

# Kluwer Arbitration Blog

## **AQZ v ARA: Singapore High Court Upholds Award Made under SIAC Expedited Procedure**

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· WilmerHale

The availability of expedited procedures providing for fast-track arbitration is by now commonplace under many modern institutional rules; however, the effectiveness of these mechanisms lies ultimately in enforcement and set-aside proceedings before national courts.

In *AQZ v ARA*,<sup>1)</sup> the Singapore High Court recently had to consider, for the first time, a challenge to an award made under the Expedited Procedure of the SIAC Rules. In rejecting the challenges to both the applicability of the Expedited Procedure and the appointment of a sole arbitrator (rather than three arbitrators as stated in the arbitration clause), Justice Prakash took a robust and commercially sensible approach to construing the parties' arbitration agreement – placing emphasis on SIAC's role in arbitrator appointments under the SIAC Rules.<sup>2)</sup> This will set a high bar for future challenges to awards under the SIAC Expedited Procedure.

### **SIAC Arbitration Proceedings and Award**

The SIAC arbitration at issue in *AQZ v ARA* arose out of a dispute over the sale and purchase of Indonesian non-coking coal. The parties were a Singapore-incorporated supplier (the "Seller") and the Singaporean subsidiary of an Indian trading and shipping conglomerate (the "Buyer"). The issue in dispute was whether, in addition to a first contract for 50,000 metric tons of coal in December 2009, the parties' negotiations had also resulted in a second contract for the same in January 2010.

On 20 March 2013, the Buyer commenced SIAC proceedings for the Seller's failure to deliver under the second contract. Clause 16 of that contract provided for arbitration "in accordance with the rules of conciliation and arbitration of the Singapore International Arbitration Centre (SIAC) by three arbitrators...."

The next day, on 21 March 2013, the Buyer applied for the arbitration to be conducted under the Expedited Procedure in the 2010 SIAC Rules, Rule 5. The Seller resisted this, challenging both the suitability of the Expedited Procedure and the existence of an arbitration agreement. After considering submissions on both sides, the President of the SIAC Court allowed the application. The arbitration thus proceeded with the appointment of a sole arbitrator under the Expedited Procedure on 8 July 2013, although the Seller reserved all rights of challenge.

After a 3-day hearing on the preliminary issues of jurisdiction and liability in mid-October 2013, and a final hearing on 22 November 2013, the sole arbitrator issued his “Ruling and Partial Award” on 12 May 2014 (the parties agreeing to an extension from the original 6 months). In the award, the arbitrator affirmed his jurisdiction over the matter and found the Seller liable for breach of contract.

### **Singapore High Court Decision**

The Seller applied to set aside the award before the Singapore High Court on several grounds. In addition to challenging the arbitrator’s jurisdiction, the Seller also challenged the award on the basis that, under Article 34(2)(a)(iv) of the Model Law, the composition of the arbitral tribunal and/or the arbitral procedure was not in accordance with the agreement of the parties.

The Expedited Procedure was the focus of this latter challenge. First, 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. Second, the Seller 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.

The Court rejected both arguments, holding that the arbitral proceedings had been conducted in accordance with the parties’ agreement. Justice Prakash dealt with the first argument by applying the well-established presumption that references to rules in an arbitration clause are to be construed as references to such rules as may be applicable at the date of the commencement of arbitration, and not at the date of the contract, so long as those rules contain mainly procedural provisions. As there was nothing on the facts to displace this presumption, Justice Prakash held that the 2010 SIAC Rules were incorporated by reference.

The second argument turned on whether the parties’ intention to have three arbitrators decide their case – as expressed in their arbitration clause – could be overridden in the event of conflict with the parties’ choice of the SIAC Rules, which vest the SIAC Court President with the power and discretion to appoint a sole arbitrator where the Expedited Procedure applied.

The Buyer cited and relied on a redacted SIAC award, *W Company v Dutch Holding Company*,<sup>3)</sup> which held that the parties’ choice of the SIAC Rules constituted acceptance of the entirety of those rules, including the Expedited Procedure, and therefore the appointment of a sole arbitrator pursuant to that agreed mechanism did not derogate from party autonomy. However, Justice Prakash found that *W Company* was not directly applicable where, as in the present case, the version of the SIAC Rules in force at the time of the contract did not provide for an Expedited Procedure.

Nonetheless, the High Court upheld the decision to appoint a sole arbitrator, giving significant weight to the SIAC Court President’s discretion under the Rules. Recognizing that the 2010 SIAC Rules had been incorporated into the parties’ contract, Justice Prakash adopted a purposive and “commercially sensible” construction of the arbitration agreement – which, in her view, required recognition of the President of the SIAC Court’s discretion under the chosen rules to appoint a sole arbitrator. Considering that this discretion had been exercised properly, the learned Justice found that the incorporated reference to an Expedited Procedure could and did override the parties’

agreement to have three arbitrators.

The High Court further held that the burden of showing materiality or seriousness (of the breach) had not been made out in any event, even if it were to accept the submission that the arbitrator should not have been conducted before a sole arbitrator. Accordingly, the Court concluded that there were no grounds to set aside the award under Article 34(2)(a)(iv) of the Model Law.

### Commentary

*AQZ v ARA* is significant as the first reported decision on the Expedited Procedure under the SIAC Rules. Compared to many other institutional rules that include an expedited or fast-track arbitration procedure, the SIAC Rules repose a considerable degree of discretionary decision-making power in the arbitral institution with respect to expedited proceedings. Under Rule 5.2, the Registrar has discretion to shorten time limits or to extend the timeline for rendering an expedited award, and the SIAC Court President has the discretion to appoint a sole arbitrator, or three or more arbitrators, as he or she deems appropriate. In contrast, the expedited procedures under the Swiss Rules<sup>4)</sup> and the HKIAC Rules<sup>5)</sup> require reference of the dispute to three or more arbitrators if the parties' arbitration clause so provides, unless parties agree to refer the case to a sole arbitrator when the institution invites them to do so. The ICDR Rules require a sole arbitrator whenever the expedited procedure is applied.<sup>6)</sup>

In *AQZ v ARA*, the Singapore High Court correctly recognized the discretion accorded, under the parties' chosen arbitration rules, to the SIAC Court President on the number of arbitrators to be appointed in an expedited arbitration. Thus, as long as that discretion is exercised judiciously, taking into account all relevant factors including the date of the contract and quantum/complexity of the case, the appointment of a different number of arbitrators from that stated in the parties' clause would not be sufficient grounds for a challenge of the expedited award.

The Singapore High Court's decision signals that the mere application of the SIAC's Expedited Procedure, without evidence establishing a breach of natural justice or some other serious procedural defect, is unlikely to form a sufficient basis for challenge of the award. That will be the case even where parties agreed to arbitrate under the SIAC Rules before the Expedited Procedure was introduced in the 2010 SIAC Rules. This provides much needed guidance and certainty for future expedited arbitrations under the SIAC Rules.

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## References

?1 (2015) SGHC 49.

The Court's decision also considers and rejects a jurisdictional challenge to the award – addressing, among other things, whether a *de novo* hearing of the jurisdictional issues would require a complete ?2 rehearing involving oral evidence and cross-examination, and whether an award that addresses both merits and jurisdiction issues can be challenged under Art 16(3) of the Model Law. These issues will not be the focus of this post.

?3 (2012) 1 SAA 97.

?4 2012 Swiss Rules, Article 42.2(b)-(c).

?5 2013 HKIAC Rules, Article 41.2(b).

?6 2014 ICDR Rules, International Expedited Procedure, Article E-6.

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