How Should “Bare” Arbitration Clauses Be Enforced By The Courts?

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In *K.V.C. Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] SGHC 32, the Singapore High Court enforced so-called “bare” arbitration clauses, i.e., clauses that specify neither the place of arbitration nor the means of appointing arbitrators.

In Singapore, the President of the SIAC Court of Arbitration is designated as the statutory appointing authority under Section 8(2) of Singapore’s International Arbitration Act (IAA) and Article 11(3) of the Model Law. Critically, Article 11(3) applies only if the place of arbitration is Singapore. This case is noteworthy because the Court considered that, even when the place of arbitration is unclear or not yet determined, the IAA nevertheless allows the President of the SIAC Court to act as the statutory appointing authority.

While the ultimate pro-arbitration ruling will not come as a surprise to readers, it is not an easy decision. This note briefly highlights two select issues which may have affected the outcome of the case:

(a) Does Article 11(3) of the Model Law apply when there is no agreement that Singapore is the place of arbitration?

(b) What condition should the Court have applied when granting a stay in favour of a “bare” arbitration clause?

Facts

The case involved two contracts for the sale and purchase of rice. Under each contract, the sellers were different, but the buyer was the same. Each of the two contracts contained an arbitration clauses. Both arbitration clauses are similar. The arbitration clause in the first contract reads as follows:

> The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and finally resolved by arbitration as per Indian Contract Rules.

The arbitration clause in the second contract reads as follows:

> The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and finally resolved by arbitration as per Singapore Contract Rules.

Disputes arose between the sellers and buyer. Initially, both sellers proposed ad hoc arbitration in Singapore with a sole arbitrator. The buyer refused to cooperate. This led to the sellers commencing litigation before the Singapore courts. The buyer applied for a stay of proceedings in favour of arbitration under section 6 of Singapore's International Arbitration Act (IAA).

The Court observed that the enforcement of "bare" arbitration clauses would give rise to practical difficulties over how the arbitral tribunal would be appointed.

Decision

The Court's decision can be summarised as follows:

First, the effect of Article 11(3) is that the President of the SIAC Court cannot act in a case where it is clear that the place of arbitration is not Singapore. However, it does not necessarily follow that the President of the SIAC Court is powerless to assist in cases where the place of arbitration is unclear or not yet determined.

Second, notwithstanding the silence in the IAA and Model Law, there is a *prima facie* case that, even when the place of arbitration is unclear or not yet determined, the President of the SIAC Court can still act as the *"statutory appointing authority"*.

Third, before the President of the SIAC Court exercises his statutory powers, he needs to be satisfied that there is a *prima facie* case that Article 11(3) applies, viz Singapore is the place of arbitration.

Fourth, considering the arbitration clauses at hand, the President of the SIAC Court can form a *prima facie* view that his powers of appointment under Article 11(3) applies.

Fifth, even if the President of the SIAC Court declines to appoint the arbitrators for whatever reason, the Singapore court retains "residual jurisdiction" to ensure that the arbitration under both arbitration clauses proceed notwithstanding any deadlock between the parties on the appointment of arbitrators.

Before the Court, the buyer's position was that, the President of the SIAC Court can appoint the arbitrator in the absence of mutual agreement. The Court ultimately ordered a stay but on a condition. The condition was that the buyer will raise no objections to the President of the SIAC Court's jurisdiction to appoint an arbitrator under Article 11(3) of the Model Law in the event that the parties cannot reach agreement on the appointment.

Further, if the President of the SIAC Court declines to make an appointment, either party may apply for further orders or directions as part of the Court's "residual jurisdiction".

Comments

A. Can Article 11(3) of the Model Law apply when there is no agreement on the place of arbitration?

In the Court's view, the *travaux* suggests that the answer is yes.

In this writer's view, the *travaux* can be read differently. Where the place of arbitration has not been

determined, such as the case at hand, Article 11(3) arguably does not apply—this is left to domestic laws. Unlike countries such as England and France, there is no other provision in Singapore's IAA empowering the President of the SIAC Court to act as the appointing authority.

As the Court recognised, the *travaux* states that *"the prevailing view was that the model law should not deal with court assistance to be available before the determination of the place of arbitration".* The USSR and United States representatives in particular expressed the view that *"the case where the place of arbitration had not yet been agreed upon should remain outside the scope of the Model Law".*

In a paragraph not cited by the Court, the travaux records that *"[i]n the subsequent discussion concerning the territorial scope of application of the model law, the Commission decided not to extend the applicability of articles 11, 13, 14 to the time before the place of arbitration was determined".* (Report of the UNCITRAL on the work of its 18th Session, 3-21 June 1985, UNCITRAL, Yearbook Volume XVI, U.N. Doc. A/CN.9/SER.A/1985, paragraph 111)

B. Should a different condition have been imposed by the Court in granting the stay?

Ultimately, the Court enforced the arbitration clauses under a condition that the buyer will raise no objections to the SIAC President's jurisdiction to appoint an arbitrator *under Article 11(3) of the Model Law* in the event that the parties cannot reach agreement on the appointment.

There are a number of difficulties. First, it is doubtful whether Article 11(3) is applicable in the first place. Second, it is unclear how Article 11(3) should be applied because Article 11(3), on its terms, requires clarity on the number of arbitrators. It is further unclear on what basis the Court assumed that the Tribunal(s) in this case should comprise a sole arbitrator. If that assumption was based on section 9 of the IAA read with Article 10 of the Model Law, section 9 and Article 10 arguably applies only if the place of arbitration is Singapore—which has not yet been determined in this case.

Given the difficulties surrounding the applicability and application of Article 11(3), it is arguable the Court could have enforced the arbitration clauses on the facts of this case without having to invoke Article 11(3). Neither was it necessary to find that the Court enjoys some kind of *"residual jurisdiction"* not otherwise expressed in the IAA.

The Singapore apex court in *Tomolugen Holdings Ltd and another v Silica Investors Ltd* [2015] SGCA 57 held that, a court hearing a stay application under the IAA should grant a stay in favour of arbitration if the applicant can establish a *prima facie* case, *inter alia*, that:

(a) there is a valid arbitration agreement between the parties to the court proceedings; and

(b) the arbitration agreement is not null and void, inoperative or incapable of being performed.

In a case where the arbitration clause is a typical "model" arbitration clause commended by major arbitral institutions, an applicant seeking a stay likely does not have to do much more than show the existence of that clause in a contract signed by both parties.

However, in a case where the arbitration clause is a "bare" arbitration clause, the applicant seeking a stay could be asked how the "bare" arbitration clause could be capable of being performed. After a position is taken by the applicant on that issue, assuming all other requirements for a stay are met, a stay could be granted on the condition that the applicant abide by the position it had taken before the Court.[1)]The Singapore High Court in *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267 highlighted there may be a potential inconsistency on the burden of proof articulated in

Tomolugen and an earlier decision of the Singapore apex court in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 3 SLR(R) 732. In *Tjong Very Sumito*, the Singapore apex court earlier held that the burden is on the *party resisting the stay* to show that the arbitration agreement is incapable of being performed. According to the High Court in *Dyna-Jet*, the party resisting the stay must establish that *"no other conclusion on this issue is arguable"*. Even if the legal burden may ultimately rest on the party resisting the stay, it would not be inconsistent for the applicant to articulate its position on how the "bare" arbitration clause could be capable of being performed.

For instance, in the present case, the buyer took the position that the clause was capable of being performed because the President of the SIAC Court could appoint the arbitrator. There appears to have been no dispute between the parties that any arbitral tribunal under each of the clauses shall comprise a sole arbitrator. Given these particular facts, the Court could have ordered a stay on the condition that the buyer will consent should the seller(s) propose that the parties appoint SIAC as the appointing authority to appoint a sole arbitrator for each of the two clauses.

Major arbitral institutions, such as SIAC and ICC, offer their services as appointing authority for ad hoc arbitrations upon the agreement of the parties and upon the payment of certain fees to the institution. Such powers of appointment can be *consensual* and not statutory in nature. Any appointment by the President of the SIAC Court would be based on the consensual subsequent agreement of the parties, and not pursuant to Article 11(3) of the Model Law.

An additional benefit of this approach is that the President of the SIAC Court would not be left with the unenviable task of having to determine whether his statutory powers under Article 11(3) apply, and if so, how he should apply Article 11(3) when there is no clarity on the number of arbitrators in the first place.

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References

1. ↑ The Singapore High Court in *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267 highlighted there may be a potential inconsistency on the burden of proof articulated in *Tomolugen* and an earlier decision of the Singapore apex court in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 3 SLR(R) 732. In *Tjong Very Sumito*, the Singapore apex court earlier held that the burden is on the *party resisting the stay* to show that the arbitration agreement is incapable of being performed. According to the High Court in *Dyna-Jet*, the party resisting the stay must establish that *"no other conclusion on this issue is arguable"*. Even if the legal burden may ultimately rest on the party resisting the stay, it would not be inconsistent for the applicant to articulate its position on how the "bare" arbitration clause could be capable of being performed.