Interpreting Arbitration Agreements: A Cautionary Tale for Commercial Parties

October 2021 | Brunei

Introduction

With the indiscriminate spread of COVID-19 and the corresponding prevalence of remote hearing tools across the world, it has never been easier for disputes to be heard in a foreign jurisdiction of one's choice. However, all that glisters is not gold, and it pays for parties to pay special attention to the drafting of arbitration agreements and, in particular, references to the arbitral seat.

In Civil Appeal No. 4 of 2019, the Court of Appeal of Brunei Darussalam ("**BCA**") considered an arbitration agreement that seemingly referenced both Brunei and Singapore as potential arbitral seats. Preferring a commonsensical approach, the BCA interpreted the arbitration agreement as having clearly established Brunei as the proper seat of the arbitration.

The BCA's decision goes beyond academic interest or discussion, and serves as a cautionary tale for commercial parties. In this Update, we look at the practical significance of the arbitral seat and how the wrong interpretation of an arbitration agreement may result in the uninformed party's waste of significant time and costs.

The Plaintiff shipowners in this case were successfully represented by Kendall Tan, Yip Li Ming, and Shaun Ou from Rajah & Tann Asia's Brunei desk.

Brief Facts

The Defendants entered into a charterparty with the Plaintiff to charter the Plaintiff's vessel from January 2014 to January 2017. Despite the Plaintiff's repeated demands for payment, no payment was forthcoming from the Defendants. Accordingly, on 11 April 2019, the Plaintiff commenced legal proceedings against the Defendants in the High Court of Brunei Darussalam ("**BHC**").

A series of notices and applications were filed as follows:

Party	Actions
Defendants	• Filed a Notice of Intention to Arbitrate ("**Notice**") in Singapore, pursuant to the Singapore International Arbitration Centre ("**SIAC**") Rules • Filed an application in the BHC to stay court proceedings pending the outcome of arbitral proceedings in Singapore **Result**: A stay of proceedings was granted by a Senior Registrar of the BHC.
Plaintiff	• Filed a Notice of Appeal against the stay of proceedings **Result**: The stay was set aside by the Honourable Judicial Commissioner Edward Timothy Starbuck Woolley ("**Woolley JC**").
Defendants	• Filed Notice of Appeal in the BCA against the decision of Woolley JC

By way of its written judgment dated 27 November 2019, the BCA dismissed the Defendants' appeal, and we examine the BCA's reasoning below.

Grounds of Decision of the BCA

Unlike Woolley JC and the Senior Registrar below, both of whom had focused on the existence of a real dispute, the BCA considered whether the arbitral seat was Brunei or Singapore. Agreeing with the Plaintiff, it held that the arbitration agreement should be read as having "*established the seat of the arbitration to be Brunei*".

The arbitration agreement

The relevant provision in the charterparty provides:

> "*Any dispute arising out of this Charter Party shall be referred to arbitration at the place stated in Box 33 subject to the law and procedures applicable there*"

Box 33 states:

> "*English law preferably in Negara Brunei Darussalam or otherwise in Singapore*"

Commonsensical interpretation of the arbitration agreement

The BCA acknowledged that the Defendants had by their Notice "*unilaterally selected Singapore as the place of arbitration*", and succinctly identified "*the question [of whether] on a proper construction Box 33 permit[s] [the Defendants] to do so*". Adopting a commonsensical interpretation, and agreeing with the Plaintiff, the BCA held that the arbitration agreement did not permit the Defendants to unilaterally select Singapore as the arbitral seat for two reasons.

First, the plain wording of "*preferably in Brunei*" indicated that the parties "*were stating a preference*". The BCA compared that wording with an alternative phrase "*in Brunei or Singapore*". Unlike the latter, where parties would have the unfettered right to elect between two equal options, the arbitration agreement was phrased to indicate what the BCA called "*an agreed preference*" for Brunei.

Second, the BCA interpreted the phrase "*or otherwise*" as implying that the "*displacement of that preference must come about for a reason other than the whim of one of the parties*". The BCA further highlighted that choosing the alternative second choice of venue cannot be a unilateral decision, and that this ability to select a second venue is "*not an option given to either party [but] is a fallback provision should a cogent reason arise to prevent an arbitration in Brunei*".

In particular, the BCA accepted the Plaintiff's analysis that such "*cogent reason*" must also be agreed by both parties. The Defendants' counsel had unsuccessfully contended that the Defendants had chosen Singapore over Brunei because of the "*considerable developments in the [SIAC] which have not been matched in Brunei*". In rejecting this reason, the BCA acknowledged that this could have constituted a "*cogent reason*", but only if it had been agreed by both parties.

Accordingly, the BCA held that the seat of the arbitration was Brunei.

Concluding Remarks

The BCA's decision was anchored not merely on semantics, but on sound legal analysis of the charter terms and good sense. The decision highlights the importance of clear drafting to the enforcement of arbitration agreements and, more crucially, the importance of careful and sound interpretation of such clauses.

In the result, the Defendants' instigation of arbitration in the wrong seat led to them wasting significant time and costs. Such costs included the fees paid to SIAC, their legal fees in preparing the necessary submissions, and also the costs incurred by the Plaintiff arising from the Defendants' application for a stay of the Bruneian court proceedings, which the BCA had awarded to the Plaintiff. Additionally, commencing arbitration in the wrong seat may also leave the misguided party open to being enjoined by anti-suit relief from the correct curial court.

In short, the BCA's decision underscores the importance of proper interpretation of arbitration agreements and the weight placed on their plain and/or logical wording. When in doubt, it pays to fall back on their clear and commonsensical meaning.

Contacts

Kendall Tan
Partner, Singapore

T +65 6232 0634
kendall.tan@rajahtann.com

Yip Li Ming
Partner, Singapore

T +65 6232 0647
li.ming.yip@rajahtann.com

Shaun Ou
Associate, Singapore

T +65 6232 0656
shaun.ou@rajahtann.com

Please feel free to contact the editorial team of *Arbitration Asia* at arbitrationasia@rajahtannasia.com and follow us on LinkedIn here.