

PRC Court refuses to enforce SIAC arbitral award made by one arbitrator under expedited arbitration procedures when arbitration agreement provided for three arbitrators

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In *Noble Resources International Pte. Ltd v. Shanghai Good Credit International Trade Co., Ltd.* (2016) Hu 01 Xie Wai Ren No. 1, the Shanghai No.1 Intermediate People's Court in a judgment dated 11 August 2017 refused recognition and enforcement of a Singapore International Arbitration Centre ("**SIAC**") arbitral award under the New York **Convention on the Recognition and Enforcement of Foreign Arbitral Awards** 1958 ("**New York Convention**") on the basis that the composition of the arbitral tribunal and/or the arbitral procedure was not in accordance with the agreement of the parties.

The case arose out of the recently replaced SIAC 2013 arbitration rules ("**SIAC Rules**"). Article 5 of the SIAC Rules provided for the expedited procedure:

5.1 Prior to the full constitution of the Tribunal, a party may apply to the Registrar in writing for the arbitral proceedings to be conducted in accordance with the Expedited Procedure under this Rule where any of the following criteria is satisfied:

- the amount in dispute does not exceed the equivalent amount of S\$5,000,000, representing the aggregate of the claim, counterclaim and any set-off defence;*
- the parties so agree; orc. in cases of exceptional urgency*

5.2 When a party has applied to the Registrar under Rule 5.1, and when the President determines, after considering the views of the parties, that the arbitral proceedings shall be conducted in accordance with the Expedited Procedure, the following procedure shall apply:

- The Registrar may shorten any time limits under these Rules;*
- The case shall be referred to a sole arbitrator, unless the President determines otherwise;*
- Unless the parties agree that the dispute shall be decided on the basis of documentary evidence only, the Tribunal shall hold a hearing for the examination of all witnesses and expert witnesses as well as for any argument;*
- The award shall be made within six months from the date when the Tribunal is constituted unless, in exceptional circumstances, the Registrar extends the time; and*
- The Tribunal shall state the reasons upon which the award is based in summary form, unless the parties have agreed that no reasons are to be given.*

Under Article 5.1 of the SIAC Rules, a party may apply to the Registrar of SIAC for the arbitral proceedings to be conducted in accordance with the expedited procedure. If the expedited procedure applies, the arbitration is to be referred to a sole arbitrator, unless the President of SIAC determines otherwise. The Iron Ore Sale & Purchase Agreement dated 29 October 2014 ("**Contract**") between Noble Resources International Pte Ltd of Singapore ("**Claimant**") and Shanghai Good Credit International Trade Co., Ltd. of China ("**Respondent**") incorporated a Standard Iron Ore Trading Agreement ("**Standard Agreement**"). Article 16 of the Standard Agreement contained the arbitration agreement and Article 16.1.1 provides for three arbitrators.

The dispute was in respect of the sale and purchase of iron ore. The Respondent failed to issue a letter of credit to the Claimant to pay for the goods as required under the Contract, and it was ultimately terminated. On 14 January 2015, the Claimant served a Notice of Arbitration and applied to SIAC for the proceedings to be conducted under the expedited procedure on the basis of the amount in dispute being under S\$5 million. SIAC accepted the application for the arbitration to be conducted pursuant to the expedited procedure on 17 February 2015. On 20

April 2015, SIAC appointed a sole arbitrator for the case. On 16 July 2015, a hearing was conducted before the sole arbitrator. The Respondent objected to the expedited procedure and the appointment of a sole arbitrator but did not otherwise participate in the arbitration and the Final Award was made in their absence. The Final Award was issued on 26 August 2015. The sole arbitrator awarded the sum of US\$1,603,100 to the Claimant representing damages for breach of contract.

When it came to recognition and enforcement of the arbitral award in Mainland China, the Respondent challenged enforcement under the New York Convention and Article 283 of the *Civil Procedure Law* of the PRC, based on a number of grounds.

One ground was the composition of the tribunal was not in accordance with the agreement of the parties as stipulated in the arbitration clause, as under the Contract it was expressly stated that the tribunal would comprise of three arbitrators, but in this case only a sole arbitrator was appointed. The Respondent had not accepted the composition of the tribunal and it had strongly opposed the appointment of a sole arbitrator, objecting on multiple occasions. Accordingly, the composition of the arbitral tribunal and/or the arbitral procedure was not in accordance with the agreement of the parties.

The Court's reason for refusal of recognition and enforcement was Article V(1)(d) of the New York Convention – the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

First, the arbitration agreement in the Contract provided for three arbitrators. Accordingly, the arbitral proceedings and composition of the tribunal should have complied with the arbitration agreement.

Second, the adoption of the expedited procedure in this case was in line with Article 5.1 of the SIAC Rules as the disputed amount did not exceed S\$5 million. Accordingly, the Court was of the view that the adoption of the expedited procedure by SIAC was not contrary to the agreement of the parties.

Third, regarding the composition of the tribunal, the Court commented that the 2013 SIAC Rules neither excluded the adoption of an alternative composition of the tribunal in proceedings conducted under the expedited procedure, nor does it specify that the President of SIAC can have the right to invoke Article 5.2(b) regarding the appointment of a sole arbitrator when the parties have agreed on the composition of the tribunal. Article 5.2(b) of the SIAC Rules stating "*the case shall be referred to a sole arbitrator, unless the President determines otherwise*" should not be interpreted that the President of SIAC having absolute discretion on the composition of the tribunal; on the contrary, when exercising its discretion, the President must give full consideration to the parties' agreement with respect to the composition of the tribunal in order to preserve party autonomy.

Since the parties had already expressly agreed in the arbitration agreement that the tribunal shall comprise of three arbitrators and did not exclude this composition of the tribunal in the expedited procedure, the adoption of the expedited procedure should have been referred to a

three member tribunal. The Court considered that use of the expedited procedure should not prevent the parties from exercising their fundamental rights to an arbitration comprised of three arbitrators as stipulated in the arbitration agreement. In this case, the Court considered appointment of a sole arbitrator in accordance with Article 5.2 of the SIAC Rules was a breach of the arbitration agreement when the arbitration agreement had provided for three arbitrators and the Respondent had expressed its strong opposition against the appointment of a sole arbitrator. Accordingly, this fell within Article V(1)(d) of the New York Convention and the award should not be recognized and enforced.

Comments

Users of arbitration want efficiency and economy in the arbitral process. The availability of expedited procedures providing for arbitrations conducted under shortened time limits and an award to be rendered within six months from the date when the institution transmits the file to the tribunal is commonplace under the leading institutional arbitral rules and reflects international best practice. The SIAC and HKIAC have had 207 and 20 arbitrations^[1] conducted under their expedited procedures respectively, and client feedback has been very positive.

In the 2015 International Arbitration Survey "*Improvements and Innovations in International Arbitration*" conducted by Queen Mary University of London, 92% of respondents favoured the inclusion of simplified procedures in institutional rules for claims under a certain value. 33% of respondents would have this as a mandatory feature and 59% as an optional feature.

However, the effectiveness of expedited procedures depends ultimately on the enforcement of an award rendered from such procedures.

The PRC courts have a good track record of enforcement and their concern in this case is not with the expedited procedures themselves. Although the PRC courts are becoming more arbitration friendly and have upheld arbitration agreements providing for ICC arbitration in Shanghai^[2] and Beijing^[3], and the validity of a "hybrid" arbitration clause providing for arbitration at CIETAC under the UNCITRAL Arbitration Rules proceedings^[4], the Shanghai Intermediate People's Court in this case upheld the parties' agreement in their arbitration clause to have a three member tribunal. Where the decision is significant is that it treated the stipulation of three arbitrators as paramount, and did not read the expedited procedural provisions of the former version of the SIAC Rules as allowing SIAC to appoint a sole arbitrator when the arbitration agreement required three.

PRC courts have also upheld the parties' agreement on the arbitration procedure in other enforcement cases. For example, in *Alstom Technology Ltd. v. Insigma Technology Co. Ltd.*, the Hangzhou Intermediate People's Court refused to enforce a SIAC award on the ground that the constitution of the tribunal, with reference to the SIAC rules, was not in accordance with the parties' agreement that SIAC administer the ICC Rules in the arbitration clause. The refusal of enforcement was upheld by the Supreme People's Court.

It is significant that this case is based on the 2013 version of the SIAC Rules. In 2016, SIAC published an updated version of its rules to put this issue beyond doubt. In respect of the expedited procedure, Article 5.3 now states that "*[b]y agreeing to arbitration under these Rules, the parties agree that, where arbitral proceedings are conducted in accordance with the Expedited Procedure under this Rule 5, the rules and procedures set forth in Rule 5.2 shall apply even in cases where the arbitration agreement contains contrary terms.*" The PRC Court would have come to a different conclusion under the revised 2016 SIAC Rules.

The inclusion of the above provision in the 2016 SIAC Rules was partly due to the decision of *AQZ v. ARA* [2015] SGHC 49 in which the Singapore High Court considered a setting aside application to an award made under the expedited procedure of the SIAC Rules. In that case, the parties had entered into an agreement in 2009 regarding the sale and purchase of Indonesian non-coking coal. Arbitration was commenced by the buyer in 2013, and SIAC proceeded with the appointment of a sole arbitrator under the expedited procedure, with the seller reserving its rights of challenge. In the Singapore setting aside proceedings, the seller argued that the rules in force at the time of the parties' contract were the 2007 SIAC Rules (which had no expedited procedure), and therefore the conduct of the arbitration under the expedited procedure of the 2010 SIAC Rules was not in accordance with the parties' agreement. The seller also argued that the parties had expressly agreed to arbitration before three arbitrators, and that therefore the conduct of the expedited arbitration before a sole arbitrator was not in accordance with the parties' agreement. However, the Singapore High Court rejected the challenges to both the applicability of the expedited procedure and the appointment of a sole arbitrator, and placed emphasis on SIAC's role in arbitrator appointments under the SIAC Rules.

Institutions have taken different approaches to the composition of the tribunal when applying their expedited procedures. For example, the ICC amended its rules in March 2017 to provide for an expedited procedure. Adopting a similar approach to SIAC, Article 30(1) states that "[b]y agreeing to arbitration under the Rules, the parties agree that this Article 30 and the Expedited Procedure Rules set forth in Appendix VI (collectively the "Expedited Procedure Provisions") shall take precedence over any contrary terms of the arbitration agreement."^[5]

In drafting the arbitration clause, for parties who want three arbitrators to decide their disputes under the expedited procedures of the ICC and SIAC arbitration rules, they are advised to stipulate this in their arbitration clause.

The Hong Kong International Arbitration Centre ("**HKIAC**") has taken a different approach. Article 41.2 of the HKIAC's Administered Arbitration Rules ("**HKIAC Rules**") provides that "*[w]hen HKIAC, after considering the views of the parties, grants an application made pursuant to Article 41.1 [the Expedited Procedure], the arbitral proceedings shall be conducted in accordance with an Expedited Procedure based upon the foregoing provisions of these Rules, subject to the following changes:*

- 1. the case shall be referred to a sole arbitrator, unless the arbitration agreement provides for three arbitrators;*
- 2. if the arbitration agreement provides for three arbitrators, HKIAC shall invite the parties*

to agree to refer the case to a sole arbitrator. If the parties do not agree, the case shall be referred to three arbitrators;"

In this regard, the HKIAC rules preserve party autonomy, and the quantum of a dispute does not necessarily correlate with its complexity.

This case is potentially significant for claimants with arbitration agreements stipulating three arbitrators who are considering using the expedited procedures under two older versions (2010 and 2013) of the SIAC rules. If they intend to enforce the award in the PRC, they can still enjoy the benefits of expedited arbitration but should ask for three arbitrators to be appointed. The 2016 SIAC rules address this situation. It is interesting in this case that the Claimant had indicated that it was prepared to agree to a tribunal consisting of three arbitrators subject to the Respondent indicating that it would pay the costs of a three member tribunal. Since this did not happen, and there was no agreement on a three member tribunal, SIAC appointed a sole arbitrator.

In the PRC, if the Intermediate People's Court refuses recognition and enforcement of a foreign arbitral award (including a Hong Kong award), it must submit the case to the Provincial Higher People's Court for review before issuing its ruling. If the Higher People's Court agrees with the ruling, it must report to the Supreme People's Court. A ruling refusing recognition and enforcement of a foreign arbitral award can only be issued after the Supreme People's Court makes a formal reply.

We understand that the Shanghai Intermediate People's Court referred the matter to the Supreme People's Court before issuing the judgment. Therefore, the judgment already reflects the Supreme People's Court's position.

Article by *James Kwan*, partner from Hong Kong office.

[1] This is the number of accepted applications. For SIAC, the statistics are from 1 July 2010 to 25 August 2017. For HKIAC, the statistics are from 1 November 2013 to 25 August 2017.

[2] *Longlide Anhui Packaging Co. Ltd. v. BP Agnati SRL* (2013) Min Si Ta Zi No. 13. Reply given by the Supreme People's Court on 25 March 2013

[3] *Ningbo Beilun Licheng Lubricating Oil Co Ltd v Famowanchi Corporation*. The Reply to the Request for Instructions in the Sale and Purchase Contract Dispute Between Ningbo Beilun Licheng Lubricating Oil Co Ltd and Famowanchi Corporation Involving the Issue of the Validity of an Arbitration Clause rendered by the Supreme Court (issued by the SPC on 5 December 2013 and published in Vol. 28 (2014), Reference Guide for Foreign-related Commercial and Maritime Litigation. c.f. Supreme People's Court Case No. (2012) MSTZ No.2 dated 31 August 2012, where the Supreme People's Court confirmed the Jiangsu Higher People's Court decision that an ICC Beijing arbitration clause was invalid.

[4] See Ningbo Intermediate People's Court judgment of March 2014 of *Invista Technologies S.a.r.l. v. Zhejiang Yisheng Petrochemical Co. Ltd.* [2012] Zhe Yong Zhong Que Zi No 4.

[5] See also APPENDIX VI: EXPEDITED PROCEDURE RULES Article 2(1): Constitution of the Arbitral Tribunal: "*The Court may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator.*"

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