THE ARBITRATION DIGEST

Bibliographic Information:

Contemporary Developments in Arbitration law, Vol. 1, December 2023, pp. 9-12

Interpretation of Pathological Clauses in Singapore

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INTRODUCTION

When parties enter into an arbitration agreement, it is to make sure that any dispute arising out of the contract, be settled privately and expediently through arbitration. But due to varying reasons, including inappropriate drafting and inconsistency in the arbitration agreement, it may lead to making such an agreement inoperative. Such agreements are not void nor voidable but have been rendered inoperative due to defects.

LEGAL PROVISIONS IN SINGAPORE

The primary legislation governing domestic arbitration in Singapore is Arbitration act, 2001. In Section 21, which provides competence-competence jurisdiction of arbitral tribunal, the tribunal is empowered to rule on the validity of arbitration agreement and can render the arbitral award, but in Section 48(1)(a)ii, the court is empowered to set aside the arbitral award if the arbitration agreement is not valid. For international arbitrations, the legislation enforced is International Arbitration act, 1994. Section 6(2) of the act empowers the court for which application of enforcement is made, to refuse the enforcement, if the arbitration agreement is invalid.

APPROACH OF THE JUDICIARY

In Insigma Technology Co Ltd. v. Alstom Technology Ltd**,** the arbitration agreement provided as follows:

> Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English. [¶4]

The defendant made a request for arbitration before the International Chamber of Commerce. The plaintiff disputed the jurisdiction of any arbitral tribunal constituted by the ICC, pleading that the defendant had submitted the arbitration to the wrong body, as the clear intent of the parties was that the Singapore International Arbitration Centre should administer the arbitration

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under the ICC Rules [¶6&7]. Both the parties requested SIAC to confirm whether it would have jurisdiction to administer the arbitration. The SIAC replied as follows:

We are of the view that there is prima facie jurisdiction for the SIAC to accept the request for arbitration and administer the arbitration under the said clause. While ***the clause is ambiguous*** *as it brings into play both the SIAC Rules and the ICC Rules, some weight and meaning must be accorded to the reference to the ICC Rules.*

If the case is submitted to the SIAC, the arbitration will be administered under the SIAC Rules with the ICC Rules to be applied as a guide to the essential features the parties would like to see in the conduct of the arbitration. [¶6]

Later on, the ICC arbitration was withdrawn by consent of the parties and was commenced at the SIAC. The tribunal was thus constituted and heard arguments on the preliminary issues of jurisdiction. After the hearing, the tribunal wrote to the SIAC to ask if it would be prepared to administer the arbitration in accordance with the ICC Rules and, if so, which bodies within SIAC would perform the functions assigned to the Secretary-General, Secretariat, and the International Court of Arbitration of the ICC ("ICC Court") under the ICC Rules. On 25 October 2007, the SIAC responded to confirm that it would be prepared to administer the arbitration in accordance with the ICC Rules, with the SIAC Secretariat undertaking the role of the ICC Secretariat, the SIAC Registrar that of the ICC Secretary-General and the SIAC Board of Directors the role of the ICC Court. The tribunal rendered its Decision on Jurisdiction ("Decision") on 10 December 2007 [¶11]. The tribunal held that there was a valid arbitration agreement and that the defendant had not breached it by initially commencing arbitration before the ICC [¶19]

Afterwards, the plaintiff challenged that there was no valid arbitration agreement and even if there was, the tribunal was not validly constituted by SIAC, and defendant breached the agreement by commencing the arbitration before the ICC.

The plaintiff argued that arbitration agreement is void due to uncertainty. As the arbitration agreement meant that arbitration would be administered by the SIAC, using ICC rules but SIAC cannot administer the ICC rules, as ICC rules have many unique features which cannot be administered by an institution other than the ICC.

The court rejected the argument and observed that *it is obvious from the clause, taking an objective view of its wording, that the parties did not bargain for an ICC institutional arbitration, but for an SIAC administered one and even that was not to be institutional in nature because they intended the SIAC to apply the rules of the ICC in administering the proceedings. By specifying a different set of procedural rules that was not the SIAC's in-house rules, the parties showed their desire for an ad hoc arbitration* [¶25].

The court further observed that reference to two different sets of arbitration rules must be made with great care so as to avoid the type of inconsistency that would render the arbitration inoperative. To be certain that the procedure is operational, it is thus advisable to make clear that in an ICC-administered arbitration the ICC Rules take precedence, and that additional rules of procedure are referred to only to fill gaps **[¶27]**. Thus, the administering or supervising authority and the procedural rules adopted for the arbitration do not have to be of the same institution as long as the choices made do not result in significant inconsistency [¶28].

In HKL Group Co Ltd v. Rizq International Holdings Pvt Ltd**,** the arbitration clause read as follows:

Any dispute shall be settled by amicable negotiation between two Parties. In case both Parties fail to reach amicable agreement, all dispute out of in connection with the contract shall be settled by the ***Arbitration Committee at Singapore under the rules of The International Chamber of Commerce*** *of which awards shall be final and binding both parties. Arbitration fee and other related charge shall be borne by the losing Party unless otherwise agreed.*

Both parties agreed that there is no entity in Singapore named "Arbitration committee." **[¶2]**. Therefore, the plaintiff argued that the arbitration clause is inoperable due to pathology **[¶3]** , which was opposed by the defendant and argued that although the arbitration clause was defective, it was clear that the parties' intention was to arbitrate and that the court should rely on the principle of effective interpretation to find that parties could still agree to arbitrate the matter in Singapore, for instance, by referring the matter to the Singapore International Arbitration Centre ("SIAC") for ad-hoc arbitration and agreeing that the International Chamber of Commerce ("ICC") rules are to apply [¶9].

The court observed that where the arbitration clause, although contractually valid, is defective, and after applying the general principles of contractual interpretation, or after rectification as the case may be, the court is unable to discern the meaning of that clause either in part or entirely, that clause is said to be pathological [¶37]. Whether that clause may or may not be upheld depends on the nature and extent of its pathology [¶12].

The court further observed that, the defect in the arbitration clause is the reference to a non-existent "Arbitral Committee at Singapore", which, when considered against the framework of Eisenmann's essential elements, is a deviation from the fourth element as it leads to inefficiency and slows down the arbitral process as parties are bogged down by the dispute, over the preliminary question of the mode of dispute resolution instead of moving on to resolve the substantive dispute [¶19].

The court took the view that the arbitration clause is workable and not "invalid [¶29], therefore, it would be open to the parties to approach any arbitral institution in Singapore which would be able to administer the arbitration, applying the ICC rules, to resolve their dispute. Of course, it is by no means easy for any arbitral institution not established for the purpose of conducting an ICC arbitration to do so given the unique rules and structure of the institution needed to conduct an ICC arbitration. But, as the Court of Appeal in Insigma noted, the SIAC was able and willing, for that particular case, to conduct a hybrid arbitration, applying the ICC rules [¶28].

CONCLUSION

TOGETHER, it can be concluded that the court of Singapore takes a liberal approach often hailed as "modern approach" towards the arbitration. For Singapore courts, once the intention to arbitrate is established between the parties, even if the arbitration clause is defective, then it is more likely in Singapore that parties will be referred to arbitration, then India.

IN CONTRAST, the Indian courts examine ad idem in the whole arbitration clause and therefore, if something present in arbitration clause was without the knowledge or without ad idem of the parties, then it is more likely that parties will not be referred to arbitration.