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Expedited Procedure Vis-à-Vis Party Autonomy, Enforceable?

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The ICC Rules introduced expedited procedure with effect from March 01, 2017. With this, the ICC joined the league of other leading arbitration institutions such as SIAC, LCIA and HKIAC who had already incorporated expedited procedure. Courts across the globe have delivered uniform decisions, views in interpreting party autonomy except for a decision by the Shanghai Court. This conflict has led to some uncertainty in the discretion exercised in appointing arbitrators. This post will examine the decision of the Shanghai Court conflicting with other uniform decisions and views which have ignited the discussion on the subjectivity involved in interpreting party autonomy.

This post discusses the refusal of enforcement of an award under the expedited procedure by a Shanghai court. The Shanghai No.1 Intermediate Court, in the case of Nobles Resources Pte. Ltd. v. Good Credit International Trade Co. Ltd. (2016) refused to enforce a SIAC award passed under the expedited procedure (Rules of 2013). The court ruled that it is not in consonance with the intention of the parties and it does not uphold party autonomy. The agreement entered by the parties contained a clause providing for a three-member arbitration tribunal in Singapore. Subsequently, the vice – chairman of SIAC appointed a sole arbitrator under the expedited procedure who passed an award.

The Shanghai Court before which the enforcement of the award was litigated, held that the SIAC Rules did not empower the chairman to compel the parties to accept the jurisdiction of the sole arbitrator. Moreover, the agreement provided for a three-member arbitration tribunal that did not preclude the chairman of constituting the tribunal against the backdrop of the number of arbitrators stipulated in the agreement. It observed that the sole arbitrator had disregarded this objection and the intention of the parties reflected in the agreement specifying a three-member tribunal. As a result, the Shanghai Court refused to enforce the award delivered by the sole arbitrator. This decision was later affirmed by the PRC Supreme People's Court as a part of their reporting system.

Conversely, two years before the Shanghai Court delivered its decision, the Singapore High Court in AQZ v. ARA [2015] SGHC 49 had discussed the issue of appointment of a sole arbitrator under expedited procedure despite the arbitration agreement specifying a three-member tribunal. A post by Gary Born and Jonathan W. Lim discussed the decision of the Singapore High Court. The crux of the post is that the High Court adopted a 'commercially purposive' stance and liberally interpreted the concept of party autonomy. The Court held that opting for the expedited procedure under SIAC Rules 2010 is indicative of the intention of the parties to accept the SIAC Rules in its entirety and not just one single rule. It is established that when parties opt for SIAC Rules they

impliedly validate the discretion exercised by the SIAC president in appointing the arbitrators.

Thus, the duty of the court is limited to examining if the discretion has been 'exercised properly' by the president. If a judicious exercise of the discretion is ascertained and established, then it can override the parties' agreement. In deciding so, the Shanghai Court heavily relied on the intention of the parties in the arbitration agreement, which provided for a three-member tribunal. It opined that the SIAC president ought to have used his/her discretion only against the backdrop of the stipulation of a three-member tribunal.

The job of a court in enforcing an award is not to sit in judgement on the procedure adopted in exercising discretion. If every court interferes with the discretion exercised by the president in appointing the number of arbitrators, it will give rise to subjective interpretations of the same rule. These subjective interpretations of the courts across the globe will cause confusing interpretations on party autonomy, thereby leaving parties in uncertainty. However, the Shanghai Court erred when it upheld the view that expedited procedure never deprived the president of constituting the tribunal against the backdrop of the number of arbitrators stipulated in the agreement. It held that the president was not empowered to appoint the sole arbitrator given the fact that the agreement provided for a three-member tribunal.

The Swiss Rules and the HKIAC Rules invite parties opting for the expedited procedure to modify the agreement in case of more number of arbitrators. Failure to modify the agreement results in party autonomy being preferred while effecting expedited procedure. Under the JCAA Rules, the expedited procedure is automatically applied to disputes below ¥20 million, but party autonomy prevails if the parties have agreed on more than one arbitrator.

Judicial precedents

The Bombay High Court (India) in Siddhi Real Estate Developers v. Metro Cash & Carry India Pvt. Ltd. & Anr. (2014) SCC Bom 623 held that sanctity of the party autonomy should be preserved whilst deferring the procedure for appointment of arbitrators and the courts should retain the power to appoint arbitrators.

Likewise, the Singapore High Court in AQZ v. ARA, ruled that by opting for SIAC Rules the parties had recognised the SIAC president's power and discretion to appoint a sole arbitrator where the expedited procedure applied.

In Travis Coal Restructured Holdings LLC v. Essar Global Fund Ltd., the English High Court considered the ICC Rules opted by the parties in its entirety. It can be inferred that the court validated the summary procedure adopted by the arbitrators, as the same was within the discretion exercised by them. This discretion exercised was held to be consented by the parties when they opted for ICC Rules.

In W. Company v. Dutch holding Company (2012) 1 SAA 97, the court held that by choosing SIAC Rules to govern the arbitration, the parties had accepted the SIAC Rules in its entirety, including the expedited procedure under rule 5.

Deliberation & discussion

The interpretation of the Shanghai Court was dislodged when it held the SIAC president should not have composed a sole arbitrator tribunal. The consent of the parties for the whole of SIAC Rules

validates the decision arrived at by the SIAC president. Thus, the discretion exercised by the president in appointing the arbitrator/arbitrators is implied by the parties when they choose the SIAC Rules in its entirety.

The decision in the Singapore High Court case has well laid down the jurisprudence in interpreting 'party autonomy' under institutional arbitration. Instead of relying on the established jurisprudence, the Shanghai Court misinterpreted the intention of the parties by not looking at the SIAC Rules in its entirety.

The SIAC Rules at the time of the dispute in the Shanghai Court were the SIAC Rules of 2013 (5th Edition) and at the time of the Singapore High Court decision were SIAC Rules of 2010 (4th Edition). Nonetheless, Rule 5 in both the above editions provided for the expedited procedure and it was duly applied in both these cases. Thereafter, in 2016 SIAC published its 6th Edition of Rules, and under Rule 5 of the (6th Edition) of SIAC Rules 2016, there has been an effective amendment in particular under Rule 5.3 which now states, –

"Rule 5.2 shall apply even in cases where the arbitration agreement contains contrary terms."

This amendment was introduced in order to completely eliminate the discrepancy governing the intention of the parties against the number of arbitrators appointed under the expedited procedure. Post this Amendment, even though the plain language of an arbitration agreement might mandate for a three-member or a higher numbered arbitration tribunal, in cases of expedited procedure it would be the sole discretion of the SIAC president to appoint the number of arbitrators, irrespective of the intention of the parties inferred from the arbitration agreement.

Conclusion

In light of the evolving jurisprudence in this area of arbitration, the Shanghai Court might have interpreted the agreement and party autonomy differently post the SIAC 2016 (6th Edition) Rules. However, the concept of party autonomy has been respected across the globe by varied courts whilst also adopting a commercially liberal construction. In the authors' opinion, the appointment of a sole arbitrator proves to be the most efficient alternative on multiple fronts.

Firstly, a sole arbitrator would naturally be more expeditious in delivering decisions which is one of the fundamental purposes of opting for the expedited procedure. Secondly, the costs of a sole arbitrator would also outweigh the costs of a three-member arbitration tribunal. Ultimately, it would boil down to the intention of the parties and the language employed in drafting the arbitration agreement. Interpretational references are set to aggrandize with the advent of growing needs and demand for institutional arbitration.

The underlining principle of arbitration should be taken into account by every court in every country and the components of arbitration such as speedy redressal, minimal court intervention and a pro-business approach should be upheld. A smooth functioning mechanism to this effect, observed by the courts of the world would lead to a healthier environment for businesses to arbitrate.

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