NCC International AB v Land Transport Authority of Singapore
[2008] SGHC 186

Case Number : OS 1602/2007

Decision Date : 28 October 2008

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Sundaresh Menon SC and Chua Kee Loon (Rajah & Tann LLP) for the plaintiff; Alvin Yeo SC and Chan Hock Keng (WongPartnership LLP) for the defendant

Parties : NCC International AB — Land Transport Authority of Singapore

Arbitration – Arbitral tribunal – Appointment of arbitrator – Singapore International Arbitration Centre ("SIAC") – Discretion of Registrar of SIAC under r 5.1 of 2007 SIAC Rules to appoint three arbitrators – Whether discretion of Registrar under r 5.1 exercisable when parties had agreed on number of arbitrators – Whether r 5.1 would override agreement of parties on number of arbitrators – Rule 5.1 2007 SIAC Rules

Contract – Contractual terms – Arbitration clause – Interpretation of arbitration clause – Arbitration clause provided for an arbitrator to be appointed – Whether parties had agreed on number of arbitrators to be appointed – Whether r 5.1 of 2007 SIAC Rules would override agreement of parties on number of arbitrators

28 October 2008

Tay Yong Kwang J:

The application

1 In this Originating Summons, the plaintiff seeks the following orders:

(a) a declaration that Rule 5.1 of the Singapore International Arbitration Centre Rules ("SIAC Rules") is incorporated into Contract 822 by way of clause 71.4 of the Conditions of Contract 822;

(b) declarations that on a true construction of clause 71.4 of the Conditions of Contract 822 read with the SIAC Rules, including Rule 5.1 of the SIAC Rules:

(i) the parties have not already agreed to appoint a sole arbitrator;

(ii) in any event, the Registrar of the Singapore International Arbitration Centre ("SIAC") is empowered to appoint three arbitrators if, having given due regard to proposals from the parties, the complexity, the quantum involved or other relevant circumstances of the disputes, it appears to the Registrar of the SIAC that the disputes warrant the appointment of three arbitrators;

(c) an order that the defendant pay the plaintiff's costs of this application; and

(d) such further or other relief be given or made as the Court deems fit.

The facts

2 The plaintiff, a company incorporated in Sweden, is the contractor for the construction of the MacPherson and Upper Paya Lebar MRT stations, including tunnelling, forming part of stage 2 of the Mass Rapid Transit Circle Line, a project of the defendant. In 2002, this contract ("Contract 822") was originally awarded to a joint venture comprising the plaintiff and a local company. When the local company went into liquidation, the contract was novated to the plaintiff as sole contractor.

3 Clause 71.4 of the conditions of Contract 822 ("clause 71.4') has an arbitration agreement in the following terms:

> In the event that mediation is unsuccessful, the dispute or difference between the parties shall be referred to an Arbitrator to be agreed upon between the parties, or failing agreement, to be nominated on the application of either party by the Chairman of the Singapore International Arbitration Centre (SIAC) and any such reference shall be a submission on arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force which rules are deemed to be incorporated by reference to this clause.

It is not in dispute that the relevant SIAC Rules in force at the time of commencement of the arbitration proceedings were the 3rd Edition of the said Rules dated 1 July 2007.

4 On 21 August 2007, the plaintiff commenced arbitration proceedings against the defendant. On 28 August 2007, the solicitors for the plaintiff wrote to the solicitors for the defendant seeking their agreement for three arbitrators to be appointed for the proceedings. Thereafter the solicitors for the parties held discussions on this issue but were unable to agree on the constitution of the arbitration tribunal. The defendant therefore applied to the Chairman of the SIAC to nominate a sole arbitrator pursuant to clause 71.4. However, the plaintiff applied to the Registrar of the SIAC pursuant to Rule 5.1 of the 2007 SIAC Rules ("Rule 5.1") to exercise her discretion to appoint three arbitrators.

5 Rule 5.1 provides:

> Unless the parties have agreed otherwise or unless it appears to the Registrar giving due regard to any proposals by the parties, the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators, a sole arbitrator shall be appointed.

6 The plaintiff's application to the Registrar of the SIAC was contested by the defendant which took the position that clause 71.4 provided expressly for a sole arbitrator, leaving the Registrar of the SIAC no discretion under Rule 5.1 to appoint three arbitrators. On 15 October 2007, the Registrar of the SIAC directed the parties to file written submissions on the following three issues:

> (1) whether clause 71.4 provides for a sole arbitrator;
>
> (2) if clause 71.4 provides for a sole arbitrator, whether the Registrar of the SIAC under Rule 5.1 still has the power to appoint a three-member tribunal; and
>
> (3) if there is such a power, whether the complexity and circumstances warrant the Registrar of the SIAC to exercise this discretion.

7 After considering the submissions made by the parties, the Registrar of the SIAC made the following findings:

(a) Clause 71.4 of the Conditions of Contract 822 provides for a single member Tribunal to hear this dispute.

(b) Rule 5.1 of the SIAC Rules is not intended to fetter party autonomy and therefore does not grant discretion to the Registrar to vary the number of arbitrators where parties have agreed to the number.

(c) In view of my finding in (2) above, the issue of exercising the Registrar's discretion to vary the number of arbitrators in the constitution of the Tribunal does not arise.

8 This originating summons, in seeking the proper interpretation of clause 71.4 and Rule 5.1, is therefore essentially seeking to overturn the findings of the Registrar of the SIAC set out above.

The plaintiff's submissions

9 The plaintiff is of the view that the Registrar of the SIAC has misconstrued clause 71.4 read with Rule 5.1. The plaintiff argues that Rule 5.1 is expressly incorporated into the arbitration agreement between the parties and that the effect of such incorporation means that Rule 5.1 must be read with, rather than subject to, clause 71.4, particularly when construing the parties' agreement on the number of arbitrators to be appointed.

10 Reading clause 71.4 with Rule 5.1, it is clear that the parties did not agree on any particular number of arbitrators as the words "an Arbitrator" have the same meaning as "a Tribunal" and refer to a body of persons or persons having authority to act as an arbitrator over disputes referred to it. The words "an Arbitrator" are quite different from the phrases "a sole arbitrator", "a single arbitrator" or "one arbitrator". The parties did not intend themselves to be bound to appoint only one arbitrator.

11 While the parties could have adopted the specific wording in the SIAC's model arbitration clause to expressly provide for a specific number of arbitrators, they chose not to do so. For instance, the SIAC model arbitration clause recommends the insertion of the following:

The Tribunal shall consist of _____ * arbitrator(s) to be appointed by the Chairman of the SIAC.

…

*State an odd number. Either state one or state three.

Similarly, the model clause suggested by the Hong Kong International Arbitration Centre is as follows:

"There shall be only one arbitrator.*

…

Notes:

*This sentence must be amended if a panel of three arbitrators is required.

The very fact that the parties chose not to include such a provision, recommended by the SIAC for use should the parties adopt the SIAC Rules, must mean that they intended the number of arbitrators to be left open for agreement between themselves, or failing such agreement, to be decided in accordance with the SIAC Rules.

12 Further, clause 1.2 of Contract 822 explains that "words importing the singular also include the plural and vice-versa where the context requires". There can be no doubt that the parties intended flexibility on the issue of arbitrators and that the words "an Arbitrator" can be read equally as a plural reference. The plain language of the provisions in issue shows that instead of agreeing on a number which would apply to all circumstances, the parties chose to agree on a mechanism for deciding the number of arbitrators. If there was no agreement between the parties, the Registrar of the SIAC would have the power to operate this mechanism. This is a sensible approach given the nature of large engineering projects since the number, quantum and complexity of the disputes in such projects may vary substantially at any given time. For instance, it would not make sense to have three arbitrators for a relatively small dispute of $10,000.

13 The position taken by the plaintiff in its notice of arbitration dated 21 August 2007, in particular, paragraph 26, is consistent with clause 71.4 not expressly specifying the number of arbitrators to be appointed. Immediately after the defendant's solicitors came on record in the arbitration proceedings, the plaintiff's solicitors wrote to them to state that the plaintiff's position is that the circumstances of the case warrant the appointment of a three-member tribunal. The defendant's response is noteworthy in its use of the term "arbitrator(s)", denoting that the issue of whether a sole arbitrator or a three-member tribunal ought to be appointed remains open.

14 At its highest, the words "an Arbitrator" are ambiguous, in which event:

(1) the ambiguity is such as to lead to the irresistible conclusion that no agreement was reached (or can be said to have been reached) between the parties on the number of arbitrators. All that was agreed was the mechanism to decide on the number of arbitrators;

(2) even if an agreement can be implied, the ambiguity in clause 71.4 must be resolved in the plaintiff's favour by applying the *contra proferentum* rule since Contract 822 was drafted by the defendant.

15 Even if clause 71.4 can be read to indicate the parties' agreement on a sole arbitrator, Rule 5.1 nevertheless confers the discretion on the Registrar of the SIAC to decide whether a three-member arbitral tribunal is warranted in the circumstances of the particular case. If those circumstances mandate that a three-member tribunal is more appropriate, the Registrar of the SIAC is empowered to override the default position of a sole arbitrator.

16 Far from fettering party autonomy, such a reading of the provisions endorses and affirms party autonomy. The indisputable fact is that the parties agreed to incorporate Rule 5.1 into their arbitration agreement and effect should be given to this rule in a manner consistent with its incorporation. Any other interpretation would render its incorporation completely useless. It would not be respecting party autonomy to consider only clause 71.4 while ignoring Rule 5.1 or by giving the rule a status subservient to clause 71.4 by reading it as being subject to clause 71.4. It cannot be correct, as argued by the defendant, that Rule 5.1 can only be activated where the arbitration agreement is silent on the number of arbitrators to be appointed. This contention is not supported by the language of Rule 5.1. The defendant's position would be correct only if Rule 5.1 had the qualifying words "Where the parties have not agreed upon the number of arbitrators" (or such similar words) which may be found in the equivalent provision in the rules of other arbitration institutions (see for example, article 8.2 of the International Chamber of Commerce ("ICC") Rules, article 5 of the American Arbitration Association ("AAA") Rules and article 14(b) of the World Intellectual Property Organization ("WIPO") Arbitration Rules).

17 Accordingly, Rule 5.1 should be construed in the following manner:

A sole arbitrator shall be appointed:

(1) unless the parties have agreed otherwise; or

(2) unless it appears to the Registrar of the SIAC giving due regard to any proposals by the parties, the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators.

The default position of a sole arbitrator in Rule 5.1 may therefore be departed from in either one of the two exceptions set out above.

18 Such an interpretation is fortified by a comparison between the present Rule 5.1 and its predecessor in Rule 6 of the 2nd edition of the SIAC Rules (the 1997 version) which was in the following terms:

A sole arbitrator shall be appointed unless the parties have agreed otherwise.

It is obvious that Rule 5.1 introduced an additional circumstance from which the default position of a sole arbitrator may be departed.

19 This innovative approach in the drafting of Rule 5.1 is progressive. The draftsperson clearly had the foresight of recognizing the need to aid a bona fide party who is involved in a large complex case from being held ransom by an opposing party who is intent on unfairly leveraging on an arbitration clause providing for a sole arbitrator particularly where that opposing party is either economically or politically the dominant party within the geographical bounds of the arbitration venue and which is requesting the appointment of an arbitrator who is of the same nationality, business and personal residence as itself. Rule 5.1 provides a remedy by allowing the Registrar of the SIAC in appropriate cases to fix the number of arbitrators at three. This is a right conferred by the Rule in addition to the parties' autonomy in determining the number of arbitrators. By clause 71.4, the parties have agreed to be bound by the SIAC Rules which include an agreement to confer such discretion on the Registrar of the SIAC. The incorporation of the SIAC Rules into the arbitration agreement is therefore also an agreement on the number of arbitrators, with Rule 5.1 setting out the circumstances in which it would be appropriate for a sole arbitrator or for a three-member tribunal.

The defendant's submissions

20 The defendant does not dispute that the 2007 SIAC Rules are incorporated into Contract 822 by virtue of clause 71.4 but argues that insofar as the provisions of the said Rules are inconsistent with the express terms of the parties' arbitration agreement, the latter must prevail. It cites *PT Tugu Pratama Indonesia v Magma Nusantara Ltd* [2003] 4 SLR 257 ("*PT Tugu Pratama Indonesia*") where Judith Prakash J at [46] said:

Finally, the agreement of the parties to shift the seat of the arbitration to Singapore under the SIAC Rules would not permit those rules to overrule the express terms of the arbitration clause except as expressly assented to.

The parties in that case agreed to refer their dispute to arbitration under the SIAC Rules only after the dispute had arisen. Notwithstanding this, the court held that the subsequent agreement incorporating the SIAC Rules was not sufficient to overrule the parties' express agreement (on the apportionment of costs) specified in the original dispute resolution clause.

21 Applying the principle enunciated above, the defendant submits that if Rule 5.1 has a meaning inconsistent with the parties' agreement in clause 71.4, then that rule should not apply to the reference to arbitration.

22 The defendant contends that clause 71.4 contains the parties' agreement to have a sole arbitrator to decide any dispute between them. The words "an Arbitrator" are unambiguous and to read them as being synonymous with "a Tribunal" is to place a strained meaning on them. The context in which they appear fortifies the position that a sole arbitrator is contemplated in clause 71.4. Should the parties fail to agree on the arbitrator, he will be nominated by the Chairman of the SIAC. Such an appointment process would not be applicable to a three-member tribunal. The words "an Arbitrator" were also accepted in the Malaysian decision of Penang Development Corp v Trikkon Construction Sdn Bhd [1997] 3 MLJ 115 as meaning a sole arbitrator.

23 The factual background at the time Contract 822 was entered into also militates against the plaintiff's contention. The relevant rules at that time were the 2nd edition of the SIAC Rules made in October 1997. The 2nd edition, in Rule 6 on "Number of Arbitrators", merely provided that "A sole arbitrator shall be appointed unless the parties have agreed otherwise". There was no discretion then for the SIAC to appoint a three-member tribunal. If the parties had intended to leave the issue of the number of arbitrators open for subsequent agreement, they would have made it patently clear because in the absence of any agreement to the contrary, a sole arbitrator would be appointed.

24 The plaintiff's reliance on clause 1.2 of Contract 822 (see [12] above) ignores the key phrase "where the context requires" in that clause. Clearly, not every singular word in the contract can include the plural.

25 The defendant also questions the basis upon which the plaintiff is seeking the court's assistance to construe Rule 5.1. This is because Rule 35.2 of the SIAC Rules provides:

> The provisions in these Rules shall insofar as they relate to the powers and functions of the Tribunal be interpreted by the Tribunal. All other provisions shall be interpreted by the Registrar.

By incorporating Rule 35.2 into their arbitration agreement, the parties have agreed that all provisions not relating to the powers and functions of the Tribunal be interpreted by the Registrar of the SIAC. Rule 5.1 is one such provision whose interpretation is reserved to the said Registrar. The plaintiff has evinced by its conduct that it accepted the jurisdiction and power of the Registrar to interpret Rule 5.1 and, having thus accepted, is bound by the Registrar's interpretation of that provision.

26 The defendant does not dispute that Rule 5.1 confers on the Registrar of the SIAC the power to appoint a three-member tribunal where the parties have not agreed on the number of arbitrators. It disputes, however, the plaintiff's contention that Rule 5.1 empowers the Registrar of the SIAC to override the parties' choice of a sole arbitrator. As the Registrar of the SIAC has already made a pronouncement on the meaning of Rule 5.1 and as the SIAC, being the body which drafted the SIAC Rules, is in the best position to interpret those Rules, even if the Registrar's interpretation is not binding on the parties, it is at least instructive as to the true construction of Rule 5.1 and should be given due consideration by the court.

27 The defendant points out that under Rule 6 of the SIAC Rules of 1997 (see [18] and [23] above), unless the parties had agreed otherwise, the SIAC would have no power or discretion to appoint a three-member tribunal. This was so even if the parties had not specified the number of arbitrators to be appointed.

28 This rigidity under the SIAC Rules of 1997 was mitigated by Rule 5.1 of the existing Rules. However, the discretion conferred on the Registrar of the SIAC was not meant to override the parties' agreement on a sole arbitrator. The wording of Rule 5.1 does not support the innovative approach advocated by the plaintiff.

29 The defendant argues that party autonomy is fundamental in arbitration. As Judith Prakash J said in Bovis Lend Lease Pte Ltd v Jay-Tech Marine & Projects Pte Ltd and Anor [2005] SGHC 91 at [18]:

> One of the most important principles in arbitration law is that of party autonomy. This is not only reflected in s 23 of the Act but has also been recognised by this court in *Jurong Engineering Ltd v Black & Veatch Singapore Pte Ltd* [2004] 1 SLR 333. Party autonomy means that the parties are free to decide how their arbitral tribunal is to be constituted and how the arbitration proper is to be conducted. In this case Bovis and Jay-Tech Marine were free to select and agree to the role to be played by the SIAC – whether as appointing authority, account holder, administrator or rule provider. …

30 The general principle that institutional rules only apply subject to the terms of the parties' arbitration agreement also militates against any suggestion that Rule 5.1 was intended to override the express choice of a single arbitrator. An institutional rule that is inconsistent with the parties' agreement will not be enforced (see *PT Tugu Pratama Indonesia* at [20] above).

31 The Registrar of the SIAC's holding and the defendant's understanding of the effect of Rule 5.1 are also supported by the commentaries on the SIAC Rules by other practitioners of international arbitration in Singapore. For instance, Shearman & Sterling LLP's "International Arbitration Alert" of 29 May 2007 states:

> Importantly, if the parties have not agreed on the number of arbitrators, the Registrar will have the power to decide that a dispute warrants the appointment of three arbitrators, taking into account the dispute's complexity, sums involved or other relevant circumstances (New Rule 5.1).

The introduction of Rule 5.1 was to bring the SIAC Rules in line with the practice of other arbitral institutions by conferring the discretion to appoint three-member tribunals in the absence of agreement by the parties as to the number of arbitrators.

The letter from SIAC dated 19 February 2008

32 At the close of the first hearing, I invited the parties to make a joint request to the SIAC to ask whether there were any working materials leading to the amendment of the SIAC Rules, in particular Rule 5.1, and directed the parties to make further submissions on such materials if they were available.

33 Pursuant to the parties' joint request, the SIAC replied on 19 February 2008 as follows:

> …
>
> Pursuant to the request, we enclose two draft versions of the relevant provision and a copy of Rule 6 (Number of Arbitrators) of the SIAC Rules (2nd Edition, 22 October 1997)("1997 Rules"). Please note that the provision was numbered as Rule 6 in the first working draft, and subsequently renumbered Rule 5.1 in the sixth working draft which was adopted in the final version of the SIAC Rules (3rd Edition, 1 July 2007)("2007 Rules").

Please draw the Court's attention to the fact that:

Under the 1997 Rules, the default number of arbitrator in the absence of an agreed number was one.

The words "unless the parties have agreed otherwise" were retained from the 1997 Rules in the 2007 Rules to embody this concept of party autonomy.

The words "… or unless it appears to the Registrar giving due regard to any proposal by the parties, the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators …" were added in the 2007 version to give the Registrar the power to increase the number of arbitrators to three, instead of the default rule of one.

In the attached first draft of 13 April 2006, Rule 6 (Number of Arbitrators) reads:

Unless the parties have agreed otherwise or unless it appears to the Registrar that the Registrar (sic) the dispute warrants the appointment of three arbitrators, a sole arbitrator shall be appointed.

The sixth draft of 30 April 2007 has Rule 5.1 appearing in its present form (see [5] above).

My decision

34 On the preliminary issue of the court's jurisdiction to interpret Rule 5.1, it is not disputed that Rule 35.2 of the SIAC Rules does not oust the court's jurisdiction to construe an agreement between the parties. As Rule 5.1 has been incorporated into the contract, it is open to both parties to seek the court's construction of Rule 5.1 as one of the terms of the contract.

35 In my opinion, the words "an Arbitrator" in clause 71.4 are no different from "a single/sole arbitrator" or "one arbitrator". If the parties had meant "a tribunal", with the number of arbitrators remaining to be agreed, they would have simply stated so. Alternatively, they would have quite easily provided that their dispute is to be referred to arbitration rather than specify "an Arbitrator", a term which in its natural, ordinary meaning means "one Arbitrator". The context in which the words appear certainly does not require that the singular embrace the plural. I find no ambiguity in the said words and there is therefore no question of applying the *contra proferentum* rule against the defendant as the drafter of Contract 822. Accordingly, I hold that the parties have, by virtue of clause 71.4, already agreed on one arbitrator should mediation fail and their dispute escalate to arbitration.

36 According to the plaintiff, even if clause 71.4 provides for one arbitrator, when this clause is read with the incorporated Rule 5.1, the Registrar of the SIAC nevertheless has the discretion to direct that a three-member tribunal hear the dispute if the circumstances warrant such. As the plaintiff has emphasized, its complaint is about the Registrar's failure to exercise her discretion because of her ruling (see [7] above) rather than the manner of exercise of discretion.

37 It is conceded by the defendant that "[o]n the face of Rule 5.1 of the2007 SIAC Rules, the interpretations advanced by [the plaintiff] and [the defendant] are both possible literal interpretations". Rule 5.1 is not subsidiary legislation which would be interpreted purposively pursuant to s 9A of the Interpretation Act (Cap 1, Rev Ed 2002). However, it has been incorporated into the parties' contract and commercial contracts such as the one in this case would be interpreted using a purposive approach (see, for example, the Court of Appeal's decision in *Panwah Steel Pte Ltd v Koh*

Brothers Building & Civil Engineering Contractor Pte Ltd [2006] 4 SLR 571 at [29] and [31]). As Rule 5.1 is also an institutional rule of the SIAC, interpreting Rule 5.1 using a purposive approach necessarily includes a consideration of how the Rule came into being, something akin to studying the legislative history of an Act of Parliament.

38 Rule 5.1 of the 2007 SIAC Rules has its genesis in Rule 6 of the 1997 SIAC Rules (see [18] above), which were the Rules in operation when Contract 822 was signed. The words "unless the parties have agreed otherwise" in Rule 6 of the 1997 SIAC Rules encapsulate the supremacy of party autonomy. This means that the said Rule 6 set out the default position of a sole arbitrator only where the parties had not agreed on the number of arbitrators. Where the number of arbitrators was specified by the parties, there was no occasion to resort to the said Rule 6 at all.

39 Rule 5.1 also has the words "unless the parties have agreed otherwise" contained in the said Rule 6. As stated in SIAC's letter of 19 February 2008 (see [33] above), these words were retained in the present Rules "to embody this concept of party autonomy". In Rule 5.1, these words are placed at the beginning rather than at the tail end of the Rule. The addition of the other "unless" was merely to mitigate the rigidity of the said default position of a sole arbitrator by conferring on the Registrar of the SIAC the discretion to appoint three arbitrators where the circumstances warrant such. In my opinion, the SIAC intended the Registrar to have such discretion only where the parties have not specified the number of arbitrators in their agreement, although, like the defendant, I could not dismiss outright the literal interpretation proffered by the plaintiff. I do not think the SIAC, mindful and respectful of party autonomy in arbitration, intended for its Registrar to have the power to override the clear wishes of the parties expressed in their agreement on the number of arbitrators, which in this case was one arbitrator.

40 A comparison of the drafts of Rule 5.1 with the Rules of other arbitral institutions indicates that the words "warrants the appointment of three arbitrators" were borrowed from Article 8.2 of the Rules of Arbitration of the ICC (in force from 1 January 1998) which states:

> Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators. ……

The defendant submits that this strongly suggests that the SIAC, in modifying Rule 6 of the 1997 SIAC Rules, was clearly moving towards the ICC model, which has a default position of one arbitrator unless the appointing authority is of the view that three arbitrators are warranted but only where the number of arbitrators has not been agreed in the first place.

41 Further, the SIAC, in the process of refining Rule 5.1 to its present form, appeared to have borrowed from the wording in Article 5 of the AAA arbitration rules and in Article 14 of the WIPO arbitration rules. Article 5 of the AAA arbitration rules reads:

> If the parties have not agreed on the number of arbitrators, one arbitrator shall be appointed unless the administrator determines in its discretion that three arbitrators are appropriate because of the large size, complexity or other circumstances of the case.

Article 14 of the WIPO arbitration rules provides:

> (a) The Tribunal shall consist of such number of arbitrators as has been agreed by the parties.
>
> (b) Where the parties have not agreed on the number of arbitrators, the Tribunal shall consist

> of a sole arbitrator, except where the Center in its discretion determines that, in view of all the circumstances of the case, a Tribunal composed of three members is appropriate.

Hence, the defendant submits, although the first draft and the final version of Rule 5.1 do not use identical expressions as the ICC, AAA and WIPO rules set out above, the intention of the SIAC to preserve party autonomy remains intact by its retention of the words "Unless the parties have agreed otherwise" at the start of Rule 5.1.

42 The defendant's arguments are not without difficulty as the SIAC did not choose to word Rule 5.1 in the same way as the cited counterparts of the other arbitral organizations. As the plaintiff has retorted forcefully:

> If the SIAC had such a fixed intention that the rule was only applicable when the clause is silent on the number of arbitrators, and if the SIAC was looking for inspiration to other rules to express this intention (as to all of which the SIAC itself has not given evidence) then it defies comprehension why the SIAC did not borrow the entire language from those Rules since that would have achieved the precise effect that the [defendant] contends for.
>
> …
>
> The evolution of Rule 5.1 from that first draft to the sixth draft (dated 30 April 2006) was merely to articulate the specific circumstances that the Registrar ought to consider when exercising that discretion, so defining the limits of the discretion.
>
> It is significant to note the absence of Rule 5.2 to Rule 5.5 from the former Rule 6. These rules which confer wide powers on the SIAC all appeared to have been introduced together.
>
> …
>
> The argument on inconsistency is the obverse of the argument on party autonomy. In the present contract they both fail because the [defendant] does not appreciate what the clear and obvious meaning of both the old and new rule was and further it does not appreciate that a party to the exercise of its autonomy may agree to yield on certain matters to the SIAC's discretion and this is expressly seen in Rule 5 of the 2007 Rules. This is a specific choice made by the parties unlike the position with the Domestic Rules which were criticized and then repealed as they were capable of being applied even if not specifically chosen.

43 Despite the compelling arguments put up by the plaintiff, I think the better view is that Rule 5.1 has no application where the parties have agreed on the number of arbitrators. The former Rule 6 was changed to its present form in Rule 5.1 only to facilitate the appointment of three arbitrators instead of the inflexible position of one arbitrator in default, *i.e.* in the absence of parties' agreement on the number of arbitrators. It was never meant to apply where an agreement on the number of arbitrators already exists, much less to override that agreement. I therefore prefer and accept the defendant's interpretation of Rule 5.1.

44 In any event, I do not think that it was within the parties' contemplation that their agreement in clause 71.4 on a sole arbitrator would be subject to the power of the Registrar of the SIAC to direct otherwise. When Contract 822 was made between the parties, Rule 6 of the 1997 SIAC Rules was in force and, as mentioned earlier, there was no need to even refer to it at that time as it was not applicable to the parties who had already agreed on one arbitrator in the event of a dispute. Rule 5.1, as the successor rule to the said Rule 6, if read in the way the plaintiff has contended,

would not merely have provided the procedure for the arbitration. It would alter quite fundamentally the parties' agreement on the arbitral tribunal.

45 Accordingly, even if the plaintiff is correct in its interpretation of Rule 5.1, I would still hold that its incorporation into the parties' agreement does not have the effect of overriding their express intention to have only one arbitrator to determine their dispute. The agreement of the parties to incorporate the SIAC Rules, even though stated to be those for the time being in force, does not permit those rules to override the express term of the arbitration clause (on a sole arbitrator) except as expressly assented to, and, in my view, clause 71.4 does not show that the parties have agreed to allow the SIAC Rules to take precedence over their agreement. Reading clause 71.4 and Rule 5.1 together (the latter in the manner interpreted by the plaintiff) in a commercially sensible way, it is my opinion that clause 71.4 takes precedence over and overrides Rule 5.1.

46 For the above reasons, I dismissed this originating summons. As the plaintiff's arguments could not be said to be completely unsustainable, it was agreed between the parties that costs of this originating summons be reserved to the arbitrator in the arbitration proceedings.