concept of an independent arbitral seat.

86 We find this submission untenable. Quite apart from this being only Mr Kim's subjective appreciation of the negotiations and of the significance of the reference to "Shanghai", the desire for neutrality could be, and was, fulfilled when the parties selected what they perceived to be a neutral arbitral institution, the SIAC, and made express provision for it in Art 14.2. The desire for neutrality did not have to manifest itself *only* in the choice of a neutral seat. Further, if Mr Kim was perceptive enough to understand the *substance* of the choice of seat – amongst other things, that it would engage the supervisory jurisdiction of that territory's courts and result in the award being made in that territory for the purposes of enforcement under the New York Convention – we find it difficult to accept that the significance of the words "arbitration in Shanghai" in indicating the seat of the arbitration was lost on him. With the knowledge he is suggested to have possessed, we find it striking that he failed to ask that it be specified that Shanghai was merely the *venue* of the arbitration, or that he could have justifiably considered that adequate provision had been made for

Version No 2: 27 Oct 2020 (22:41 hrs)

Singapore to be the seat by the simple reference to the SIAC alone, when the SIAC is only an arbitral institution, and not a legal jurisdiction of itself. In addition, nothing in the evidence shows that the parties intended Shanghai to be only the *physical venue* of the arbitration and not its *legal seat*.

87 Mr Kim's evidence to the effect that the words "in Shanghai" were inadvertently left in Art 14.2, when they were excised from the equivalent clauses in the other three agreements, is similarly unpersuasive. It is only Mr Kim's subjective view that the words "in Shanghai" were inadvertently left in. And if it truly were a mistake, then, as we pointed out at the hearing, the respondents should have applied for rectification of the Takeout Agreement, which they have not done.

88 In short, Mr Kim's evidence of the pre-contractual negotiations do not satisfy the *Zurich* criteria for the admissibility of extrinsic evidence. It is therefore unnecessary for us to go further to consider whether the Judge was correct in finding that the entire agreement clause would have operated to exclude Mr Kim's evidence in any event.

The effects of PRC law on the arbitration agreement

89 The other indicium which Mr Ong argued indicated that Shanghai was not the seat was the invalidating effect PRC law would have had on the arbitration agreement, based on the state of PRC law as existed at the time the parties entered into the Takeout Agreement. It was said that because the parties could not have chosen to invalidate their arbitration agreement at the same time as they expressed a manifest intention to arbitrate, Shanghai therefore *cannot* be the seat. If it was, there would be nothing to displace PRC law as the proper law of the arbitration agreement, which would lead in turn to the absurd result of the arbitration agreement being invalidated. Mr Ong therefore urged us to consider

Version No 2: 27 Oct 2020 (22:41 hrs)

the PRC law position as part of the contextual interpretation of Art 14.2 and the Takeout Agreement more generally.

90 We disagree that the state of PRC law can be taken into account in the way that Mr Ong suggests. For the respondents to advance this argument they would have to show that the parties were, at the very least, *aware* that the choice of proper law of the arbitration agreement could have an impact upon the validity of the arbitration agreement. But there is nothing in the evidence to show that the parties were sensitive to the interplay between PRC law and choosing the SIAC as the administering institution, much less the invalidating effect of this particular combination of choices. Instead, the evidence suggests that this consideration did not operate in their minds at all. It therefore cannot form part of the context in construing Art 14.2.

The relevance of Shanghai not being a law district

91 Our analysis above addresses the two main planks of Mr Ong's arguments before us. We turn then to deal briefly with the Judge's reasoning that "arbitration in Shanghai" is more naturally read as a reference to Shanghai as the venue, given that Shanghai is not itself a law district, whereas Singapore is a law district: GD at [110]. Mr Ong adopted this point in his written case.

92 We think this argument does not assist Mr Ong. This was not an argument raised or addressed by either party in their written submissions below, nor was it relied upon by the tribunal. More importantly, it seems to us that commercial parties often do only specify either the city or country in their arbitration agreements. The authorities we have canvassed above at [66]–[67] reflect this practice. Similarly, the earlier or even current Model Clauses of some arbitral institutions and associations suggest it is sufficient for parties to refer to the "City and/***or*** Country", for example, the London Court of

Version No 2: 27 Oct 2020 (22:41 hrs)

International Arbitration Recommended Clauses: "The seat, or legal place, of arbitration shall be [City and/or Country]".

93 We recognise that it is probably best practice to specify both the city *and* the country, as most Model Clauses now do, including the present edition of the SIAC Model Clause. Certainly doing so will help to avoid arguments being raised about where precisely the seat is. But the omission to do so will not render a clear reference to a seat, as here, a reference to venue instead.

Summary on the seat of the arbitration

94 The sum result of the above analysis is that Shanghai is the seat. The natural reading of the phrase "arbitration in Shanghai" is that Shanghai is the seat of the arbitration, and there are no contrary indicia to point away from this natural reading. This in turn means that the law of the seat and the parties' implied choice of proper law of the arbitration agreement are one and the same: PRC law. It follows that PRC law is the proper law of the arbitration agreement. Hence the question whether the implied choice of PRC law as the proper law should be displaced by the law of the seat in order not to nullify the parties' intention to arbitrate simply does not arise. There is also no need to go into the third stage of the *BCY* framework.

95 In addition, it is apparent from the analysis above that it becomes unnecessary to deal with some of the points considered by the Judge – specifically the validation principle and the effective interpretation principle. These issues would only have arisen for consideration if there was some *other* law that could compete with PRC law to be the proper law of the arbitration agreement. But there is no such other law. Moreover, it is also unnecessary for us to express a view on the doctrine of separability and whether it applies even where the validity of the main or substantive contract is not impugned. Here, on

Version No 2: 27 Oct 2020 (22:41 hrs)

the *BCY* analysis, all the factors point to PRC law as the proper law of the arbitration agreement.

Issue 3: the Court's orders in the appeal

96 The analysis on the *BCY* framework shows that Shanghai, and not Singapore, is the seat. We therefore allowed the appeal when parties were before us on 15 October 2019, but only to the extent that Singapore was not the seat. We expressly indicated in our oral grounds given at that time that we did not take any concluded view as to whether the tribunal did or did not have jurisdiction.

97 The limited scope of our decision might seem somewhat surprising given that the appeal arose out of a jurisdictional challenge mounted under s 10 of the IAA. On one view, it might be contended that a jurisdictional challenge ought naturally to culminate in a decision on the tribunal either having or not having jurisdiction. That view, however, would be incorrect. In our judgment, it was only proper and logical that we express no view as to jurisdiction once we had determined that Singapore was not the seat. If Singapore was not the seat, any decision of the Singapore courts on jurisdiction would not be binding upon the tribunal anyway. The Singapore courts would simply have no supervisory jurisdiction over the arbitration.

98 We add that the making of this declaration was by no means inconsistent with the structure of s 10 of the IAA. Section 10 of the IAA does not mandate that the court make a positive finding as to jurisdiction either way: ss 10(6) and (7) only set out the powers of the court to make certain consequential orders if it does find that the tribunal has or does not have jurisdiction. Further, it was appropriate to make this declaration despite it not having been specifically sought by the appellant because the issue of the seat was placed before the

Version No 2: 27 Oct 2020 (22:41 hrs)

Singapore courts by the very nature of the s 10 IAA application itself. It was necessary first to determine the seat in order to determine whether the law of the seat might be available to displace the law of the main contract, which law, it was said, might invalidate the arbitration agreement. Thus, the declaration that Singapore is not the seat was a necessary part of, and a sufficient ruling in, the jurisdictional inquiry triggered by the s 10 IAA application.

99 We further observe that it was particularly appropriate in *this* case that the question of jurisdiction, which we consider ought to be determined under PRC law as the proper law of the arbitration agreement, be given to the PRC courts to decide. This was because the parties were not agreed as to what PRC law truly provides, and whether PRC law will truly have an invalidating effect on the arbitration agreement. The Judge perceived the PRC law position to be "fraught with difficulty and rapidly evolving": GD at [116]. And the parties' positions in the appeal were similarly not any clearer than below. This was therefore a question best left to the relevant PRC court having supervisory jurisdiction over the arbitration to decide.

100 We should add, however, that this does not mean that the jurisdictional challenge was not properly brought in the High Court. It might seem surprising that the appellant, having taken the position that Shanghai was the seat, did not pursue its jurisdictional challenge before the PRC courts as the courts of the alleged seat, instead of coming to the Singapore High Court. But we think that the appellant was entirely justified in mounting its s 10 IAA challenge here.

101 It is significant to bear in mind that the appellant's application was filed in the Singapore High Court because the majority of the tribunal had decided that Singapore was the seat. It was therefore entirely correct for the appellant to seek relief from the seat court, *ie*, the Singapore High Court, as determined by

Version No 2: 27 Oct 2020 (22:41 hrs)

the majority of the tribunal. Besides, the parties *disagreed* about the location of the seat and whether there was even a valid arbitration agreement to begin with. That being the case, the Singapore High Court had as good a claim as the Shanghai courts to hear the jurisdictional challenge. In our view, it was unnecessary or even unworkable that the court hearing the jurisdictional challenge be the court of the seat in a situation such as the present case where the location of the seat was *precisely* the subject of the jurisdictional challenge. To require that the court hearing the jurisdictional challenge be the court of the seat would create an unsolvable contradiction: the court which should hear the challenge ought to be the court of the seat chosen by the parties, but the court hearing the challenge would have to decide what was the seat and, by extension, whether it was the seat court.

102 It is now for the parties to decide what further actions they wish to take. The majority of the tribunal had determined that it had jurisdiction, but that determination was made on the erroneous premise that Singapore was the seat and Singapore law as the proper law would have kept the arbitration agreement alive. That conclusion might no longer stand now that Shanghai is determined to be the seat, and PRC law is the proper law of arbitration agreement. It might be that the appellant is content to have the arbitration administered by the SIAC, but under the supervision of the PRC courts, if that can be done at all under PRC law. Equally, the appellant might still adhere to its original position that the arbitration agreement is invalid and the dispute must be litigated in the PRC courts. That is for the appellant to decide, and for the respondents to make the necessary responses as they so desire.

Version No 2: 27 Oct 2020 (22:41 hrs)

Conclusion

103 For the reasons given above, we determined that Shanghai is the seat of the arbitration, and not Singapore. We therefore allowed the appeal to that limited extent, without expressing any concluded view as to whether the tribunal did or did not have jurisdiction.

104 The essential point we make is that the parties' manifest intention to arbitrate is not to be given effect at all costs. The parties did not only choose to arbitrate – they chose to arbitrate in a certain way, in a certain place, under the administration of a certain arbitral institution. Those all have to be given effect to by a process of construction which critically gives the words of the arbitration agreement their natural meaning, unless there are sufficient contrary indicia to displace that reading. If the result of this process of construction is that the arbitration agreement is unworkable, then the parties must live with the consequences of their decision.

Sundaresh Menon Chief Justice	Judith Prakash Judge of Appeal	Steven Chong Judge of Appeal

Thio Shen Yi SC and Thara Rubini Gopalan (TSMP Law Corporation) for the appellant;
William Ong, Tan Xeauwei and Sheryl Lauren Koh Quanli (Allen & Gledhill LLP) for the respondents.

Version No 2: 27 Oct 2020 (22:41 hrs)