DETERMINING THE LAW GOVERNING THE ARBITRATION AGREEMENT: ANUPAM MITTAL V WESTBRIDGE

CHUA KANG LE*

I. INTRODUCTION

Under the doctrine of separability, the arbitration agreement is considered a separate agreement from the main contract, and the law governing the arbitration agreement may be distinct from the law governing the main contract itself.[1] In this regard, the validity of the arbitration agreement would be construed based on the law governing the arbitration agreement – if the law governing the arbitration agreement does not permit the formation of such arbitration agreements, the arbitration agreement would be invalid.

The main issue facing the courts is determining the law governing the arbitration agreement, where no express choice of law was made. Typically, the law governing the overall agreement is presumed to apply to the arbitration agreement. However, ambiguity arises when the parties stipulate a governing law for the overall agreement which would invalidate the arbitration agreement, but do not expressly and specifically stipulate a governing law for the arbitration agreement. The invalidating effect of the governing law may rebut its applicability to the arbitration agreement, but cases differ in requiring awareness of this effect. This issue has been the

* LLB Candidate, National University of Singapore, Class of 2024. All errors remain my own. This article was last updated on 26 March 2023.

[1] Gary Born, *International Commercial Arbitration*, 3rd ed (Alphen aan den Rijn: Kluwer Law International B.V., 2021) at 510-512 [Born]. Some commentators have argued for a narrow conception of separability in that the arbitration agreement is separate only with regard to the determination of validity and not to its choice of law: see Ian Glick & Niranjan Venkatesan, "Chapter 9: Choosing the Law Governing the Arbitration Agreement" in Neil Kaplan & Michael Moser, eds, *Jurisdiction, Admissibility & Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Alphen aan de Rijn: Kluwer Law International B.V., 2018) 132 at 136-139. However, the position in Singapore has followed the broader definition of separability articulated by Born (see e.g. *BNA v BNB* [2019] SGHC 142 at paras 17(e), 67-77. On appeal, the SGCA did not find it necessary to decide on the point; see *BNA v BNB* [2020] 1 SLR 456 (SGCA) at para 95 [BNA]).

subject of several local decisions, namely, *BCY v BCZ*[2], *BNA v BNB*[3] and the recent Singapore Court of Appeal (SGCA) case of *Anupam Mittal v Westbridge*.[4]

This article will critically examine the SGCA's decision of *Anupam Mittal* and assess it in light of case authority. First, it is humbly submitted that the SGCA's attempt at distinguishing the facts of *Anupam Mittal* from *BNA* is unconvincing. Secondly, the approach of *Anupam Mittal*, following the law in *BNA*, is problematic. The courts ought to dispense with the need for awareness of the invalidating effect as outlined in *BNA*.

II. APPLICABLE FRAMEWORK

To determine the law governing the arbitration agreement, local courts have adopted the three-stage test laid down in *BCY v BCZ*,[5] based on the U.K. case of *Sulamérica*.[6] Under the first stage, the court will consider if the parties had expressly chosen the law governing the arbitration agreement.[7]

If there is no express choice, under the second stage, the court will determine if the parties had made an implied choice as to the law governing the arbitration agreement.[8] There is a presumption that the law governing the main contract will also be the law governing the arbitration agreement, unless "the consequences of choosing it as the governing law of the arbitration agreement would *negate* the arbitration agreement even though the parties have themselves evinced a clear intention to be bound to arbitrate their disputes".[9]

Under the third stage, if the court finds that there is neither an express nor an implied choice, the court will then determine "the system of law with which the arbitration agreement has its

---

[2] [2017] 3 SLR 357 (SGHC) [*BCY*].

[3] *BNA, supra* note 1.

[4] [2023] SGCA 1 (SGCA) [*Anupam Mittal*].

[5] *BCY* , *supra* note 2 at paras 59-67, *BNA, supra* note 1 at paras 44-5.

[6] *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102 [*Sulamérica*].

[7] *BNA, supra* note 1 at para 46.

[8] *Ibid* at para 47.

[9] *BCY, supra* note 2 at para 74, as affirmed in *Anupam Mittal, supra* note 4 at paras 69-70.

closest and most real connection".[10] Typically, the arbitration agreement will have the closest and most real connection with the law of the seat of the arbitration.[11]

III. ANUPAM MITTAL V WESTBRIDGE

In *Anupam Mittal*, the dispute was over the management of a company. The appellant, a shareholder of People Interactive (India) Private Limited (the "Company"), had commenced proceedings before the National Company Law Tribunal ("NCLT") in India.[12] The respondent was also a shareholder of the Company, and the arbitration agreement, which was part of a larger shareholders' agreement, stipulated that any dispute relating to the management of the Company must be referred to arbitration, with Singapore as the seat of arbitration, under the International Chamber of Commerce Rules.[13] One issue before the SGCA was whether a valid arbitration agreement was formed under the governing law of the arbitration agreement, such that the anti-suit injunction, granted by the High Court of Singapore (SGHC), should be sustained.[14]

The SGCA found that under the first stage, although the shareholders' agreement was stated to be governed by Indian law, this did not *ipso facto* constitute an express choice of the law governing the arbitration agreement.[15] The SGCA emphasized that there must be "explicit language stating so in no uncertain terms", which was not present on the facts.[16]

Under the second stage of the framework, the SGCA examined whether Indian law should be viewed as the implied choice of law governing the arbitration agreement. The SGCA held that there is a presumption that Indian law, as the law governing the main shareholders' agreement, applies as the law governing the arbitration agreement.[17]

---

[10] *BNA, supra* note 1 at para 48.

[11] *BCY, supra* note 2 at para 45, 54, affirming *Sulamerica, supra* note 6 at para 32.

[12] *Anupam Mittal, supra* note 4 at para 15.

[13] *Ibid* at para 6.

[14] *Ibid* at paras 61-62.

[15] *Ibid* at paras 64-66.

[16] *Ibid* at para 66.

[17] *Ibid* at para 68-70.

The SGCA then considered whether the presumption should be rebutted. The SGCA accepted the respondent's argument that the presumption should be rebutted as the appellant's case centred around minority oppression, which is non-arbitrable in India as the NCLT is empowered with exclusive jurisdiction over management disputes.[18] On the facts of the case, the SGCA reasoned that there were sufficient indicators to rebut the presumption that the law governing the arbitration agreement was intended to be Indian law.[19]

Moving on to the third stage of the framework, the SGCA held that Singapore law, as the law of the seat of the arbitration, had the closest and most real connection with the arbitration agreement, and would apply as the law of the arbitration agreement.[20] Hence, the court found that the arbitration agreement was valid under its governing law.

IV. REASONING AND CONSISTENCY WITH BNA V BNB

With respect, the SGCA's attempt at distinguishing *Anupam Mittal* and *BNA* on the facts is unconvincing. In *BNA*, an issue was whether the implied choice of PRC law as the governing law of the arbitration agreement was rebutted under the *BCY* framework.[21] It was argued that a foreign arbitral institution such as the Singapore International Arbitration Centre was not permitted by PRC law to administer an arbitration agreement, with the PRC as its seat.[22] As such, the invalidating effect of PRC law should rebut the presumption of its applicability as the law governing the arbitration agreement.

The SGCA in *BNA* rejected this argument, finding that for such an argument to be advanced, it must be shown 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".[23] The SGCA in *BNA* thus required awareness of the potential invalidating effect of the choice of law, although the court did not elaborate on the degree of awareness required – knowledge of its

---

[18] *Ibid* at para 74.

[19] *Ibid*.

[20] *Ibid* at para 75.

[21] *BNA, supra* note 1 at paras 62-3.

[22] *Ibid* at para 89.

[23] *Ibid* at para 90.

invalidating effect or mere consideration of some legal consequence. On the facts of *BNA*, the SGCA found that this consideration was not operative on the parties, and thus cannot be part of the context in determining the choice of law.[24] This requirement of awareness has been characterised to be "a far more restrained approach towards any pro-validation rule".[25] In contrast, the UK approach in *Enka v Chubb*[26] and *Sulamérica* is based on the "rational assumption that parties would prefer to have an agreement upheld than not".[27] The UK approach is an application of a broad validation principle, and no awareness is required.

It is humbly suggested that the SGCA's decision in *Anupam Mittal* fails to adequately address this requirement of awareness in *BNA*. In *Anupam Mittal*, the SGCA reasoned that the instant case could be distinguished from *BNA* on the basis that the parties' intention for all disputes to be resolved by arbitration was demonstrated "much more strongly".[28] By distinguishing *BNA* and *Anupam Mittal* solely on the facts, the SGCA impliedly reaffirmed *BNA*'s strict requirement of awareness. On the facts, the SGCA highlighted two main differentiating factors between the cases.

First, the SGCA highlighted that "[i]t is impossible to contend that as shareholders they were not aware that disputes arising under the SHA and also in connection with the management of the Company would give rise to questions of *Indian* company law that would generally fall to be determined by the *Indian courts* (at the time of the agreement".[29] The SGCA appeared to be drawing an inference that parties were aware of the invalidating effect of the choice of law. However, the basis for this inference is unclear. One interpretation of the SGCA's statement could be that the appellant and respondent, as shareholders, are assumed to be aware of the laws governing management disputes in India. However, this line of reasoning can be equally applied to *BNA* – as businesspeople, it could equally be assumed that businesspeople would exercise due diligence and be aware of the laws governing the subject matter of the arbitration.

---

[24] *Ibid*.

[25] Darius Chan & Jim Yang Teo, "Re-formulating the test for ascertaining the proper law of an arbitration agreement: a comparative common law analysis" (2021) 17:3 J. Priv. Int. Law 439 at 462.

[26] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] 1 WLR 4117 [*Enka*]

[27] *Ibid* at para 198.

[28] *Anupam Mittal*, supra note 4 at para 72.

[29] *Ibid* at para 72.

Furthermore, while it may be possible that the shareholders were aware that such questions are generally under the jurisdiction of the Indian courts, the shareholders may not be aware that the Indian courts possessed *exclusive* jurisdiction. While the court appeared to infer that the phrase "relating to the management of the Company" in the arbitration clause evinced an awareness of the potential invalidating effect of Indian law , such an inference was drawn too easily.[30] The phrase could simply have been added for the benefit of doubt. If the parties were truly aware of the invalidating effect of Indian law, the parties would probably have included a "notwithstanding" clause, which would be a far more unequivocal indication of awareness of the invalidating effect. The court's approach here suggests that a lower degree of awareness – that the arbitration agreement could *possibly* be invalidated - would suffice. However, as argued above, there is no principled basis for this inference.

Although the SGCA took into account the fact that the parties "chose to arbitrate under Singapore law in Singapore and according to the rules of the ICC, thereby choosing a seat and an arbitral body the common feature of which was that neither had any connection with India",[31] the relevance of these considerations are unclear. The parties in *BNA* had also chosen an arbitral body (the SIAC) which did not have any connection with the seat of arbitration (the PRC) – thus, the choice of arbitral bodies were of little relevance in *BNA*. It may be possible that the choice of Singapore as the seat could indicate awareness of the invalidating effect. Parties may have had the mistaken belief that the law of the seat, Singapore, would immediately apply instead of Indian law as the law governing the arbitration agreement, or may have (correctly) believed that the invalidating effect of Indian law would lead to a finding that the law of the seat would apply. However, the SGCA did not expressly elucidate how the choice of seat is indicative of the parties' awareness of the invalidating effect, drawing such an inference without further explanation. Instead, the choice of Singapore as the seat appeared to be because it was an "Asian arbitration-friendly jurisdiction where an ICC arbitration could be held" [32], and not because the parties were aware of the invalidating effect of Indian law.

---

[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid.*

Second, the SGCA considered that the parties had "paid some amount of attention to the mechanics of the arbitration", citing several clauses in which interim relief and enforcement measures were agreed upon.[33] The SGCA interpreted these clauses to evince an intention for the dispute to be settled by arbitration, which would be inconsistent with the choice of Indian law as the law governing the arbitration agreement.[34] However, this line of reasoning is flawed. The absence of such clauses should not indicate a lack of serious intention to arbitrate, as the subject matter of these clauses would typically be covered under the stipulated arbitration rules and the relevant statutes of the seat. For instance, in *BNA,* the SIAC Rules stipulated in the arbitration agreement would similarly cover interim relief and enforcement. While it may be argued the presence of these express clauses could still evince a stronger intention to arbitrate, a mere reference to default arbitral rules should not be given any less weight, given that there is no real need to draft such detailed clauses if parties find the default arbitration rules suffice for their purposes, and instead choose to incorporate them into the terms of the arbitration agreement by reference.[35] There is no principled basis to draw a distinction between a detailed arbitration clause and an incorporation of default arbitral rules. Thus, the court should not draw inferences based on how detailed an arbitration clause is drafted. It should not be the case that more detailed arbitration clauses would *ipso facto* evince a clearer intention for the dispute to be resolved by arbitration.

Hence, with respect, the SGCA's decision in *Anupam Mittal* fails to convincingly distinguish *BNA* on the facts. A strict application of the problematic requirement of awareness from *BNA* should have led to a finding that the presumption was not rebutted. Reliance on contractual interpretation to draw inferences as to the parties' awareness at the time of drafting may be unprincipled and lead to inconsistent outcomes. This highlights that the requirement of awareness is inherently problematic due to its difficulty of proof and reliance on inferences.

V. RATIONALISING THE CASES

[33] *Ibid.*

[34] *Ibid* at para 73.

[35] *Lao Holdings NV v Government of the Lao People's Democratic Republic* [2022] SGCA(I) 9 at para 53.

The SGCA should adopt the approach preferred by the UK Supreme Court in *Enka*, and clarify that parties need not have awareness of the potential invalidating effect for the presumption of an implied choice of law to be rebutted. Awareness of the potential invalidating effect should only be one factor that the court takes into account in determining whether the parties have impliedly chosen the governing law of the main contract to operate as the governing law of the arbitration agreement, instead of a threshold requirement as conceived of in *BNA*. There are three main reasons.

A. Case Authority

First, as a matter of authority and case law, there should not be such a requirement. The line of cases from *Sulamérica* to *BCY* and the UKSC case of *Enka* all lacked this requirement. In *Sulamérica*, Brazilian law was stipulated to be the law governing the main contract. Under Brazilian law, the insured must provide consent to refer the dispute to arbitration. The England and Wales Court of Appeal found that this requirement of consent undermined the efficacy of the arbitration clause (which provided that either party could refer a dispute to arbitration), and thus the potential invalidating effect of Brazilian law suggested that the parties did not intend for the arbitration agreement to be governed by Brazilian law.[36] Notably, the EWCA did not examine or take into account whether the parties knew of this potential invalidating effect. Instead, the EWCA reasoned that the intention to arbitrate as evinced by the arbitration clause itself indicated that there should not be an implied choice of law with invalidating effect.[37] The formulation in *Sulamérica* was endorsed by the UKSC in *Enka* as an application of the validation principle, on the basis that rational commercial parties, as a matter of purposive interpretation, are assumed not to have intended a choice of law that would undermine the arbitration agreement.[38] If the requirement of awareness in *BNA* was applied in *Sulamérica*, a different outcome may have been reached.[39] While the Singapore courts are not bound by decisions by the UK courts, the courts have not provided a clear acknowledgement of and justification for this divergence in law.

[36] *Sulamérica*, *supra* note 6 at paras 30-2.

[37] *Ibid*.

[38] *Enka*, *supra* note 26 at para 106-7.

[39] Chan & Teo, *supra* note 25 at 462.

Furthermore, in *BCY*, the SGHC's emphasis was on whether the consequences of the implied choice of governing law would negate the arbitration agreement despite a clear intention to be bound to arbitrate. The court did not require awareness of the invalidating effect.[40] This requirement was first introduced in *BNA* without detailed judicial reasoning, undermining the decision's persuasiveness.[41] Thus, as a matter of authority, the original formulation of *BCY* should be returned to.

B. Difficulty of proof

Second, it is difficult to determine if the parties were indeed aware of the invalidating effect at the time of drafting. Absent contemporary documentary evidence, the court would have to infer from the phraseology of the arbitration clause itself, which was the approach taken in *Anupam Mittal*. This runs the risk of being arbitrary, as the detail and phraseology of the arbitration clause may not directly indicate the parties' intention, as argued above. If parties truly were aware of the invalidating effect of the choice of law, parties would likely have chosen to expressly indicate the governing law of the arbitration agreement to avoid any ambiguity. Additionally, the parol evidence rule may bar the admission of pre-contractual negotiations as evidence.[42] Any proof of awareness would thus be subject to the strict requirements set out in *Zurich Insurance*[43], such that the evidence must be "relevant, reasonably available to all the contracting parties, and relates to a clear or obvious context".[44] Hence, the ability of parties to prove their subjective intention behind the phraseology is limited.

C. Public Policy Considerations

---

[40] *BCY*, *supra* note 2 at para 74.

[41] *BNA*, *supra* note 1 at para 90.

[42] As codified under section 94 of the Evidence Act 1893.

[43] *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at paras 125-129.

[44] *BNA*, *supra* note 1 at para 81.

Third, Singapore adopts a strong public policy in favour of arbitration, which supports dispensing with the need for awareness of the invalidating effect.[45] Indeed, it was noted in *Anupam Mittal* itself that courts ought to give effect to the public policy unless there is a "good reason not to".[46] Thus, this public policy in favour of arbitration should mean that "[t]he parties' true and authentic intentions regarding their agreement to arbitrate", as indicated by the arbitration clause, should prevail over an invalidating choice of law, regardless of the awareness of the parties.[47]

While it may be argued that parties ought to bear the consequences of their agreement, such that "the parties' manifest intention to arbitrate is not to be given effect at all costs",[48] the requirement of awareness is too difficult to apply, leading to uncertainty. Removing the requirement would promote certainty in arbitration clauses and is consistent with the pro-enforcement objective of the New York Convention, which Singapore is a signatory to.[49]

Furthermore, since the purpose of arbitration is often to ensure neutrality of the forum and avoid the jurisdiction of the national courts,[50] a "rescued" arbitration agreement with differing terms would still hew closer to the intention of the parties than an invalid arbitration agreement and dispute resolution via litigation. For instance, in the context of pathological clauses, the Singapore courts have "disregard[ed] meaningless words in arbitration clauses in order to construe such clauses in a workable manner".[51] This approach has been interpreted to be one where the primary intention to arbitrate is given primacy over secondary procedural rules.[52] Drawing a

---

[45] *Anupam Mittal*, *supra* note 4 at para 74.

[46] *Ibid*.

[47] Born, *supra* note 1 at 617.

[48] *BNA, supra* note 1 at para 104.

[49] Born, *supra* note 1 at 615.

[50] Margaret Moses, *The Principles and Practice of International Commercial Arbitration*, 3rd ed (Cambridge: Cambridge University Press, 2017) at 3.

[51] *KVC Rice Intertrade Co v Asian Mineral Resources Pte Ltd* [2017] 4 SLR 182 (SGHC) at para 53; but see *Insigma Technology v Alstom* [2009] 3 SLR(R) 936 (SGCA) at para 31, where the SGCA caveated that giving effect to an intention to settle any dispute by arbitration should not "result in an arbitration that is not within the contemplation of either party".

[52] Morten Frank, "Interpretation of Pathological Arbitration Agreements: Non-existing and Inaccessible Elements" (2020) 20:3 Pepperdine Disp. Resol. L.J. 298 at 330. In this article, the author also finds that in U.S case law, the primary intention to arbitrate is given primacy over the procedural rules, and the pathological procedural rules would be severed. See also Born, *supra* note 1 at 814-819.

parallel, the requirement of awareness of the invalidating effect ought to be dispensed with. The presence of the invalidating effect should suffice to rebut the presumption that the law governing the main agreement applies to the arbitration agreement, to give proper effect to the primary intention to arbitrate.

Indeed, even without the need for awareness of the invalidating effect, the SGCA in *BNA* would have reached the same outcome in finding PRC law to be the governing law of the arbitration agreement.[53] The SGCA could have found that the potential invalidating effect rebutted the implied choice of PRC law as the governing law of the arbitration agreement. There was no choice, whether express or implied, of law for the governing law of the arbitration agreement. Moving on to the third stage of the test, the court would then determine the system of law with the closest connection. On the facts of *BNA*, PRC law would still be the system of law with the closest connection, and thus would be the governing law, as the seat of the arbitration was specified to be Shanghai.[54]

VI. CONCLUSION

In summary, it is respectfully submitted that the SGCA did not convincingly distinguish *Anupam Mittal* from *BNA* on its facts, and its attempt to do so impliedly affirms the problematic requirement of awareness in *BNA*. The courts ought to return to the initial formulation in *BCY*, based on the authority of *Sulamérica* and *Enka*, and focus its analysis on the invalidating effect of the choice of law rather than the parties' awareness of it. Such an analysis would better ensure certainty in determining the law governing the arbitration agreement and avoid potential subjectivity in interpretation, furthering the public policy in favour of arbitration.

---

[53] Chan & Teo, *supra* note 25 at 462.

[54] *BNA*, *supra* note 1 at para 94. The issue before the court was on the identification of the proper law of the arbitration agreement; once the proper law of the arbitration agreement was identified to be PRC law and the seat of arbitration was Shanghai, the issue of jurisdiction was left to the PRC courts to decide (at para 99).