Dispute Resolution Hotline

March 11, 2022

WHO APPOINTS THE ARBITRAL TRIBUNAL UNDER THE SIAC RULES

- Reading Rule 28.3 of the SIAC Rules and Article 16(2) of the UNCITRAL Model Law on International Commercial Arbitration, jurisdictional objections raised by a party before the arbitrator, after such party failed to participate in the proceedings and file a defence would be considered as out of time.
- A non-participating party is not precluded from raising jurisdictional objections subsequently before the court.
- In all cases under the SIAC Rules, 2016, it is the President of SIAC who shall appoint the tribunal
- Where parties intend to displace the appointment, procedure laid down in the SIAC Rules, 2016, such intent should be explicit and unequivocal.

In *Hunan Xiangzhong Mining Group Ltd. v Oilive Pte Ltd.*,[1] the Singapore High Court **("Singapore High Court")** ruled on the appointment of arbitrator under the rules of the Singapore International Arbitration Centre **("SIAC")**. The Singapore High Court clarified the importance of raising a jurisdictional challenge at the earliest possible time. However, a non-participating party is still permitted to challenge the award subsequently before the court based on the jurisdictional objections.

FACTUAL BACKGROUND

On 18th May 2020, Hunan Xiangzhong Mining Group Ltd. **("Hunan")** entered into a contract with Oilive Pte Ltd. **("Oilive")** for the sale and purchase of a cargo of barrels of light cycle oil. The contract contained an arbitration agreement which prescribed that:

> *"the Tribunal shall consist of a single arbitrator agreed upon by both parties, or if not so agreed, by the Chairman for the time being of SIAC."*

The arbitral proceedings were governed by the SIAC Rules.

Certain disputes arose and Oilive initiated arbitration as per the arbitration agreement in the contract. The notice of arbitration was sent to the Hunan proposing the appointment of a sole arbitrator which went unanswered. Consequently, Oilive requested SIAC to appoint the sole arbitrator. Receiving no response from Hunan upon several communications, SIAC requested the President to appoint the sole arbitrator in accordance with Rule 10.2 of the SIAC Rules, 2016. Rule 10.2 of SIAC Rules states that where the parties fail to agree on the nomination of a sole arbitrator within 21 days, the President of the SIAC would appoint the arbitrator.

ARBITRAL PROCEEDINGS

The arbitrator ordered Hunan to file its written submissions and evidentiary documents by 5th April with an extension till 12th April 2021. Hunan failed to do so and failed to attend the first evidentiary hearing as well. It finally appointed counsel on 25th May 2021 and raised objections regarding the jurisdiction of the arbitrator to adjudicate the matter. It stated that the sole arbitrator was to be appointed by the Chairman of SIAC as stated in the arbitration agreement and not by the President as had happened in the present case.

It should be noted that in 2013 SIAC implemented a new governance structure. Under its earlier rules i.e. the 2007 and 2010 versions, the chairman of SIAC had the power to appoint the arbitrator. However, in 2013, with the new governance structure, the president of SIAC was empowered to appoint the arbitrator and *vide* SIAC Rules, 2013, its earlier rules were amended and the power to appoint arbitrators was moved from the Chairman to the President of SIAC.

The arbitrator dismissed Hunan's jurisdictional challenge on the following grounds:

1. **First,** the arbitration agreement merely provided that the parties or the Chairman of SIAC "agree" on an arbitrator and never conferred the power on the Chairman to "appoint" one. This also finds backing by Rule 9.2 of the SIAC Rules, 2016 which provides that wherever the arbitration agreement states that the parties or a third-person may "appoint" an arbitrator, it shall be deemed to be nomination. Rule 9.3 of the SIAC Rules, 2016 further mentions that upon such nomination, it shall be the President of SIAC who will actually appoint the arbitrator.
2. **Second**, there is nothing in the arbitration agreement to provide that the parties intended to displace SIAC Rules, 2016 in favour of their own clause.

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3. **Third,** any reference to SIAC Rules will necessarily mean a reference to the latest edition, which provides that the President of SIAC will be the appointing authority. The reference to Chairman in the arbitration agreement does not mean that the parties intended for the older edition to apply. Further, a reference to the older rules would not change the effect, as regardless of whether the 2007, 2010 or 2013 version of rules was incorporated, the power to appoint would continue with the President. If the parties intended on the unamended version of the earlier rules to apply then they would have set that out expressly.

4. **Fourth,** Rule 10.2 of SIAC Rules, 2016 states that where the parties fail to appoint the sole arbitrator within 21 days, the President would appoint the same. This provision would also govern situations where a party does not participate in the proceedings at all. Since in the present case Hunan did not participate in the arbitral proceedings and 21 days had passed, Rule 10.2 would empower the President of SIAC to appoint the sole arbitrator. It was intended as a fall-back provision in case the parties could not reach an agreement on appointment due to non-participation of either party in the proceedings. Further, parties expressly wrote that the SIAC Rules "currently in force" were deemed to be incorporated into the arbitration agreement, indicating that most up to date rules apply. Further, Rule 10 of the SIAC Rules is not prefaced with the words "*unless the parties have agreed otherwise".* Hence, Rule 10 has to be read with the arbitration clause as opposed to the clause superseding the language of Rule 10.

5. **Fifth**, Hunan had filed its jurisdictional challenge out of time, since it never filed its memorial within the time stipulated by the arbitrator and ignored repeated requests.

This decision on jurisdiction was challenged in the Singapore High Court under Section 10(3) of the International Arbitration Act, 2002 **("IAA").**

JUDGMENT OF THE SINGAPORE HIGH COURT

On the jurisdictional objection being filed out of time

The Singapore High Court first ruled on whether Hunan's jurisdictional objection was filed out of time. Rule 28.3(a) of the SIAC Rules read with Article 16(2) of the UNCITRAL Model Law stipulates that a jurisdictional challenge has to be raised no later than the statement of defence is filed. Hunan argued that since no statement of defence had been submitted and that since it had not participated in the arbitration, it was free to raise such a jurisdictional objection at any point of time.

The Singapore High Court rejected the contention, holding that Hunan *chose* not to file a jurisdictional objection within the time stipulated by the arbitrator. It had received all correspondences and communications calling upon it to file a statement of defence but willfully ignored to do so. Relying on the rationale behind Rule 28.3 of the SIAC Rules and Article 16(2) of the UNCITRAL Model Law which was to require the parties to raise their jurisdictional objections at the earliest possible time, the Singapore High Court held that accepting Hunan's argument of raising the jurisdictional objection at any point of time while it willfully avoids filing of a statement of defence and participating in the arbitral proceeding would only serve to derail the arbitral process.

Nevertheless, the Singapore High Court held that it is not disentitled from hearing a jurisdictional challenge based on the procedural irregularity of the objection being filed out of time. The Singapore High Court relied on the UNCITRAL Analytical Commentary of Article 16(2) and ***Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd.***[2] to hold that the preclusive effect of failing to raise a jurisdictional challenge does not apply where a party fails to participate in the arbitral proceedings. Therefore, even if Hunan did not participate in the arbitration within the deadline stipulated by the arbitrator, the court could nevertheless address the question of the arbitrator's jurisdiction under Section 10(3) of the IAA and was not precluded from doing so solely on the ground that the objection was filed out of time.

On the jurisdiction of the arbitrator: whether appointed in accordance with the arbitration agreement

At the very outset, the Singapore High Court alluded to various principles of construction of an arbitration agreement. It observed that effect must be given to the agreement to the fullest extent wherever possible. This was termed to be the principle of "effective interpretation". Further, it reiterated that courts should not construe the arbitration agreement restrictively or strictly and should prefer a commercially logical and sensible construction.[3] Applying these principles, the Singapore High Court upheld the appointment of the sole arbitrator on the following grounds:

1. **First**, the Singapore High Court observed that the arbitration agreement used the words "agreed upon by" instead of "appoint" or "nominate". Hence, no power of appointment or nomination was conferred on the parties or the Chairman of SIAC. Further, Rule 9,2 of the SIAC Rules, 2016 states that where an arbitration agreement states that the parties or a third-party may appoint an arbitrator, such appointment has to be deemed as nomination. Rule 9.3 of the SIAC Rules, 2016 stipulates that the actual appointment shall be done by the President in all cases. Hence, even if the arbitration agreement stated that the parties or the Chairman would "appoint" the sole arbitrator, such appointment would only be deemed as nomination. It is the President of SIAC who would subsequently appoint the sole arbitrator.

2. **Second**, Hunan had sought to contend that the reference to the Chairman of SIAC being the appointing authority in the arbitration agreement would be akin to the application of an earlier version of the SIAC Rules that mentioned the Chairman of SIAC would appoint arbitrators. However, the Singapore High Court held that: (a) since the contract was entered into on 18th May, 2020, a reference to SIAC Rules would necessarily mean a reference to the latest version, wherein the President of SIAC had the power of appointment; and (b) if the parties intended for the Chairman of SIAC to "appoint" the sole arbitrator and displace the SIAC Rules, 2016 in favour of an earlier version, they would have explicitly mentioned so. Such explicit intent was absent from the arbitration agreement.

3. **Third**, the Singapore High Court rejected Hunan's contention that Rule 10.2 of the SIAC Rules, 2016 cannot be applied as a fall-back provision. It observed that since the rule is not prefaced by words such as "unless the parties have agreed otherwise", there is nothing to indicate that the parties intended to disapply the same. The Singapore High Court stated "*In the absence of any such clear indications, the court should incline towards*

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reading the arbitration agreement harmoniously with the whole of the institutional rules as chosen by the parties." Further, construing it as a fall-back provision would not only be commercially sensible, it would also render the arbitration agreement workable. Therefore, the appointment of the sole arbitrator by the President of SIAC in accordance with Rule 10.2 of the SIAC Rules, 2016 was held to be valid.

CONCLUSION

The Singapore High Court's approach towards giving full effect to the arbitration agreement is praiseworthy. Further, the Singapore High Court's approach towards parties that willfully ignore to participate proceedings and tend to use the wording of a provision to raise objections at their own whims is also noteworthy. Such a decision will go a long way in dissuading parties from raising objections while prolonging the arbitral proceedings. However, the decision also reflects the importance of taking due care in drafting the arbitration agreement. A flawed clause could result in objections being raised which leads to wastage of time and resources on tangential issues as opposed to the merits of the dispute.

The observation of the Singapore High Court is relevant in the Indian context. Article 16(2) of the Model Law has been imported into Section 16(2) of the Indian Arbitration & Conciliation Act, 1996 **("the Act")**. Further, Section 16(4) of the Act allows the arbitral tribunal to condone the delay in raising such jurisdictional objection beyond filing of a statement of defence if such delay is justifiable. In ***Gas Authority of India Ltd v Keti Const. (I) Ltd***,[4] the Supreme Court of India observed that a plea challenging the jurisdiction of the arbitrator has to be raised at very beginning of the proceedings and "*normally not later than the statement of defence*". The importance of raising a jurisdictional objection at the earliest possible opportunity was restated by the Bombay High Court in ***Surendra Kapoor v Prabir Kumar***.[5]Hence, Indian jurisprudence is in concert with the principles of law the Singapore High Court laid down. However, procedurally, Indian law is slightly different. Under Singapore law, a decision of the arbitral tribunal holding it has jurisdiction to hear the dispute can be challenged before the court within 30 days of the jurisdictional ruling. However, in India, as per Section 16(5) and 16(6) of the Act, the ruling of the arbitral tribunal dismissing the jurisdictional objection, can be challenged under Section 34 of the Act once the final award is passed.

– Ashish Kabra & Vyapak Desai

(*We acknowledge and thank Ansh Desai, Student Gujarat National Law University, Gandhinagar for his assistance on this hotline.*)

You can direct your queries or comments to the authors

[1] [2022] SGHC 43

[2] [2019] 2 SLR 131

[3] BNA v BNB and another [2019] SGHC 142

[4] (2007) 5 SCC 38

[5] 2008 (1) RAJ 133 (Bom) (DB)