

NEWSLETTER

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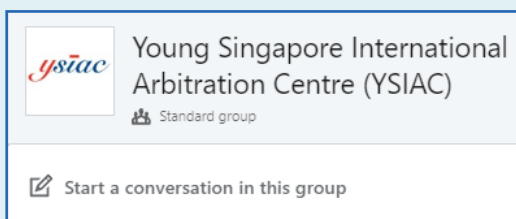
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2019: THE YEAR IN INTERNATIONAL ARBITRATION

by Calum Mulderrig and Rajesh Pillai, 3 Verulam Buildings

2019 may in time be seen as a year in which significant changes began in a number of spheres. Discussion continues over the role and future of investment arbitration, driven by the next (but probably not final) instalment of the *Achmea* saga and UNCITRAL's ongoing look at Investor-State Dispute Settlement (ISDS) reform. Elsewhere, new rules of evidence were released, promising to promote greater time and cost efficiency in arbitration procedure, while the arbitration market was bolstered by updated offerings in new (and not so new) seats. We set out some highlights below.

1. *Achmea*: the end of the saga?

In its landmark decision in *Slovak Republic v Achmea (Achmea)* on 6 March 2018, the Court of Justice of the European Union (CJEU) determined that bilateral investment treaties (BITs) concluded between EU Member States were incompatible with EU law, leaving in doubt the fate of some 190 intra-EU BITs, as well as proceedings pending under those treaties. By early 2019, much was left to be resolved.

On 15 January 2019, 22 of the 28 Member States declared their intention to terminate their intra-EU BITs by 6 December 2019, as well as all intra-EU claims under the Energy Charter Treaty (ECT). In a second declaration, certain Member States considered that it would be preferable to wait for the CJEU to determine the position under the ECT first, while Hungary issued its own declaration on 16 January 2019, which rejected the application of *Achmea* to the ECT entirely.

Following these declarations, the European Commission gave notice on 24 October 2019 that a plurilateral agreement had been reached between EU Member States to terminate all intra-EU BITs. A leaked draft of the agreement revealed significant further details about proposed next steps.

A notable feature is the proposed approach to arbitrations commenced under intra-EU BITs prior to and post-*Achmea*. Any arbitrations commenced under an intra-EU BIT prior to the *Achmea* judgment which are still pending will be subject to an out-of-court and out-of-arbitration settlement mechanism. The draft agreement states that an amicable settlement should be reached within six months of the appointment of an "impartial facilitator" (who

will assist the parties to reach settlement) or "*such longer period as the parties may agree*", although there is no guidance as to what will happen where parties fail to settle. This seemingly important omission is perhaps unsurprising, given the difficulties presented by the two contrasting outcomes: either the arbitration claim will fall away, depriving the investor of its claim entirely, or the arbitration will be allowed to continue, defying the CJEU's position in *Achmea*. This will be an issue worth monitoring once arbitral proceedings commenced under intra-EU BITs start to be wound down.

As to arbitration proceedings concluded before 6 March 2018, these will remain unaffected by the agreement. Similarly, in a reversal from the main 15 January 2019 declaration, the agreement "*does not cover intra-EU proceedings*" under the ECT, which will instead be dealt with "*at a later stage*".

The position in relation to arbitration proceedings commenced under intra-EU BITs post-*Achmea* is controversial. These arbitrations will be rendered void *ab initio*, leaving investor claimants in various ongoing sets of proceedings without a claim. It remains to be seen whether this measure will be amenable to challenge, particularly given its retroactive effect on arbitration proceedings which could have been initiated nearly two years ago and may be nearing resolution. The approach to sunset clauses is similarly bold, with the agreement providing that such clauses in intra-EU BITs will have no post-termination legal effect, immediately removing investment protection without any transitional measures.

While the course of travel has now been firmly set following *Achmea*, we can expect some further twists once the agreement is finalised, the remaining intra-EU BITs are terminated and the fallout for investor-claimants is properly understood.

2. The future of ISDS

The *Achmea* decision coincided with ongoing efforts to reform investment arbitration generally.

The UNCITRAL Working Group III (WGIII) continued its work on ISDS reform, following its mandate in 2017 to identify issues and concerns in ISDS practice, as well as to consider whether reform in those areas would be desirable and, if so, to make

appropriate recommendations to the United Nations Commission.

In its prior sessions, WGIII considered myriad issues, ranging from costs of ISDS proceedings to consistency and predictability of arbitral decisions. At its 38th session, which took place in Vienna from 14 to 18 October 2019, discussion focused on three issues: the establishment of an advisory centre; a code of conduct for decision makers; and third-party funding. On 23 October 2019, it published a report setting out its recommendations. The WGIII will meet again in Vienna in January 2020 to resume the 38th session and in New York in March 2020 for the 39th session, where further reform proposals for discussion will include the introduction of a standing multilateral investment court and a security for costs regime.

WGIII's work is ambitious and may bring about meaningful change to ISDS practice. It also comes at an interesting time, as States and organisations consider novel approaches to dispute settlement and the termination of existing methods (see *Achmea* above).

3. Trade agreements booming in Asia-Pacific

ISDS reform has not been at the top of every agenda. Asia-Pacific States were especially active in concluding investment and trade agreements in 2019. Vietnam signed an "Investment Protection Agreement" with the EU, while Singapore signed a BIT with Myanmar and an investment agreement with Armenia. Australia signed a Comprehensive Economic Partnership Agreement with Indonesia and an investment agreement with Hong Kong. For its part, Hong Kong concluded a BIT with the UAE. Indeed, Asia Pacific States were parties to eight of the thirteen international investment agreements signed in 2019.

The most important development in this area came at the end of the year. On 4 November 2019, members of the Association of Southeast Asian Nations (**ASEAN**), together with its major Asia-Pacific trading partners in the Regional Comprehensive Economic Partnership (**RCEP**) committed to signing a trade pact in 2020 (**the RCEP Agreement**) following seven years of negotiations. Although India ultimately withdrew from the pact, if enacted the RCEP Agreement would become the world's largest trade agreement, both in terms of population scope and Gross Domestic Product (**GDP**). Consistent with the current trend in investment arbitration, an interesting feature of the

RCEP Agreement is that it contains no ISDS clause at all (see *Achmea* and ISDS reform above).

4. The Prague Rules: a civil law attack on the common law approach to evidence?

The *Rules on the Efficient Conduct of Proceedings in International Arbitration (the Prague Rules)* were finalised on 14 December 2018, sparking lively debate in 2019 about their potential impact and, in particular, the extent to which they might challenge the widely-adopted *IBA Rules on the Taking of Evidence in International Arbitration (the IBA Rules)*. For some, the Prague Rules represented an all-out attack on the inefficiencies and spiralling costs that the IBA Rules had encouraged with their unduly expansive approach to evidence and procedure. For others, the Prague Rules represented only a limited departure.

The Prague Rules intend to provide a framework for the efficient conduct of arbitration proceedings and are effective only to the extent of the parties' agreement or at the tribunal's initiative after consulting with the parties (though there is also limited recourse for a tribunal to apply the rules without party consent). The central distinction with the IBA Rules is that the Prague Rules adopt procedures in line with the civil, inquisitorial tradition, whereas the IBA Rules' origin lie in the common law approach to evidence and procedure.

One difference of consequence is that the Prague Rules expressly envisage a proactive role for the tribunal. This is evident in various articles, including: the tribunal's case management powers (article 2.4(e)); its role in establishing matters of fact (article 3.1) and in taking evidence (article 3.2); its ability unilaterally to apply relevant laws (*iura novit curia*) (article 7.2); and its power to assist the parties to the dispute to reach settlement (article 9). There are no equivalent express provisions under the IBA Rules, although tribunals are encouraged to be proactive (see, for example, articles 5.4, 6 and 9.2).

One major criticism made by the drafters of the Prague Rules related to the time and cost inefficiencies of document production under the IBA Rules. Mirroring the approach adopted in civil law jurisdictions, the Prague Rules seek to limit document production with article 4.2 providing that "*the arbitral tribunal and the parties are encouraged to avoid extensive production of documents, including e-discovery*". This stands in contrast with article 3.1 of the IBA Rules which requires that parties produce "*all Documents*

available to it on which it relies" in the dispute.

Although cross-examination of witnesses was another area that came in for criticism from the drafters, the Prague Rules retain the procedure, albeit article 5.9 provides that "*examination of any fact witness shall be conducted under the direction and control of the arbitral tribunal*". Combined with the proactive role that the tribunal is required to take in relation to establishing facts and taking evidence, witness interrogation by the tribunal (as opposed to counsel) is the approach preferred under the rules. But, as article 8.1 makes clear, the favoured method of resolving a dispute under the Prague Rules is, where possible, without a hearing at all, "*on a documents only basis*", which marks a serious departure from current arbitration practice that promotes interrogation of the evidence and submissions by the parties' counsel as part of a fair hearing.

The Prague Rules have only been available for parties to adopt since the end of 2018, so it is premature to assess their impact at this stage. On their face, they herald a cultural shift away from a well-established common law approach. Can these rules provide a serious challenge to the primacy of the IBA Rules and will the promise of greater efficiency and cost reduction be borne out in practice? Cynics might view a narrower approach of this sort as ripe for abuse by parties who have something to hide.

5. Innovations in seats

While Hong Kong and Singapore have maintained their positions as go-to locations for international arbitration in Asia, the past year has seen some interesting developments in India, where The Arbitration & Conciliation (Amendment) Act, 2019 (**the 2019 Amendment**) came into force on 9 August 2019, with its stated purpose being to make India a hub for domestic and international arbitration. The 2019 Amendment followed the Arbitration & Conciliation (Amendment) Act, 2015, which itself had heralded significant changes to the arbitration landscape in India.

The changes in the 2019 Amendment are principally geared towards building up an arbitration infrastructure in India and promoting greater efficiency in arbitration proceedings, making it a more attractive and user-friendly seat. Particular innovations in the 2019 Amendment include: the establishment of the Arbitration Council of India (**ACI**), a body comprising government approved

chairperson and appointees which will (when in force) grade arbitral institutions and give accreditations to arbitrators (Part IA); a requirement that parties to arbitrations in India maintain the confidentiality of those proceedings (section 42A); and new time limits, such as the requirement that statements of claim and defence must be filed within six months from the date of the arbitrator's appointment (section 5). Changes relating to the quality and efficiency in any jurisdiction are to be welcomed as contributing to speedy and cost-effective justice. It remains to be seen if and how the ACI concept rolls out, since governmental oversight or regulation of what is usually a field for private actors might be said to interfere with the independence of arbitral institutions and arbitrators. This is potentially of real importance where the state (in its many emanations) is often a counterparty.

Subject to implementation and continued reliable adoption by the domestic arbitration community, the statutory reforms in India over the last few years have undoubtedly put this jurisdiction on the right track to become an attractive destination for arbitration disputes. The increasingly high-profile Mumbai Centre for International Arbitration (**MCIA**) is touted as a potential home for significant arbitrations and New Delhi is also attempting to develop its own centre further to the New Delhi International Arbitration Act 2019. Whether the reforms introduced are sufficient to achieve the nation's ambition to become a hub for both domestic and international arbitration remains to be seen.

Finally, despite being the most popular seat for international arbitration, London has not rested on its laurels. It upgraded its offering not with new procedures but with the opening of a new centre, the International Arbitration Centre (**IAC**). The IAC positions itself as a rival to the facilities offered in Singapore and Hong Kong, and boasts spacious hearing rooms, printing facilities and all the necessary accoutrements for hosting major international arbitration disputes. It is a necessary complement to the International Centre for Dispute Resolution (**ICDR**). As the competition between seats intensifies, we will see whether the IAC enhances London's reputation as the leading seat for international arbitration in 2020 and beyond.

ENFORCING MONEY AWARDS IN INDIA: NAVIGATING FOREX RATES AND DATES

By Moazzam Khan and Shweta Sahu, Nishith Desai Associates

With cross-border dispute resolution on the rise, currency variations and exchange rate fluctuations remain a concern in enforcement of foreign awards and decrees. It is not unusual for courts and arbitral tribunals to render judgments and awards in a foreign currency¹, which is required to be enforced in India in Indian rupees (INR). As a result of fluctuations in currency rates, the actual amount payable to the award-holder in INR remains speculative, even after the arbitral award has been rendered. The Indian award debtor would prefer a conversion date on which the INR is stronger and the inverse would be true for the foreign currency award holder. Thus, myriad dates come up for consideration before the executing court for determination of the most suitable date to use for the currency conversion rate.

What aren't the "relevant dates" for conversion

In the landmark case of *Forasol v. Oil and Natural Gas Commission*², the Supreme Court examined and rejected the prospect of considering the following dates as the "relevant date" for conversion:

i. Date when the claim amount became due and payable:

This date does not effectively reinstate the claimant in the same position he would have been if the respondent had discharged his obligations when he should have, i.e. when the claim became due and payable. Owing to currency fluctuations, there would be a difference between the exchange rates as of the date on which the amount is paid and when the amount became payable. Thus, the parties are exposed to unforeseeable movements of the international monetary market.

ii. Date of commencement of action or proceedings:

This date is marred with issues such as delay tactics by the opposite parties or prolonged litigations in court. At times, extended proceedings such as reviews, appeals and revisions, render dispute resolution a

perennial affair. This leaves parties in an uncertain and precarious position as to the actual recovery of the amounts awarded in favour of the claimant.

iii. Date of award

In cases of foreign arbitral awards, which are deemed decrees³, the date of the award may be considered as the "relevant date" for conversion of currency. Specifically, where the court is satisfied that the foreign award is enforceable under the Arbitration and Conciliation Act 1996 (**Arbitration Act**), the award shall be deemed to be a decree of that court⁴. Similarly, domestic awards are executable as a decree of the court where the time for making an application to set aside the arbitral award has expired, or such application having been made, it has been refused⁵.

However, the choice of date of decree as the "relevant date" is ridden with issues such as challenges or objections to the award itself or appeals against subsequent orders from court.

iv. Date of payment:

The date of payment of the decretal amount is also flecked with additional concerns. The "date of payment" may not be a practical option as the award holder would have to specify the INR equivalent of its claim at the time of filing the execution petition as the execution must issue for a specific sum expressed in Indian currency "due upon the decree"⁶. This serves the purpose of satisfying the court that the claim falls within the pecuniary limit of the court's jurisdiction.

Conclusion: What is the "relevant date" for conversion

An ideal scenario would be where the award⁷ or the underlying contract⁸ explicitly states the date to be considered for the purposes of the forex rate. In these scenarios, the executing court would be bound to follow such a date.

¹ For example, Section 48(4) of the UK Arbitration Act 1996 provides that: "The tribunal may order the payment of a sum of money, in any currency."

² 1984 Supp SCC 263

³ *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.* (2001) 6 SCC 356; *Vitol S.A v. Bhatia International Limited* 2014 SCC OnLine Bom 1058; *Narayan Trading Co. v. Abcom Trading Pvt. Ltd.*, 2012 SCC OnLine MP 8645

⁴ Arbitration and Conciliation Act 1996, s 49

⁵ Arbitration and Conciliation Act 1996, s 36

⁶ Code of Civil Procedure 1908, Order XXI Rule 11(2); *Forasol v. Oil and Natural Gas Commission* 1984 Supp SCC 263

⁷ *Forasol v. Oil and Natural Gas Commission* 1984 Supp SCC 263

⁸ *Meenakshi Saxena & Anr. v. ECGC Ltd.* (Formerly known as Export Credit Guarantee Corporation of India Ltd.) and Anr. Civil Appeal No.5681/2018 (Arising out of SLP (C) No. 6286 of 2017)

In absence of such ideal situations, the courts have determined the following dates as the relevant dates for conversion:

a) Relevant date of conversion for enforcement of foreign awards

i. Under the pre-Arbitration Act regime

For enforcing awards under the erstwhile Foreign Awards (Recognition and Enforcement) Act, 1961, on being satisfied that the foreign award is enforceable, the award was required to be filed for pronouncement of a judgement according to the award, which would be followed by a decree. The date of such decree would be the relevant date for considering the forex rate.

ii. Under the Arbitration Act

Under the extant Arbitration Act, the effective date for considering the exchange rate is the date of rejection of objections to the enforcement of the foreign award, or when all the remedies (such as appeals and revision petitions) against enforcement of the foreign award were exhausted⁹.

b) Relevant date of conversion for enforcement of domestic awards

i. Under the pre-Arbitration Act regime

For enforcing awards under the erstwhile Arbitration and Conciliation Act 1940, a suit was required to be filed for obtaining a decree for enforcement of the award. The date of the resultant decree passed in terms of the award, would govern the rate of exchange adopted for conversion¹⁰. Thus, the date of conversion would be the date when the award attained finality¹¹. i.e., the date of finality of the award.

ii. Under the Arbitration Act

Awards rendered in India would be enforced after refusal of applications for challenging the award¹² or upon expiry of the time for making such applications to set aside the arbitral award¹³.

In a recent judgment, the Delhi High Court considered the following dates¹⁴:

- a. Date of award, being the date when the award was quantified in terms of Indian currency for payment of stamp duty;
- b. Date of disposal of the petition challenging the domestic award by the Single Judge of the High Court;
- c. Date of disposal of the appeal against the order of the Single Judge by the Division Bench of the of the High Court;
- d. Date of disposal of the special leave petition filed against the order of the Division Bench, by the Supreme Court of India; and
- e. Date of disposal of the review petition filed against the order of the Supreme Court.

In doing so and applying the principle of “date of finality” of award, the Delhi High Court observed that an award becomes an executable decree immediately upon the dismissal of the challenge to the award. Thus, the date of dismissal of the challenge application would be the relevant date for consideration of the forex rate.

However, in the event of the subsequent appeals or review petitions, the relevant date would be one when the challenge to the award was finally dismissed, i.e. the date on which the award attained finality. This follows from the “doctrine of merger”, which is applicable where an appeal or revision against an order passed by a subordinate forum is modified, reversed or affirmed by a superior forum on appeal/revision. Under the “doctrine of merger”, the decision by a subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement under law¹⁵.

⁹ Fuerst Day Lawson Limited v. Jindal Exports Limited; Progetto Grano S.P.A. v. Shri Lal Mahal Limited; DLF Universal Limited & Ors. v. Koncar Generators and Motors Limited (2018) 190 PLR 398

¹⁰ Forasol v. Oil and Natural Gas Commission 1984 Supp SCC 263

¹¹ Renuagar v General Electric AIR 1994 SC 860

¹² Arbitration and Conciliation Act 1996, s 34

¹³ Arbitration and Conciliation Act 1996, s 36

¹⁴ Trammo AG v. MMTC Limited (Ex. P. 164/2015 and Ex. Appl. (OS) 1229/2015, decided on 18 February 2019)

¹⁵ Kunhayammed v. State of Kerala, (2000) 6 SCC 359

UNPACKING THE SINGAPORE COURT OF APPEAL'S DETERMINATION OF THE PROPER LAW OF THE ARBITRATION AGREEMENT IN *BNA V BNB AND ANOTHER* [2019] SGCA 84

By Samuel Koh, Drew & Napier LLC

In *BNA v BNB and another* [2019] SGCA 84 (**BNA**), the Singapore Court of Appeal provided authoritative guidance on the applicable principles in determining the proper law of an arbitration agreement. In this post, I unpack the significance and ramifications of the findings that the Court made in *BNA*, as well as those that the Court arguably could have made, but ultimately refrained from making.

Background

The contract in question contained a choice-of-law clause selecting the law of the People's Republic of China (**PRC**) as the proper law of the contract, as well as an arbitration clause providing that "... any and all disputes arising out of or relating to this Agreement ... 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 defendants commenced arbitration against the plaintiff pursuant to this arbitration clause and in accordance with the SIAC Rules 2013. The plaintiff challenged the tribunal's jurisdiction on the ground that the proper law of the arbitration agreement was PRC law, under which the arbitration agreement was invalid, because: (a) the dispute in question was considered a "domestic dispute" under PRC law, and PRC law prohibited foreign arbitral institutions from administering arbitrations of "domestic disputes"; and (b) PRC law prohibited foreign arbitral institutions from administering PRC-seated arbitrations. The three-member tribunal issued a preliminary ruling, with the majority finding that the tribunal had jurisdiction because the seat of the arbitration was Singapore, the proper law of the arbitration agreement was Singapore law, and hence the arbitration agreement was valid. The plaintiff then applied to the High Court under s 10(3) of the Singapore International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "**IAA**"), seeking a declaration that the tribunal lacked jurisdiction.

The High Court applied the three-stage choice-of-law analysis set out by the English Court of Appeal in *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharía SA and others* [2013] 1 WLR 102 (**Sulamérica**) and adopted by the Singapore High Court in *BCY v BCZ* [2017] 3 SLR 357 (**BCY**) (the **three-stage analysis**), and found, among other things, that Singapore was the seat of the arbitration, Singapore law should be the implied choice of the proper law of the arbitration agreement, and the tribunal thus had jurisdiction over the dispute.¹ Dissatisfied with this ruling, the plaintiff sought, and successfully obtained, leave to appeal to the Court of Appeal.

The 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 of Appeal expressly affirmed the application of the three-stage analysis in determining the proper law of the arbitration agreement (at [44]–[48]).

In applying the three-stage analysis, the Court of Appeal held that:

- (a) 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 did not, in and of itself, also constitute a choice of the proper law of the arbitration agreement (at [56]–[61]);
- (b) 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 was PRC law in the present case (at [47], [62] and [63]);

¹ A fuller summary of the High Court's decision can be found in an earlier post submitted on this blog: <http://arbitrationblog.kluwerarbitration.com/2019/09/20/a-critical-review-of-the-singapore-high-courts-determination-of-the-proper-law-of-the-arbitration-agreement-in-bna-v-bnb/>.

(c) 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

(d) as the implied choice of the proper law had 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 had the “closest and most real connection” (at [94]).

However, the Court of Appeal declined to determine whether the tribunal lacked jurisdiction on the basis that the arbitration agreement would be invalid under PRC law (at [96]). The Court instead decided that such a finding was best left to the relevant seat court in the PRC (at [97]–[99]).

Analysis

The Court of Appeal’s decision in *BNA* was significant in many ways, four of which are addressed below.

Endorsing the proper law of the underlying contract as the presumptive implied choice of proper law of the arbitration agreement

First, in applying the three-stage analysis, the Court of Appeal expressly endorsed the approach taken in *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* [2014] SGHCR 12 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* 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* [2017] 3 SLR 267 at [31] and *BMO v BMP* [2017] SGHC 127 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 had the occasion to, and did indeed, rule conclusively in favour of the *Sulamérica* Presumption.

Clarifying the proper interpretation of the reference to a city in an arbitration agreement

Secondly, 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 has 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 (which is merely the physical locale where the tribunal 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 the effect of PRC law on the arbitration agreement

Thirdly, the Court of Appeal ruled 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]). Notably, this approach had been endorsed by the Singapore High Court. In *BCY*, while the court clarified that the choice of seat would be insufficient on its own to negate the presumption that parties intended the proper law of the underlying contract to govern the arbitration agreement (at [55] and [65]), the court accepted that the proper law of the main contract *could* be displaced if the consequences of choosing it would negate the arbitration agreement even though the parties had themselves evinced a clear intention to be bound to arbitrate their disputes (at [74]).

While the Singapore Court of Appeal suggested 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 appeared to be a departure from the approach adopted by the English Court of Appeal in *Sulamérica* and by the Singapore High Court in *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.

Secondly, the Court of Appeal's approach also appears problematic as a matter of principle. The Court of Appeal's 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 had 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 had 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 would arguably be unnecessary.

That being the case, assuming that PRC law would indeed 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 had 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 (*ie*, that PRC law was 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.

Declining to determine whether the tribunal lacked jurisdiction

Finally, the Court of Appeal declined to decide whether the tribunal lacked jurisdiction, and decided to leave this decision to the relevant PRC court at the seat court because: (a) any decision of the Singapore courts on jurisdiction would not be binding upon the tribunal as Singapore was not the seat and the Singapore courts had no supervisory jurisdiction over the arbitration (at [97]); (b) s 10 of the IAA did not mandate that the court make a positive finding as to jurisdiction either way (at [98]); and (c) parties were not agreed as to whether PRC law would truly have an invalidating effect on the arbitration agreement (at [99]).

It is suggested that the Court's decision to defer any ruling on the question of jurisdiction to the PRC courts should have been justified only on the basis of inconclusive evidence presented by the parties regarding the effect of PRC law on the validity of the arbitration agreement.

While it is true that the Singapore courts were no longer the supervisory court of the present arbitration proceedings in the light of the Court of Appeal's finding that Shanghai (and not Singapore) was the seat of arbitration, one wonders if the Court of Appeal should still have given a ruling on the jurisdiction of the tribunal in the light of its decision that the proper law of the arbitration agreement was

PRC law. From a plain reading of s 10 of the IAA, the Court did not appear to be precluded from making a ruling on jurisdiction after having found that the seat was not Singapore. Although the Court of Appeal rightly noted that s 10 of the IAA “*does not mandate that the court make a positive finding as to jurisdiction either way*”, it remained open to the Court to make a finding on jurisdiction.

The Court of Appeal’s main concern was that after finding that Singapore was not the seat, it was no longer the court of the seat, and hence had no supervisory jurisdiction over the arbitration. It is submitted that this concern is not entirely justified. As the Court of Appeal itself rightly recognized, the Singapore courts did originally correctly assume supervisory jurisdiction over the arbitration and the s 10 application because the arbitral tribunal had originally decided that Singapore was the seat (at [100] and [101]). This was thus quite unlike the situation in, for example, *A v B* [2007] 1 Lloyd’s Rep 237, where a party was found to have acted in breach of an arbitration agreement designating Geneva as the seat by bringing an application in the English courts to determine the existence or scope of the arbitrator’s jurisdiction (at [111] and [112]). There, the English courts never had supervisory jurisdiction over the arbitration proceedings as it was always clear that Geneva, and not London, was the designated seat. Conversely, the Singapore courts in *BNA* originally correctly assumed supervisory jurisdiction due to the tribunal’s preliminary ruling, and should not be found to have lost this jurisdiction by dint of its own decision on the seat of the arbitration.

Moreover, the ruling on jurisdiction is one that is premised on an interpretation and application of the proper law of the arbitration agreement, and *not* the law of the seat. While the courts of the seat are ordinarily granted *exclusive* jurisdiction to apply the law of the seat in determining external and internal procedural issues brought before them (see Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 1576), the same may not be said of the application of the proper law of the arbitration agreement. Indeed, as long as the proper law, being a foreign law, had been properly pleaded and proved as a fact, it should be open to the Singapore courts to interpret and apply the proper law of the arbitration agreement to decide on the jurisdiction (or lack thereof) of the tribunal, even though Singapore may no longer be considered the correct seat.

The benefits arising from this approach are that it

would conduce towards savings in time and costs. Parties, equipped with such a ruling on the tribunal’s jurisdiction, may proceed to litigation in the courts of the relevant jurisdiction without first having to seek a prior ruling from the courts at the newly constituted seat regarding the tribunal’s lack of jurisdiction. Of course, the losing party might first insist on seeking a ruling on the tribunal’s jurisdiction from the new court of the seat, thereby extending proceedings once again. Aside from the potential applicability of the preclusive doctrines of issue estoppel and *res judicata*, which might restrict the ability of the losing party to relitigate this issue, the fact remains that the losing party would now at least have the option of adhering to the original supervisory court’s decision on jurisdiction and proceeding straight to litigation in the domestic courts. Parties are thus still given the opportunity to save time and costs.

That being said, on the facts, the Court of Appeal in *BNA* ultimately appears to have made the correct decision in deferring its decision on jurisdiction to the relevant PRC courts. The Court of Appeal disagreed with the High Court’s interpretation of the expert evidence on PRC law, and found that the evidence was inconclusive on whether PRC law would indeed invalidate the arbitration agreement (at [99]). In this regard, the defendants had only themselves to blame for failing to put sufficiently cogent evidence of PRC law on this point before the courts.

Conclusion

The Court of Appeal’s decision in *BNA* is a landmark judgment in many ways, having settled conflicting strands of authorities regarding the application of the three-stage analysis, and clarified 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.