IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 43

Originating Summons No 920 of 2021

Between

Hunan Xiangzhong Mining Group Ltd

… *Plaintiff*

And

Oilive Pte Ltd

… *Defendant*

JUDGMENT

[Arbitration — Arbitral tribunal — Jurisdiction]
[Arbitration — Arbitral tribunal — Appointment of arbitrator]
[Arbitration — Arbitral tribunal — Singapore International Arbitration Centre — Whether sole arbitrator is to be appointed by Chairman or President]

TABLE OF CONTENTS

Hunan Xiangzhong Mining Group Ltd v Oilive Pte Ltd

[2022] SGHC 43

General Division of the High Court — Originating Summons No 920 of 2021
S Mohan J
2 December 2021

28 February 2022 Judgment reserved.

S Mohan J:

Introduction

1 In HC/OS 920/2021 ("OS 920"), the plaintiff, Hunan Xiangzhong Mining Group Limited applies, pursuant to s 10(3)(*a*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), for a declaration that the sole arbitrator, Mr Timothy Cooke ("Arbitrator"), does not have jurisdiction over the arbitration proceedings in Singapore International Arbitration Centre ("SIAC") Arbitration No 934 of 2020 ("Arbitration"). In a Ruling on Jurisdiction dated 12 August 2021 ("Jurisdiction Decision"), the Arbitrator ruled that he has jurisdiction over the Arbitration.[1]

2 It is well established that an application made under s 10(3) of the IAA is to be reviewed by the court *de novo*. In considering the matter afresh, the

---

[1] Zhao Meiqing's affidavit dated 6 September 2021 ("Zhao's affidavit") at pp 17 to 36.

court will consider the arbitral tribunal's views on its jurisdiction, as what the tribunal has said might well be persuasive. However, beyond this, the court is not bound to accept or take into account the arbitral tribunal's findings on the matter (*Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [41]).

3 The central controversy in OS 920 pertains to the validity of the Arbitrator's appointment. In essence, the plaintiff contends that the appointment of the Arbitrator was not in accordance with the parties' agreement in the arbitration agreement contained in the underlying contract between the parties (see [7] below).[2] The relevant part of the arbitration agreement prescribed that "THE TRIBUNAL SHALL CONSIST OF A SINGLE ARBITRATOR *AGREED UPON BY BOTH PARTIES*, OR *IF NOT SO AGREED,* ***BY THE CHAIRMAN*** *FOR THE TIME BEING OF SIAC*" [emphasis added in italics and bold italics]. Since the Arbitrator in this case was appointed by *the President* of the Court of Arbitration of the SIAC ("President") and not *the Chairman* of the SIAC ("Chairman"), the plaintiff's position is that the Arbitrator's appointment is invalid.[3] In response, the defendant submits that the appointment procedures were correctly observed and the Arbitrator was properly appointed under the SIAC Rules (6th edition, 1 August 2016) ("SIAC Rules 2016").[4] In any case, the plaintiff's application should fail because it was made to the Arbitrator out of time.[5]

---

2 Plaintiff's Written Submissions dated 25 November 2021 ("PWS") at para 20.

3 PWS at paras 6 and 8.

4 Defendant's Written Submissions dated 25 November 2021 ("DWS") at paras 52 to 53.

5 DWS at para 51.

4 At the outset, I note that the parties do not dispute that the institutional authority responsible for the appointment of arbitrators for arbitrations conducted under the SIAC's arbitration rules has changed over time. Before April 2013, the appointment of arbitrators was made by the Chairman. For example, r 6.3 of the SIAC Rules (4th edition, 1 July 2010) stated that "In all cases, the arbitrators nominated by the parties, or by any third person including the arbitrators already appointed, shall be subject to appointment by the Chairman in his discretion". Following an internal reorganisation within the SIAC which, *inter alia*, created the office of the President, in r 6.3 of the SIAC Rules (5th edition, 1 April 2013) ("SIAC Rules 2013"), the reference to Chairman was amended to the President. Rules 1.3 and 1.4 of the SIAC Rules 2013 also expressly amended the previous editions of the SIAC Rules to state that "Chairman" would from 1 April 2013 onwards mean "President".

5 In this judgment, I address the effect of these retrospective amendments and the proper construction of arbitration agreements that may have been drafted on the basis of the previous editions of the SIAC Rules. I begin with the factual background pertinent to the present case.

Factual background

6 The plaintiff in OS 920 is a company incorporated in the People's Republic of China and was the respondent in the Arbitration.[6] The defendant is a company incorporated in Singapore and was the claimant in the Arbitration.[7]

7 The parties' dispute in the Arbitration arose out of a contract dated 18 May 2020 for the sale and purchase of a cargo of 280,000 barrels of light cycle

---

6 Zhao's affidavit at para 6.

7 Zhao's affidavit at para 7.

oil plus/minus 10% at the defendant's option ("Contract").[8] Clause 16 of the Contract contained the relevant arbitration agreement ("Arbitration Agreement") and stated as follows:

> **16) LAW & ARBITRATION**
>
> THE CONTRACT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH SINGAPORE LAW, NOT INCLUDING ANY CONFLICT OF LAWS OR RULES.
>
> ANY DISPUTE ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, INCLUDING ANY QUESTION REGARDING ITS EXISTENCE, VALIDITY OR TERMINATION
>
> SHALL BE REFERRED TO AND FINALLY RESOLVED BY ARBITRATION IN SINGAPORE TO THE EXCLUSION OF ANY OTHER FORUM OR JURISDICTION 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 IN THIS CLAUSE. THE TRIBUNAL SHALL CONSIST OF A SINGLE ARBITRATOR AGREED UPON BY BOTH PARTIES, OR IF NOT SO AGREED, BY THE CHAIRMAN FOR THE TIME BEING OF SIAC.
>
> THE PLACE OF THE ARBITRATION SHALL BE SINGAPORE. THE LANGUAGE OF THE ARBITRATION SHALL BE ENGLISH. THE REASONED ARBITRATION AWARD SHALL BE FINAL AND BINDING UPON BOTH PARTIES WITHOUT RECOURSE TO ANY COURTS. ANY COSTS RELATED TO ARBITRATION, INCLUDING REASONABLE ATTORNEY'S FEES, SHALL BE BORNE BY THE LOSING PARTY.
>
> THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND THE SALE OF GOODS ACT SHALL NOT APPLY TO THIS CONTRACT[.]

8 The defendant commenced the Arbitration on 14 September 2020.[9] In its Notice of Arbitration, the defendant proposed the appointment of a sole arbitrator and sought the plaintiff's agreement. It also proposed for the

---

8 Zhao's affidavit at para 8; Mangkaiyarkarasi d/o Panneer Selvam's affidavit dated 14 October 2021 ("MPS' affidavit") at para 6.

9 Zhao's affidavit at para 10; MPS' affidavit at para 8.

Arbitration to be conducted in accordance with the expedited procedure under r 5 of the SIAC Rules 2016.[10] It should be noted that the defendant stated in the Notice of Arbitration that "In accordance with the Arbitration Agreement, it has been agreed as follows: - … (b) The Tribunal shall consist of a single arbitrator agreed upon by both parties, or if not so agreed, *appointed* by the Chairman of the SIAC" [emphasis added].[11] I will deal with the significance of this statement below.

9 The plaintiff neither responded to the Notice of Arbitration nor provided any comments on the constitution of the tribunal or whether the expedited procedure should apply. On 26 October 2020, the defendant wrote to the SIAC stating that more than 21 days had passed since the date of commencement of the Arbitration and parties have not reached an agreement on the nomination of the sole arbitrator. The defendant requested that the President proceed to appoint the sole arbitrator and determine the expedited procedure application.[12]

10 On 27 October 2020, the SIAC responded and requested that the plaintiff provide its comments on the expedited procedure application, failing which, the application would be placed before the President for determination. Again, there was no response from the plaintiff. The defendant thereafter repeated its request for the President to determine the expedited procedure and the appointment of the sole arbitrator on 3 November 2020. On 4 November 2020, the SIAC confirmed that the expedited procedure application would be placed before the President for determination.[13]

---

10 Zhao's affidavit at pp 62 to 63; MPS' affidavit at para 9.

11 Zhao's affidavit at p 57 (para 10).

12 Zhao's affidavit at p 21 (para 13).

13 Zhao's affidavit at p 21 (paras 14 to 16).

11 After inviting comments from the parties on 23 November 2020 regarding the appointment of the sole arbitrator and receiving no response from the plaintiff, the SIAC announced on 14 December 2020 that it had requested the President to make the appointment. The President appointed the Arbitrator in accordance with r 10.2 of the SIAC Rules 2016 on 29 December 2020.[14]

12 The Arbitrator held a preliminary meeting on 11 January 2021 and directed that the defendant arrange for all relevant correspondence, notices, procedural orders, directions and documents to be served on the plaintiff. The defendant (as claimant in the Arbitration) proceeded to file its memorial on 25 February 2021. Despite being ordered to do so by 5 April and then 12 April 2021, the plaintiff did not file any memorial and did not communicate with the defendant, the Arbitrator or the SIAC. The Arbitrator also invited the plaintiff to confirm its availability to attend a procedural conference call on 14 April 2021 but there was again no response. At the procedural conference call, the Arbitrator directed that an evidential hearing take place remotely on 17 May 2021 at 10.00am. He directed that the order be served on the plaintiff by courier and by local lawyers at the plaintiff's two known addresses.[15]

13 The evidential hearing subsequently took place on 17 May 2021, and the plaintiff did not attend the hearing. The defendant submitted a memorandum of service recording that all relevant correspondence, notices, procedural orders, directions, submissions and documents were couriered and/or personally served on the plaintiff. The Arbitrator was satisfied that the plaintiff was aware of the evidential hearing and had been provided with the necessary details to participate remotely. At the end of the hearing, the Arbitrator directed that the

---

14 Zhao's affidavit at p 21 (paras 17 to 19).

15 Zhao's affidavit at p 22 (paras 22 to 26).

defendant file any further written submissions including those on costs by 31 May 2021 and the plaintiff to file any written submissions it wished to make by 14 June 2021.[16]

14 The plaintiff only appointed counsel on 25 May 2021. The defendant, the SIAC and the Arbitrator were informed of this in an email from the plaintiff's solicitors, Wee Swee Teow LLP, on 27 May 2021.[17] The Arbitrator responded the same day remarking that he understood that the plaintiff "has been provided with copies of documents relating to [the Arbitration] from the outset" and stated that since the Arbitration was being conducted under the expedited procedure, the final award was to be rendered within six months of the constitution of the tribunal. He also stated that the evidential hearing had taken place and a final award was due by 1 July 2021. In the circumstances, the Arbitrator requested that the plaintiff clarify why it had waited so long before instructing counsel in the Arbitration and what steps it intended to take given that it had apparently chosen not to participate until 27 May 2021.[18]

15 The plaintiff, through its solicitors, responded substantively on 31 May 2021 asserting that the Arbitrator had not been appointed in accordance with the Arbitration Agreement and protested the continuation of the Arbitration. The plaintiff made certain proposals for the future conduct of the proceedings but did not address the Arbitrator's query as to why it had not participated in the Arbitration thus far.[19]

---

16 Zhao's affidavit at pp 22 to 23 (paras 26 to 29).

17 Zhao's affidavit at pp 23 (para 30) and 132.

18 Zhao's affidavit at p 23 (para 30).

19 Zhao's affidavit at p 23 (para 31).

16 On 1 June 2021, the Arbitrator wrote to the secretariat of the SIAC, copying the parties, seeking an explanation of the steps that had been taken in relation to his appointment. On 3 June 2021, the SIAC responded in the following terms:

> When making the appointment, we noted that the arbitration clause provides 'The Tribunal shall consist of a single arbitrator agreed upon by both parties, or if not so agreed, by the Chairman for the time being of SIAC'. The Chairman was unable to make the appointment.
>
> We also noted that the President of the SIAC Court of Arbitration ('President') has decided that the proceedings be conducted under the expedited procedure. We proceeded to request the President to appoint the sole arbitrator pursuant to Rule 10.2 of the SIAC Rules and let the Parties know that the President would make the appointment (as stated in our email to the Parties dated 14 December 2020).

17 On 8 June 2021, the defendant sought certain clarifications from the SIAC regarding the appointment process and the SIAC responded on 23 June 2021 as follows:

> Please be informed that although the Chairman is unable to appoint an arbitrator under the SIAC Rules 2016, the practice under SIAC Rules 9.2 and 10.2 is to allow the Chairman to nominate an arbitrator for appointment by the President, provided the Chairman is not conflicted. Here, because the Chairman had reported a conflict, no request was made to the Chairman to appoint the sole arbitrator.

The jurisdictional challenge and the Jurisdiction Decision

18 On 23 June 2021, the plaintiff wrote to the Arbitrator and the defendant stating that it intended to make a jurisdictional challenge under r 28 of the SIAC Rules 2016 read with Art 16 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), and the application was made on 28

June 2021.[20] The plaintiff objected to the jurisdiction of the Arbitrator on the basis that his appointment was not in accordance with the Arbitration Agreement. It also sought a declaration that the application was made within time.[21] Written submissions were filed by the parties and an oral hearing of the application took place at the plaintiff's request on 26 July 2021.[22]

19 The parties agreed that the Arbitrator had jurisdiction to determine the plaintiff's jurisdictional challenge and that the application should be determined as a preliminary issue.[23] The parties also agreed that the Arbitration was governed by the SIAC Rules 2016.[24]

20 In the Jurisdiction Decision, the Arbitrator dismissed the plaintiff's application and ruled that he had jurisdiction to determine the dispute between the parties.[25] The Arbitrator considered that the plaintiff's application was premised on arguments that the President did not have power to appoint the Arbitrator and this power properly vested in the Chairman for two reasons. Firstly, the reference to the Chairman in the Arbitration Agreement is to be construed as an agreement by the parties to have the Chairman appoint the Arbitrator and this was intended to displace anything to the contrary in the rules of arbitration incorporated (*ie*, rr 9.2, 9.3 and 10 of the SIAC Rules 2016). The plaintiff's position was that the Arbitration Agreement incorporated the appointment provisions of earlier editions of the SIAC Rules where the

---

20 Zhao's affidavit at pp 164 to 167 (paras 7 to 9).

21 Zhao's affidavit at p 24 (para 38).

22 Zhao's affidavit at p 24 (para 35).

23 Zhao's affidavit at p 24 (paras 36 to 37).

24 Zhao's affidavit at p 27 (para 59.1).

25 Zhao's affidavit at p 19 (para 2).

Chairman did in fact have the power to appoint the arbitrator. Secondly, if the language used in the Arbitration Agreement did not displace rr 9.2, 9.3 and 10 of the SIAC Rules 2016, then the language of the Arbitration Agreement is inconsistent with those rules and the parties' express language should prevail over the conflicting provisions of the SIAC Rules 2016. The Arbitrator considered that both of these were questions of construction of the Arbitration Agreement. It was the plaintiff's case that the President was not permitted to appoint the sole arbitrator as the parties had agreed for the Chairman to do so. Therefore, the Arbitrator's appointment by the President cannot stand.[26]

21 As regards the construction of the Arbitration Agreement, the Arbitrator disagreed that the parties objectively intended for the Chairman to appoint the Arbitrator or to derogate from the appointment provisions in the SIAC Rules 2016.[27] He gave the following reasons in support of his decision:

> (a) The Arbitration Agreement provides that a sole arbitrator is to be "agreed" by the parties. It does not provide that the parties or the Chairman are to "nominate" or "appoint" the Arbitrator. This suggests that parties did not draw a distinction between a situation where parties "agreed" an arbitrator (be that by a nomination or an appointment) or when the Chairman chose one. In the context of rr 9.2 and 9.3 SIAC Rules 2016 which provide that where parties have agreed to appoint an arbitrator (or have agreed for a third party to appoint one), such agreement is *deemed* to be an agreement to *nominate*.[28]

---

26 Zhao's affidavit at pp 26 to 27 (paras 55 to 57).

27 Zhao's affidavit at p 32 (para 79).

28 Zhao's affidavit at pp 28 to 30 (paras 61, 63 and 68).

(b) The parties did not agree that the Chairman was to play a special role in the constitution of the tribunal that would displace the provisions in the SIAC Rules 2016. If parties intended for the Chairman to "appoint" (rather than "nominate") the sole arbitrator, notwithstanding that the SIAC Rules 2016 incorporated at the time of commencement of proceedings may provide otherwise, they would have stated so explicitly. Mere reference to the Chairman is not sufficient.[29]

(c) The Arbitrator noted that whilst the earlier editions of the SIAC Rules in 2007 and 2009 provided for the Chairman to make appointments, those earlier rules had been amended in the SIAC Rules 2013 to provide for the President to make appointments (see also [4] above). Thus, any reference to Chairman in the older editions of the SIAC Rules is deemed to be a reference to the President. The effect of this is that the appointment provisions of the SIAC Rules, regardless of whether the 2007, 2010 or 2013 edition was incorporated, provide for the President to appoint or confirm any nomination of a sole arbitrator by the parties or a third party. The parties cannot have intended to have incorporated an appointment mechanism from an earlier edition of the SIAC Rules in its unamended form without having set this out expressly. Therefore, the parties' mere reference to the Chairman in the Arbitration Agreement is simply a reference to a third party to nominate the sole arbitrator.[30]

(d) The parties expressly provided that the SIAC Rules "currently in force" were deemed incorporated into the Arbitration Agreement. This

---

29 Zhao's affidavit at p 29 (para 63).

30 Zhao's affidavit at p 29 (para 64).

indicates that the parties intended for the most up-to-date rules to apply when proceedings were commenced. They did not specifically carve out from that express incorporation some historical (and since amended) provisions relating to the appointment of the tribunal.[31]

(e) The Arbitrator rejected the plaintiff's argument that the Arbitration Agreement displaces r 10.2 of the SIAC Rules 2016. The Arbitration Agreement does not state as such. Rule 10 is also not prefaced by words such as "unless the parties have agreed otherwise". Thus, the Arbitration Agreement is to be read with rather than in contrast to r 10. Rule 10.1 provides that parties may seek to agree to have a person serve as sole arbitrator and where such an agreement is reached, it is subject to appointment by the President pursuant to r 9.3. The parties' provision that they would agree upon the sole arbitrator was consistent with r 10.1. The part that read "or if not so agreed, by the Chairman for the time being of SIAC" when read with r 9.2 of the SIAC Rules 2016 clearly means that if parties could not agree on a nomination, it was for the Chairman to nominate. Pursuant to r 9.3, any such nomination would be subject to appointment by the President. Clear unambiguous wording would have been required to displace the provisions of rr 9.2 and 9.3 of the SIAC Rules 2016 which the parties incorporated into the Arbitration Agreement. This was not present.[32]

(f) Rule 10 of the SIAC Rules 2016 applies where the parties have agreed to nominate a sole arbitrator and/or where they have agreed that a third party is to nominate an arbitrator. Rule 10.2 concerns two

---

31 Zhao's affidavit at p 29 (para 65).

32 Zhao's affidavit at pp 30 to 31 (paras 69 to 71).

circumstances where the President is to appoint a sole arbitrator, namely: (a) where the parties have not reached agreement on the nomination of a sole arbitrator within 21 days (or such other period as may be agreed by the parties or set by the Registrar); or (b) if at any time either party makes such a request. The first situation would also apply where a party does not participate in the proceedings at all. The Arbitrator considered that this provision "caters for the situation where the parties' agreed procedure for appointing a sole arbitrator has failed, either because the parties have not been able to agree a nomination, or where a third party nominator has not made a nomination". Rule 10.2 therefore empowers the President to make the appointment so that the arbitral process is not stymied. It has a similar effect to Art 11(4) of the Model Law which allows a party to request a statutory appointing authority to make an appointment where the parties' chosen process has failed.[33]

(g) The parties did not state that they intended to supplant the right to request the President to appoint a sole arbitrator at any time under r 10.2 with the right for the Chairman to "appoint" or "nominate" one (which nomination would have been subject to appointment by the President). As a matter of construction, this was not the parties' objective intention. Instead, the parties agreed on a mechanism for nomination in the Arbitration Agreement and at the same time incorporated r 10.2. By doing so, the parties intended for these provisions to be read together and provided for a fall-back mechanism to ensure the timely appointment of the tribunal in the event their own intended mechanism failed.[34]

---

33 Zhao's affidavit at pp 31 to 32 (paras 73 to 77).

34 Zhao's affidavit at p 32 (para 78).

22 The Arbitrator found that the nomination process undertaken by the SIAC was entirely proper and in accordance with the parties' agreement.[35] The plaintiff did not respond to the defendant's proposal for the nomination of a sole arbitrator in the Notice of Arbitration.[36] Thereafter, the defendant wrote to the SIAC on three occasions requesting the President to appoint a sole arbitrator because 21 days had passed and parties had not agreed on the nomination of an arbitrator.[37] Upon determining that the Chairman had a conflict, the SIAC did not approach him for a nomination.[38] By 14 December 2020, the SIAC approached the President for an appointment.[39] The SIAC had been requested by the defendant to appoint the sole arbitrator. Further, since 21 days had passed without a nomination from the parties, the President was empowered by r 10.2 to make the appointment in any event.[40] The Arbitrator saw no need for the SIAC to have informed the parties of the Chairman's inability to make a nomination since all that would have happened was that the defendant would presumably have reiterated its request for the President to appoint and the plaintiff would likely have made no comment since it chose not to participate in the proceedings.[41] Thus, the Arbitrator found that he had jurisdiction over the Arbitration.[42]

---

35 Zhao's affidavit at p 33 (para 87).

36 Zhao's affidavit at p 32 (para 81).

37 Zhao's affidavit at pp 32 to 33 (paras 82 to 84).

38 Zhao's affidavit at p 33 (para 85).

39 Zhao's affidavit at p 33 (para 86).

40 Zhao's affidavit at pp 33 to 34 (para 87).

41 Zhao's affidavit at p 34 (para 88).

42 Zhao's affidavit at p 34 (para 89).

23 The Arbitrator also found that the plaintiff's jurisdictional objection was out of time. The plaintiff did not participate in the Arbitration proceedings until 27 May 2021 and provided no explanation as to why it failed to respond to the Notice of Arbitration. It also did not provide any comments on the nomination of a sole arbitrator or respond to any of the correspondence between the defendant and the SIAC prior to the appointment of the Arbitrator. Since there was no suggestion that the Arbitration was not brought to the plaintiff's attention or that it was somehow unable to appear, it appeared that it chose not to participate until the last moment in the Arbitration.[43]

24 The Arbitrator rejected the plaintiff's argument that since it has not served a statement of defence, it was not out of time in filing the jurisdictional objection. By Procedural Order No 1 dated 18 January 2021 ("PO No 1"), the Arbitrator directed the plaintiff to file its memorial, including its statement of defence, witness evidence and documents by 5 April 2021 (and subsequently granted a short extension to 12 April 2021). The Arbitrator did not consider r 28.3 of the SIAC Rules 2016 to permit a respondent not to file a statement of defence at all and then seek to contest jurisdiction months later. The purpose of the rule was to ensure that where a respondent participates in the proceedings, it must file a jurisdictional objection by the time it responds substantively to the claim brought against it. Where it fails to file a statement of defence at all and provides no explanation for not doing so, the position it is adopting is that it chose not to file a statement of defence. The Arbitrator considered that to also be a choice not to file a jurisdictional objection pursuant to the SIAC Rules 2016. There is no injustice in requiring a respondent to file a jurisdictional objection within a specific time frame. If there is a justifiable delay explaining

---

43 Zhao's affidavit at pp 34 to 35 (paras 90 to 92).

why the respondent may not have filed such an objection in time, the tribunal is empowered under r 28.3 to admit the objection outside the stipulated time. In the absence of any justification at all by the plaintiff, the Arbitrator held that its jurisdictional objection was out of time.[44]

The parties' cases

25 As detailed above at [3], the plaintiff's case is that the appointment of the Arbitrator was not in accordance with the parties' agreement in the Arbitration Agreement.[45]

26 Firstly, the plaintiff relies on the importance of party autonomy in arguing that the Arbitration Agreement's reference to "Chairman" must be strictly upheld. A ruling that a reference to "Chairman" could allow an appointment to be made by the "President" instead would lead to difficulties in enforcement of the award in foreign jurisdictions.[46]

27 Secondly, the plaintiff argues that the parties agreed that the Chairman was to nominate and appoint an arbitrator for the arbitration proceedings.[47] Under r 10.2 of the SIAC Rules 2016, there should be no split between appointment and nomination, unless parties expressly and unequivocally provided in their agreement for such a split.[48] Further, the defendant had stated in its own Notice of Arbitration that the Chairman was to appoint the sole

---

44 Zhao's affidavit at p 35 (paras 93 to 97).

45 PWS at para 20.

46 PWS at para 25; Notes of Arguments (2 December 2021) ("NOA") at pp 3 (lines 9 to 11) and 8 (lines 12 to 13).

47 PWS at paras 29 to 32.

48 PWS at para 33.

arbitrator and this is confirmation of parties' objective intentions.[49] The plaintiff contends that the Chairman still has institutional powers of appointment and thus, conceptually it was akin to parties agreeing to apply an earlier edition of the SIAC Rules. While the plaintiff does not contend that an earlier edition of SIAC Rules was incorporated, it is not necessary to decide which edition of the SIAC Rules would be applicable because in this case, the parties used the word "Chairman" in the arbitration agreement and effect should be given to that choice.[50] Thus, the Arbitrator erred in finding that the parties intended for the Chairman to nominate but not appoint the Arbitrator.

28 Thirdly, even if parties had agreed that the Chairman was to nominate but not appoint the Arbitrator, the Arbitrator's appointment was still improper because the Chairman did not nominate the Arbitrator in this case. Instead, it was the President who nominated the Arbitrator. Since the Arbitrator's appointment was not in accordance with the agreed nomination steps and parties' agreement, it is defective.[51] In the Jurisdiction Decision, the Arbitrator erred in not considering whether his nomination had been duly carried out despite his finding that "parties agreed [on] a mechanism for nomination in the Arbitration Agreement".[52] The plaintiff also argues that since the Chairman was unable to perform a function that the parties had stipulated for, it was incumbent on the SIAC to inform the parties contemporaneously and offer suggestions on what else could be done, and to act on such decisions that the parties may have

---

49 NOA at p 3 (lines 21 to 32).

50 NOA at p 8 (lines 24 to 32).

51 PWS at paras 35 to 37.

52 PWS at para 38.

agreed on subsequently. The SIAC did not do so and has not provided any reason for not doing so.[53]

29 The parties did not intend for r 10.2 of the SIAC Rules 2016 to apply at all or be a "fallback" because they specifically referred to "Chairman" in the Arbitration Agreement. There is no authority that r 10.2 is a fallback provision. Even if it acts as a fallback, the Chairman still has to at least nominate the sole arbitrator but that was not done in this case. The Arbitrator thus erred in finding that r 10.2 was a fallback provision and that it applied.[54]

30 Finally, the plaintiff argues that its jurisdictional challenge was made within time because no statement of defence had been filed.[55] Alternatively, procedural rules should not be allowed to defeat substantive justice and are in any case subject to the rules of natural justice. Thus, even if its jurisdictional objection was out of time, its objection should still be heard and considered in full regardless of the absence of any reason for the delay.[56]

31 In response, the defendant's case is that the appointment of the Arbitrator under r 10.2 of the SIAC Rules 2016 is in accordance with parties' agreement.[57] The Arbitration Agreement, properly construed, provides for the following methods of appointing the sole arbitrator: (a) nomination by the parties and appointment by the President; (b) nomination by the Chairman and

---

53 PWS at paras 42 to 45; NOA at p 4 (lines 5 to 15).

54 PWS at paras 49 to 51; NOA at p 4 (lines 22 to 32).

55 PWS at paras 52 to 56.

56 PWS at para 57; NOA at p 2 (lines 17 to 19).

57 DWS at para 16.

appointment by the President; and (c) appointment by the President in accordance with r 10.2 of the SIAC Rules 2016.[58]

32 The defendant also argues that the Arbitration Agreement provides that, if the parties are unable to agree, the Chairman may nominate an arbitrator who will then be appointed by the President. The words "appoint" and "nominate" do not appear in the Arbitration Agreement.[59] Rule 9.2 of the SIAC Rules 2016 clearly states that any agreement for a party or a third person to appoint an arbitrator will be deemed an agreement to nominate an arbitrator.[60] The Chairman is one such third person.[61] Since the Arbitration Agreement provides that parties were to agree upon a sole arbitrator and in effect nominate the arbitrator who would then be appointed by the President in accordance with r 9.3 of the SIAC Rules 2016, the alternative regarding a third person should be read in the same way such that the Chairman may nominate an arbitrator who will then be appointed by the President.[62]

33 There is no basis to assert that the Arbitrator can *only* be properly appointed if he is appointed by either the parties or the Chairman.[63] Rule 10.2 of the SIAC Rules 2016, which was incorporated by reference in the Arbitration Agreement, applies in the present case. It provides a further mechanism for the

---

58 DWS at para 19.

59 DWS at para 28.

60 DWS at para 20.1.

61 DWS at para 38.2.

62 DWS at paras 30 to 31.

63 DWS at para 20.1.

appointment of the arbitrator by allowing the President to appoint the sole arbitrator.[64]

34 Further, there is no basis to assert that the Chairman still retains institutional powers of appointment.[65] The fact that the Chairman once held powers of confirmation under older editions of the SIAC Rules does not mean that the Chairman currently holds any such powers, or that by mere reference to the Chairman, parties intended to replace the relevant provisions of the SIAC Rules 2016 with particular provisions from previous editions of the SIAC Rules.[66] The defendant also highlighted that the SIAC Rules 2013 amended all prior editions of the SIAC Rules such that Chairman would, from 1 April 2013 onwards, refer to the President.[67]

35 Finally, the defendant submits that the plaintiff's jurisdictional challenge was out of time. The plaintiff failed to file its statement of defence and memorial by the deadline specified by the Arbitrator in PO No 1 (*ie*, 5 April 2021 and subsequently extended to 12 April 2021) and did not participate in the proceedings until 27 May 2021. Considering that the plaintiff had full notice of the Arbitration and all directions and timelines made therein, it cannot choose not to file its memorial, allow proceedings to continue and then raise a jurisdictional objection at the eleventh hour after the evidential hearing had been

64 DWS at paras 32 to 37.

65 DWS at para 20.2; NOA at pp 5 (lines 29 to 32) to 6 (lines 1 to 8).

66 DWS at paras 20.2 and 38.3.

67 DWS at para 40.

completed.[68] If the plaintiff's submissions are to be accepted, it would make a mockery of the Arbitrator's directions on the filing of pleadings.[69]

Issues

36 Based on the parties' submissions, the main issues that arise for my consideration are as follows:

(a) first, the following threshold questions:

(i) was the plaintiff's jurisdictional challenge before the Arbitrator made out of time and;

(ii) if so, whether the court is precluded from hearing the challenge *de novo* under s 10(3) IAA; and

(b) second, whether the Arbitrator has jurisdiction over the Arbitration.

First issue: was the plaintiff's jurisdictional challenge before the Arbitrator made out of time and if so, whether the court is precluded from hearing the challenge *de novo* under s 10(3) IAA

The parties' arguments

37 Ms Leong Lu Yuan, counsel for the defendant, submits that the plaintiff's challenge should fail because it was made to the Arbitrator out of time, by reason of the arguments summarised above at [35].

38 Counsel for the plaintiff, Mr Arvin Lee, submits that the plaintiff's jurisdictional challenge was within time because it had not filed its statement of

---

68 DWS at paras 44 to 51.

69 NOA at p 5 (lines 8 to 10).

defence at the time the challenge was made. Rule 28.3 of the SIAC Rules 2016 and Art 16(2) of the Model Law refer to the *actual* submission of the statement of defence.[70] Alternatively, as held by the Court of Appeal in *CBS v CBP* [2021] SGCA 4 (at [62]), procedural rules should not be allowed to defeat substantive justice and are subject to the rules of natural justice. Thus, even if the plaintiff had submitted its jurisdictional challenge after the requisite time limit had passed, its challenge should still be heard and considered in full regardless of the absence of any reason for the delay given the importance of the question of the Arbitrator's jurisdiction.[71]

Analysis and decision

39 Rule 28.3 of the SIAC Rules 2016 stipulates the following time limit within which parties must raise an objection to the tribunal's jurisdiction:

> **28 Jurisdiction of the Tribunal**
>
> …
>
> 28.3 Any objection that the Tribunal:
>
> a. does not have jurisdiction *shall be raised no later than in a Statement of Defence or in a Statement of Defence to a Counterclaim*; or
>
> b. is exceeding the scope of its jurisdiction shall be raised within 14 days after the matter alleged to be beyond the scope of the Tribunal's jurisdiction arises during the arbitral proceedings.
>
> The Tribunal may admit an objection raised by a party outside the time limits under this Rule 28.3 if it considers the delay justified. A party is not precluded from raising an objection under this Rule 28.3 by the fact that it has nominated, or participated in the nomination of, an arbitrator.
>
> [emphasis added]

---

70 PWS at paras 52 to 56.

71 PWS at para 57; NOA at p 2 (lines 17 to 19).

This corresponds to Art 16(2) of the Model Law which states that "[a] plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence".

40 In my judgment, the Arbitrator was correct in finding that the plaintiff's jurisdictional objection was out of time. It is critical to note that the plaintiff does not deny having received the communications and documents pertaining to the commencement and progress of the Arbitration. As noted at [13] above, the defendant submitted to the Arbitrator a memorandum of service recording that all relevant correspondence, notices, procedural orders, directions, submissions and documents were couriered and/or personally served on the plaintiff. A reasonably strong inference may therefore be made that despite the Arbitrator's direction in PO No 1 for the plaintiff to file its memorial and statement of defence by 5 April 2021, as extended to 12 April 2021, the plaintiff *chose* not to comply or participate in the Arbitration until 27 May 2021 when its current solicitors first came on the record. Its jurisdictional objection was only raised on 31 May 2021, about 5 months after the appointment of the Arbitrator, with its formal application being made on 28 June 2021. Despite the Arbitrator querying the plaintiff on 27 May 2021 as to the reasons it waited so long before instructing counsel in the Arbitration and what steps it intended to take given that it had apparently chosen not to participate in the Arbitration, there was no response from the plaintiff explaining its position (see [14]–[15] above). Even during the hearing before me, Mr Lee could not offer any explanation for the plaintiff's conduct.[72]

41 I find the plaintiff's argument that its jurisdictional challenge was not out of time because it had not filed the statement of defence to be wholly

---

72 NOA at p 2 (lines 17 to 20).

untenable. While this argument is based on the wording of r 28.3 of the SIAC Rules 2016 and Art 16(2) of the Model Law which state, respectively, that any jurisdictional objection shall be raised "no later than in a Statement of Defence or in a Statement of Defence to a Counterclaim" and "not later than the submission of the statement of defence", these provisions must be read in the light of the schema of the Model Law.

42 The *raison d'etre* of Art 16(2) is to require parties to raise their jurisdictional objections at the *earliest possible time*. The United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (A/CN 9/264, 25 March 1985) ("UNCITRAL Analytical Commentary") on Art 16(2) (at paras 4–5) states the following:

> B. Time-limits for raising objections, paragraph (2)
>
> 4. Paragraph (2) deals with the possible plea of a party that the arbitral tribunal does not have jurisdiction to decide the case before it or that it is exceeding the scope of its authority. *It aims, in particular, at ensuring* ***that any such objections are raised without delay***.
>
> 5. The respondent may not invoke lack of jurisdiction after submitting his statement of defence (as referred to in article 23(1)), unless the arbitral tribunal admits a later plea since it considers the delay justified. …
>
> [emphasis added in italics and bold italics]

43 In *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 ("*Rakna (CA)*"), the Court of Appeal noted that Art 16(2) was "formulated to deal with challenges to the tribunal's jurisdiction and was aimed, in particular, at ensuring that any such objections were raised without delay. Hence, the provision that such a challenge has to be made at the latest by the submission of the statement of defence" (at [50]). It requires parties to an

arbitration to bring out their challenges to jurisdiction at an early point of the proceedings (at [72]).

44 However, as noted by Quentin Loh J (as he then was) in the first instance decision of *Rakna Araksha Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 4 SLR 995 ("*Rakna (HC)*"), the phraseology of Art 16(2) of the Model Law contemplates a party that is engaged in the arbitration (see [54] below). What then happens if the respondent chooses not to file the statement of defence and ignores the arbitral proceedings? The plaintiff's submission, taken to its logical conclusion, is that such a respondent would be perfectly entitled to file a jurisdictional objection any time during the arbitral proceedings regardless of any procedural orders or directions made by the tribunal, even after the evidential hearing has been conducted and just as the tribunal is about to deliver its final award on the matter – even though it had chosen not to file a statement of defence.

45 In my judgment, this ought not to be permitted. It would be entirely antithetical to the purpose behind both provisions if the respondent was permitted to refrain from filing a statement of defence without reason, wait until the evidential hearing has concluded and the tribunal is in the process of preparing the final award before raising a jurisdictional objection. Instead of preventing undue delay in the raising of jurisdictional objections and encouraging the raising of such objections at the *earliest opportunity* which is the clear aim of Art 16(2) of the Model Law (and by extension r 28.3 of the SIAC Rules 2016), such a construction of these provisions as contended for by the plaintiff would encourage guerrilla-style tactics of ambushing the tribunal (and the counterparty) at the eleventh hour with a view to derailing the arbitral proceedings according to one's whim and fancy – that can neither be right nor intended by the drafters of the Model Law.

46 Specifically, in a situation where the respondent does not participate in the arbitration and the tribunal has made a procedural order stipulating that the respondent's statement of defence is to be filed by a certain date, the reference to "no later than the submission of the Statement of Defence" in r 28.3 of the SIAC Rules 2016 and Art 16(2) of the Model Law should, in my view, be interpreted to mean that any jurisdictional objection would be out of time if it was made after the expiry of the timeline *as stipulated* by the tribunal. This position should not be different simply because a respondent *chooses* to ignore the arbitral proceedings and decides not to file its statement of defence.

47 The conclusion I have reached above is also the result of a harmonious reading of rr 20.3 and 20.9 with 28.3 of the SIAC Rules 2016. Rule 20.3 states that "… the Respondent, shall, *within a period of time to be determined by the Tribunal*, send to the Claimant and the Tribunal a Statement of Defence …" [emphasis added]. Rule 20.9 states that "If the Respondent fails to submit its Statement of Defence, or if at any point any party fails to avail itself of the opportunity to present its case *in the manner directed by the Tribunal*, the Tribunal may *proceed with* the arbitration" [emphasis added] – in this context, to "proceed with" clearly contemplates the tribunal progressing the arbitration to its conclusion and issuing an award on the merits. It appears to me that r 20 envisages that the tribunal is in control over the timelines within which the parties to the reference are required to file their pleadings/submissions and that if a party (specifically a respondent) refuses to participate in the proceedings by filing its statement of defence, the tribunal may proceed with the arbitration. Therefore, reading r 28.3 with r 20 runs contrary to allowing such a respondent to raise its jurisdictional objection at *any time* in the arbitral proceedings so long as it has not actually submitted its statement of defence. Such a conclusion would be inconsistent with allowing the arbitration to *proceed*.

48 Thus, in the present case, the Arbitrator was correct to reason that the plaintiff, in choosing not to respond in the Arbitration, must be taken to have intended not to submit any jurisdictional challenge under r 28.3 of the SIAC Rules 2016. As I explain below (at [55] and [58]), this may not preclude the plaintiff from subsequently challenging the Arbitrator's jurisdiction *in setting-aside proceedings* before *the curial court* or defending enforcement proceedings against it before *the enforcement court*. However, this does not, in my view, alter the fact that in failing to file its statement of defence in accordance with the Arbitrator's directions, the plaintiff's jurisdictional objection *was* made out of time. That being said, the Arbitrator retained the discretion to nevertheless permit the jurisdiction objection to be heard under r 28.3 of the SIAC Rules 2016 if he considered the delay justified. However, given the lack of any explanation by the plaintiff to the Arbitrator as to the reason for the delay, the Arbitrator was entirely justified in finding that the plaintiff's application was made out of time.

49 However, the matter does not end there. I note that Ms Leong does not go so far as to contend that simply because the plaintiff's application was out of time, the court does not have the jurisdiction under s 10(3) of the IAA to review the merits of the jurisdictional objection *vis-à-vis* the construction of the arbitration agreement. However, the defendant's submissions could be construed as implying that this is reason alone for the court to dismiss OS 920. Mr Lee on the other hand submits that procedural rules should not be allowed to defeat substantive justice and are in any case, subject to the rules of natural justice. Therefore, even if it had submitted its jurisdictional challenge outside

the time limit, its challenge should still be heard and considered in full given the importance of the point on the Arbitrator's jurisdiction.[73]

50 In my judgment, I do not consider that the court is *precluded* from considering the plaintiff's jurisdictional objection under s 10(3) of the IAA simply because the plaintiff's jurisdictional objection was brought before the Arbitrator out of time. I have come to this view for three reasons, which I elaborate below.

51 Firstly, the UNCITRAL Analytical Commentary on Art 16 (at paras 8–10) recognises that the preclusive effect of failing to raise a jurisdictional objection under Art 16(2) may not apply in a case where a party did not participate in the arbitration. It discusses the effect of a failure to raise a jurisdictional objection in these terms:

> C. Effect of failure to raise plea
>
> 8. The model law does not state whether a party's failure to raise his objections within the time-limit set by article 16(2) has effect at the post-award stage. The pertinent observation of the Working Group was that a party who failed to raise the plea as required under article 16(2) ***should be precluded from raising such objections not only during the later stages of the arbitral proceedings but also in other contexts***, *in particular, in setting aside proceedings or enforcement proceedings*, subject to certain limits such as public policy, including those relating to arbitrability. 55/
>
> 9. It is submitted that this observation accords with the purpose underlying paragraph (2) and might appropriately be expressed in the model law. 56/ It would mean, in practical terms, that any objection, for example, to the validity of the arbitration agreement may not later be invoked as a ground for setting aside under article 34(2)(a)(i) or for requesting, under article 36(1)(a)(i), refusal of recognition or enforcement of an award (made under this Law); ***these provisions on grounds for setting aside or refusing recognition or enforcement would remain applicable and of practical relevance to***

[73] PWS at para 57; NOA at p 2 (lines 17 to 19).

> those cases where a party raised the plea in time but without success or ***where a party did not participate in the arbitration, at least not submit a statement or take part in hearings on the substance of the dispute.***
>
> 10. As expressed in the above observation of the Working Group, there are limits to the effect of a party's failure to raise his objections. These limits arise from the fact that certain defects such as violation of public policy, including non-arbitrability, cannot be cured by submission to the proceedings. Accordingly, such grounds for lack of jurisdiction would be decided upon by a court in accordance with article 34(2)(b) or, as regards awards made under this Law, article 36(1)(b) even if no party had raised any objections in this respect during the arbitral proceedings. It may be added that this result is in harmony with the understanding (stated above, para. 3) that these latter issues are to be determined by the arbitral tribunal ex officio.
>
> [emphasis added in italics and bold italics]

52 The UNCITRAL Analytical Commentary acknowledges the preclusive effect of Art 16(2) of the Model Law such that the failure to raise a jurisdictional objection should preclude the applicant from subsequently raising the objection "not only during the later stages of the arbitral proceedings, *but in other contexts*, in particular, in setting aside proceedings or enforcement proceedings" [emphasis added]. This reference to "other contexts" could conceivably *include* a jurisdictional objection raised in an application under s 10(3) of the IAA.

53 However, the preclusive effect of Art 16(2) does not apply in *all* circumstances. One recognised exception is in relation to jurisdictional objections pertaining to certain defects such as violation of public policy (including non-arbitrability) which cannot be cured by a party's submission to the proceedings. It seems that the Secretariat considered that there was also another exception, in relation to setting aside and enforcement proceedings, that jurisdictional objections would not be precluded where "a party *did not participate* in the arbitration, at least *not submit a statement* or take part in hearings on the substance of the dispute" [emphasis added]. If this is so, it seems

to me anomalous and antithetical to the efficiency of the arbitration framework to hold that the applicant would be precluded from raising a jurisdictional objection under s 10(3) of the IAA simply because it was out of time before the arbitral tribunal.

54 My analysis coheres with the observations made by Loh J in *Rakna (HC)* in the context of counterarguments to the view that the preclusive effect of Art 16(3) of the Model Law extended to setting-aside proceedings (at [65]–[67]):

> 65 First, the ***phraseology of Art 16(2) contemplates a party that is engaged in the arbitration***; hence the reference to raising the plea not later than its statement of defence and the reference to a party not being precluded from raising a plea of no jurisdiction by appointing or participating in the appointment of an arbitrator. It is therefore unsurprising that texts on Art 16 mostly proceed on the footing that ***the objecting party is an active participant in the arbitral proceedings*** (see Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) ('*Redfern and Hunter')* at para 10.30):
>
> > Parties are unlikely to succeed on any challenge to an award based on an objection that *they have failed to raise during the arbitration*. This is because they will usually be deemed to have waived that objection. … [emphasis added]
>
> The authors of *Redfern and Hunter* referred to the English decision of *Thyssen Canada Ltd v Mariana Maritime SA [2005] EWHC 219* ('*Thyssen Canada*'), observing in a footnote to the above-quoted paragraph (n 57):
>
> > [In *Thyssen Canada*] it was held that a party *who takes part in arbitral proceedings* and fails to raise an objection as to a serious irregularity affecting the proceedings will lose the right to object, unless it can show that, *at the time that it took part or continued to take part in the proceedings*, it did not know and could not with reasonable diligence have discovered the grounds for the objection. [emphasis added]
>
> 66 These views support an argument that ***where a party has stayed away from the arbitral proceeding altogether or has walked out at some early stage, eg, before filing its statement of defence, then Art 16's time limit is not***

> ***binding on it.*** However, I note that against this, s 10 of the IAA does not contain such phraseology.
>
> 67 Secondly, there is authority that an option remains open to a party to choose to leave the arbitral proceedings in protest, in which case the time limits in Art 34 ***(and therefore by extension, Art 16 as well) do not apply***. This can be found in the first instance decision of *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 ('*Astro Nusantara*') at [133]:
>
> > If a party chooses the second option of challenge by choosing to *leave the arbitral regime in protest* and should the tribunal rule against it on the merits, that party, as the losing party, is entitled within the time stipulated in Art 34 to set aside the award under any of the grounds in Art 34. … One way in which a party may challenge the jurisdiction of a tribunal is simply to step out of the arbitral regime and boycott the proceedings altogether. *If this course of action is chosen (and this course is not without risk), then the rules for appeal which would apply to parties within the arbitral regime would no longer apply to the boycotting party. Arguably, the boycotting party would then be able to apply to set aside the award under Art 34(2)*(a)*(i) on jurisdictional grounds.* The jurisdictional award would not be final *vis-à-vis* the boycotting party, and the opposing party would have ample notice of this from the boycotting party's absolute refusal to participate. This possibility is hinted at in UNCITRAL Commentary (A/CN 9/264) on Art 16(2) at para 9.
>
> [emphasis in original in italics; emphasis added in bold italics]

Respectfully, I see the force of these counterarguments and they support the view that the time limit in Art 16 of the Model Law may not apply in a case where a party does not participate in the arbitration (whether deliberately or otherwise).

55 Secondly, my conclusion at [50] above would also be consistent with the ambit of the preclusive effect of Art 16(3) of the Model Law. In *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 (at [132]), the Court of Appeal noted, in *obiter dictum,* that even if a party did not utilise

the active remedy of a jurisdictional challenge under Art 16, it would not be precluded from relying on lack of jurisdiction as a ground to subsequently resist *enforcement* of a final award. That said, the Court also expressed its tentative view that the position may not be the same in relation to whether such a party may raise such a ground to initiate *setting aside* proceedings under Art 34 of the Model Law.

56 In *Rakna (CA)*, the Court of Appeal (at [51]) considered it clear that the drafters of the Model Law intended Art 16(2) to have a preclusive effect and, in all likelihood, intended the *same* effect for Art 16(3). However, the question is whether the preclusive effect operates in *all* circumstances.

57 After quoting paras 8–9 of the UNCITRAL Analytical Commentary on Art 16 (see above at [51]), the Court of Appeal in *Rakna (CA)* appeared to accept (at [63]) that the time limit in Art 16(2) and 16(3) would not have a preclusive effect on a non-participating party:

> 63 The second part of the paragraph … goes further than the Working Group did and reflects the Secretariat's view that a party who has not participated in the arbitration at all may still object to jurisdiction at the setting aside stage. The Secretariat therefore recognised that a different regime should apply to a non-participating party. At the time of this commentary, the 30-day time period for application to court was not included in the draft version of Art 16(3) which was probably why the Secretariat was also able at that time to say that a party that had raised the plea in time without success could also bring up the matter again in a setting aside application. In any case, *the submission that the time limit in Art 16(2) would not have a preclusive effect on a non-participating party* must, logically, apply also to non-observance of the time limit in Art 16(3) by such a party. [emphasis added]

58 The Court of Appeal then held (at [77]), in the context of setting-aside proceedings, that the preclusive effect of Art 16(3) of the Model Law does not extend to a respondent who stays away from the arbitration proceedings and has

not contributed to any wastage of costs or the incurring of any additional costs that could have been prevented by a timely application under Art 16(3). The Court of Appeal reasoned (at [72]) that while Article 16 requires parties to an arbitration to bring out their challenges to jurisdiction at an early point of the proceedings, this requirement "pre-supposes that parties are before the arbitral tribunal and that a party to an arbitration agreement who is served with a notice of arbitration by a counterparty has no option but to participate in the ensuing proceedings".

59 The Court of Appeal then proceeded to state that the law does not compel a respondent against whom arbitration proceedings have been started to take part in those proceedings and defend his position. If the respondent believes that the arbitral tribunal has no jurisdiction, for one reason or another, he is perfectly entitled to sit by and do nothing in the belief that either the proceedings will not result in a final award against him or that, if an award is made, he will have valid grounds to resist enforcement (at [73]). In the absence of a clear duty on the respondent to participate in the arbitration proceedings imposed either by the Model Law or the IAA, the Court of Appeal "found it difficult to conclude that a non-participating respondent should be bound by the award no matter the validity of his reasons for believing that the arbitration was wrongly undertaken" (at [74]).

60 In my view, the recognition in *Rakna (CA)* that a respondent to an arbitration is not bound to participate in arbitration proceedings brought against it and that such a non-participating respondent may still raise jurisdictional objections subsequently at the post-award stage supports the conclusion I have reached at [50]. By extension, a failure by a non-participating respondent to raise a jurisdictional objection within time during the course of an arbitration, whether under r 28.3 of the SIAC Rules 2016 or Art 16(2) of the Model Law,

does not preclude the applicant from raising a jurisdictional objection under s 10(3) of the IAA prior to an award being rendered. In the present case, I accept that the plaintiff, not having participated in the Arbitration at the point when the deadline stipulated in PO No 1 had elapsed, should not be bound by the timelines imposed by Art 16(2) of the Model Law.

61 Thirdly, unlike the absolute three-month time limit in Art 34(3) of the Model Law which prevents the court from entertaining setting-aside applications brought after the expiry of that limit (*Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 1 SLR 1045 at [81]), there is no indication from Art 16(2) of the Model Law that an appeal under s 10(3) of the IAA against a jurisdictional ruling may not be brought or is precluded if the jurisdictional objection in the arbitration was brought out of time. Under s 10(3) of the IAA, the court considers the arbitral tribunal's jurisdiction on the basis of an independent *de novo* review (*BTN and another v BTP and another* [2021] 1 SLR 276 at [66]). In my judgment, this jurisdiction under s 10(3) of the IAA is retained by the court even where the applicant raises the jurisdictional objection out of time during the course of the arbitration.

62 Accordingly, the plaintiff is not precluded from raising the jurisdictional objection before this court under s 10(3) of the IAA and I decline to dismiss OS 920 on the sole basis that the plaintiff's jurisdictional objection was raised before the Arbitrator out of time.

63 I turn now to consider the substantive issue of whether the Arbitrator has jurisdiction over the Arbitration.

Second issue: whether the Arbitrator has jurisdiction over the Arbitration

The parties' arguments

64 For the reasons as already summarised at [25]–[29] above, the plaintiff contends that the appointment of the Arbitrator was not in accordance with the parties' agreement in the Arbitration Agreement.[74] I do not propose to repeat those arguments here. Similarly, the defendant's arguments to the contrary have also already been summarised above at [32]–[34].

Analysis and decision

65 The guiding principles as regards the construction of an arbitration agreement have been explained by the Court of Appeal in *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 (at [30]–[34]) as follows:

> 30 Our first observation is that an arbitration agreement (such as the Arbitration Agreement) should be construed like any other form of commercial agreement (see Julian D M Lew QC, Loukas A Mistelis & Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 7-60). The fundamental principle of documentary interpretation is to give effect to the intention of the parties as expressed in the document.
>
> 31 Our second observation is that, where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars (see *Halsbury's Laws of Singapore,* vol 2 (LexisNexis, 2003 Reissue, 2003) at para 20.017) so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party. This approach is similar to the 'principle of effective interpretation' in international arbitration law,

74 PWS at para 20.

which was described in *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) (Emmanuel Gaillard & John Savage eds) ('*Fouchard*') at p 258 as follows:

> B. – THE PRINCIPLE OF EFFECTIVE INTERPRETATION
>
> **478**. — The second principle of interpretation of arbitration agreements is the principle of effective interpretation. This principle is inspired by provisions such as Article 1157 of the French Civil Code, according to which 'where a clause can be interpreted in two different ways, the interpretation enabling the clause to be effective should be adopted in preference to that which prevents the clause from being effective.' This common-sense rule whereby, if in doubt, one should 'prefer the interpretation which gives meaning to the words, rather than that which renders them useless or nonsensical,' is widely accepted not only by the courts but also by arbitrators who readily acknowledge it to be a 'universally recognized rule of interpretation.' To give just one example of the application of this principle, an arbitral tribunal interpreting a pathological clause held that:
>
> > when inserting an arbitration clause in their contract the intention of the parties must be presumed to have been willing to establish an effective machinery for the settlement of disputes covered by the arbitration clause.

32 A subsidiary principle to the principle of effective interpretation is the principle that an arbitration agreement should also not be interpreted restrictively or strictly. An arbitration agreement is not a statute. This was noted in *Fouchard* at pp 260–261:

> D. – REJECTION OF THE PRINCIPLE OF STRICT INTERPRETATION
>
> …
>
> [T]his principle [that an arbitration agreement should be interpreted 'restrictively'] is generally rejected in international arbitration. It is based on the idea that an arbitration agreement constitutes an exception to the principle of the jurisdiction of the courts, and that, as laws of exception are strictly interpreted, the same should apply to arbitration agreements. …
>
> This has been frequently confirmed in arbitral case law. For example, the Decision on Jurisdiction rendered in the *Amco* arbitration sets out the principle in general terms:
>
> > like any other convention, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in

> > a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law.
>
> The interpretation of arbitration agreements by the French courts has, likewise, never been strict nor restrictive.

33 Another subsidiary principle is that, as far as possible, a commercially logical and sensible construction is to be preferred over another that is commercially illogical (see *Law Debenture Trust Corporation Plc v Elektrim Finance BV* [2005] 2 Lloyd's Rep 755 at [39]). In the present case, the Judge applied this principle at [33]–[34] of the Judgment:

> In the absence of an administering authority, the adoption of the ICC Rules is likely to be construed as designating the ICC to be the institution conducting the arbitration. Further the selection of a particular institutional arbitral body to conduct the arbitration will be construed as also selecting the rules of that body to govern the procedure adopted in the arbitration. [David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2005)] states at para 4.27:
>
> > In many cases parties will expressly agree to submit disputes to a particular institutional arbitral body. … An agreement to refer disputes to such a body will be deemed to incorporate an agreement to abide by the rules and procedures of that body in force at the time arbitration is commenced. Not only will the arbitration be governed by that institution's rules but it will also be administered by that organisation.
>
> The present case, however, despite the nomination of the SIAC as the body to conduct the arbitration, is not an example of institutional arbitration by the SIAC, since the arbitration agreement specifically designated the use of [the] ICC Rules instead. … *By designating a separate administering authority, the parties indicated that the adoption of the ICC Rules was not a selection of the administering authority but only an agreement for the arbitration to take place by reference to those rules.*

34 This approach to the interpretation of an arbitration agreement is necessary to uphold the underlying and fundamental principle of party autonomy as far as possible in the selection of the kind of arbitration and the terms of the arbitration. Given the inherently private and consensual

> nature of arbitration, our courts will ordinarily respect the principle of party autonomy and give effect to (workable) agreed arbitration arrangements in international arbitration, subject only to any public policy considerations to the contrary.
>
> [emphasis in original in italics]

66 These "guiding principles of primary importance" were summarised by Vinodh Coomaraswamy J in *BNA v BNB and another* [2019] SGHC 142 (at [22]–[26]) as follows:

> (a) Firstly, the principles for construing an arbitration agreement are assimilated with those applicable for construing any other commercial agreement. The fundamental objective of construing a commercial agreement is to give effect to the parties' intention as they have manifested it objectively in that agreement. So too, the fundamental purpose of construing an arbitration agreement is to give effect to the parties' intention as they have manifested it objectively in their arbitration agreement.
>
> (b) Secondly, the court should, as far as possible, construe an arbitration agreement so as to give effect to a clear intention evinced by the parties to settle their disputes by arbitration. This gives rise to two subsidiary principles: first, that the courts should not construe an arbitration agreement restrictively or strictly and second, the courts should prefer a commercially logical and sensible construction over one which is commercially illogical.
>
> (c) Thirdly, a defect in an arbitration agreement does not render it void *ab initio* unless the defect is so fundamental or irretrievable as to negate the parties' intent or agreement to arbitrate.

67 Having regard to these principles, I find that the Arbitrator was *correct* in finding that he had jurisdiction over the Arbitration and his appointment was in accordance with the Arbitration Agreement.

68 To recapitulate, the relevant sentence in the Arbitration Agreement states that "THE TRIBUNAL SHALL CONSIST OF A SINGLE ARBITRATOR ***AGREED UPON BY*** BOTH PARTIES, OR ***IF NOT SO AGREED, BY THE CHAIRMAN*** FOR THE TIME BEING OF SIAC" [emphasis added in bold italics]. The crux of the plaintiff's case is that the Arbitration Agreement requires the sole (or single) arbitrator to be *appointed* by the Chairman, or alternatively to be at least *nominated* by the Chairman and since neither of these steps were undertaken, the Arbitrator's appointment by the President of the SIAC was invalid.

69 In my judgment, the plaintiff's argument that the sole arbitrator is to be *appointed* by the Chairman is incorrect and misconceived. The parties used the words "agreed upon by" in the Arbitration Agreement instead of the terms "nominate" or "appoint". Thus, they did not appear to have distinguished between the concepts of nomination or appointment in the Arbitration Agreement. However, since parties expressly incorporated the SIAC Rules 2016 by reference in the Arbitration Agreement, the Arbitration Agreement must be construed with the SIAC Rules 2016 in mind as context. Rules 9.2 and 9.3 of the SIAC Rules 2016 in turn state as follows:

> 9.2 If the parties have *agreed that any arbitrator is to be* ***appointed*** *by one or more of the parties, or by a third person* including by the arbitrators already appointed, that agreement *shall be* ***deemed*** *an* ***agreement to nominate*** an arbitrator under these Rules.
>
> 9.3 ***In all cases***, the arbitrators nominated by the parties, or by any third person including by the arbitrators already

> appointed, shall be *subject to appointment by the President in his discretion.*
>
> [emphasis added in italics and bold italics]

70 The phrase "in all cases" in r 9.3 of the SIAC Rules 2016 indicates that *all* appointments of the arbitrators *shall be* made by *the President* in his discretion. The effect of r 9.2 of the SIAC Rules 2016 is that even if the Arbitration Agreement had explicitly stated that parties were to appoint an arbitrator, this would be *deemed* as only amounting to an agreement to nominate an arbitrator. In my view, this puts paid to Mr Lee's contention that because the parties used the word "Chairman", this necessarily means that the Chairman is to *appoint* the sole arbitrator. Reading the Arbitration Agreement harmoniously with rr 9.2 and 9.3 of the SIAC Rules 2016, the parties are deemed to have intended to agree to nominate a sole arbitrator, or alternatively, to have the Chairman nominate the sole arbitrator. I see no reason not to consider the Chairman to be a "third person" that parties have agreed may nominate the sole arbitrator within the meaning of r 9.2 of the SIAC Rules 2016.

71 I also reject the plaintiff's argument that the Chairman has or retains any institutional powers of appointment or that the sentence in question in the Arbitration Agreement is conceptually akin to parties agreeing to apply an earlier edition of the SIAC Rules. As explained at [4] above, the Chairman possessed institutional powers to appoint a sole arbitrator before April 2013. However, in r 6.3 of the SIAC Rules 2013, the reference to Chairman was amended to the President. Additionally, rr 1.3 and 1.4 of the SIAC Rules 2013 expressly amended the previous editions of the SIAC Rules to state that "Chairman" would from 1 April 2013 onwards mean "President". Therefore, at the time when parties chose to incorporate the SIAC Rules 2016 by reference into the Arbitration Agreement (*ie*, on 18 May 2020 when the Contract was

concluded) (see [7] above), they must be taken to have known that the Chairman no longer had or retained any institutional powers to appoint an arbitrator. On the contrary, it was only the President under r 9.3 of the SIAC Rules 2016 who was conferred that power, upon nomination by the parties or a third person. Thus, the Arbitrator was, in my view, undoubtedly correct in noting that "if the parties intended for the Chairman to *'appoint'* (rather than *'nominate*') the sole arbitrator, notwithstanding that the SIAC Rules incorporated at the time of commencement of proceedings may provide otherwise, they would have stated so explicitly; mere reference to the Chairman is not sufficient".[75] Similarly, I cannot see how it would be conceptually sound to come to the conclusion that the parties wanted an earlier edition of the SIAC Rules to apply simply by using the word Chairman in the Arbitration Agreement.

72 Mr Lee conceded that if the Arbitration Agreement refers to a party with no institutional appointment function or power, the Arbitration Agreement would be interpreted to mean that party was to *nominate* the sole arbitrator. During the hearing before me, Mr Lee raised an example where, if instead of Chairman, the Arbitration Agreement had referred to the Chief Justice, then the Arbitration Agreement would be read to mean that the Chief Justice was to nominate the sole arbitrator because the Chief Justice did not have any powers of appointment.[76] Following on from Mr Lee's example, it would therefore follow that a similar analysis must naturally also apply to the parties since the parties do not have any institutional authority to appoint an arbitrator. As noted in John Choong, Mark Mangan, *et al*, *A Guide to the SIAC Arbitration Rules* (Oxford University Press, 2nd edition, 2018) ("*A Guide to the SIAC Rules*") at para 8.12, "Parties cannot 'appoint' arbitrators directly to a tribunal, even if they

---

75 Zhao's affidavit at p 29 (para 63).

76 PWS at para 58.

purport to do so in their agreement. The parties have the right to 'nominate' a candidate and thereafter the SIAC President makes the formal appointment". Given my conclusion above that the Chairman does not have or retain any institutional powers to appoint an arbitrator, the Arbitration Agreement, when properly construed, simply provides for the Chairman (as a third person) to *nominate* the sole arbitrator in the event that the parties are unable to agree on who to nominate, and for the President to subsequently appoint the sole arbitrator.

73 The plaintiff places considerable reliance on the defendant's Notice of Arbitration which stated that the sole arbitrator was to be *appointed* by the Chairman (see [8] above). Mr Lee also submits that the defendant did not address this point at all and that the Arbitrator also failed to give any consideration to this point in the Jurisdiction Decision.[77]

74 I have not placed much weight on this argument in assessing the proper construction of the Arbitration Agreement. I do not discount the possibility that the reference in the Notice of Arbitration was an honest mistake although I accept that there was no evidence or assertion that it was. Even if it was not a mistake, it would, in my view, only amount to a unilateral and subjective expression of the defendant's understanding of the Arbitration Agreement post-contract, as opposed to an express confirmation of the parties' objective intention at the time of contracting. Ultimately, the proper construction of the relevant sentence in the Arbitration Agreement must be objectively ascertained applying the guiding principles I have alluded to above at [65]–[66].

---

77 PWS at para 31.

75 In my judgment, that lone reference by the defendant in its Notice of Arbitration is insufficient to outweigh the importance of seeking to achieve a harmonious reading of the Arbitration Agreement with the provisions in the SIAC Rules 2016, which the parties incorporated expressly by reference into the Arbitration Agreement. Looking at the matter in the round, the proper construction of the parties' objective intentions is that they intended for the Chairman (as a third person) to *nominate* the sole arbitrator and for the President to *appoint* the sole arbitrator.

76 The plaintiff also contends that r 10.2 of the SIAC Rules 2016 does not apply at all and cannot be a "fallback" provision because the parties specifically referred to "Chairman" in the Arbitration Agreement.[78] Rule 10.2 provides that:

> 10.2 *If within 21 days after the date of commencement of the arbitration*, or within the period otherwise agreed by the parties or set by the Registrar, *the parties have not reached agreement on the nomination of a sole arbitrator, or if at any time either party so requests, the President shall appoint the sole arbitrator.* [emphasis added]

77 I reject the plaintiff's argument. Nothing in the Arbitration Agreement indicates the parties' intention to disapply r 10.2. I see no basis to find that that the mere use of the word "Chairman" can have the effect contended for by the plaintiff. I also agree with the Arbitrator that it is relevant to note that r 10.2 is not prefaced by words such as "unless the parties have agreed otherwise".[79] Where parties have expressly incorporated a set of institutional rules to govern the conduct of arbitral proceedings between them, they should not be lightly assumed to have intended to disapply particular provisions of those institutional rules unless that intention is clearly expressed in the arbitration agreement or if

---

78 PWS at paras 49 to 51; NOA at p 4 (lines 22 to 32).

79 Zhao's affidavit at p 30 (para 69).

such objective intention of the parties to create such a carve-out is clear as a matter of construction. In the absence of any such clear indications, the court should incline towards reading the arbitration agreement harmoniously with the *whole* of the institutional rules as *chosen* by the parties. Thus, in the case before me, if the mechanism stipulated in the Arbitration Agreement (*ie*, to nominate the sole arbitrator according to parties' agreement or alternatively by the Chairman's choice) failed, r 10.2 of the SIAC Rules 2016 remains applicable as a fallback mechanism. Contrary to the plaintiff's submission, the Arbitrator's appointment is *not* invalid simply because the Arbitrator was not appointed or nominated by the Chairman. Nor does it mean that the Arbitrator's appointment was not in accordance with the parties' agreement.

78 If the plaintiff's argument is to be accepted, this would mean that if the Chairman was unavailable or unable to *appoint* an arbitrator for whatever reason, the Arbitration Agreement would be hamstrung and rendered unworkable. The plaintiff even suggests that in such a scenario, it would be necessary for the SIAC to go back to the parties to inform them of this development and to act on such decisions that the parties *may agree* on subsequently (see [28] above). However, this suggestion is problematic for a number of reasons.

79 First, there is no indication in the wording of the Arbitration Agreement that such a scenario was envisaged by the parties. Second, such an interpretation would also be commercially absurd and runs contrary to the principle of effective interpretation. It is also likely to generate undue uncertainty and inefficiency since it *assumes* that parties will agree on a fallback upon being consulted by the SIAC but that begs the question – what if parties cannot come to an agreement? On the plaintiff's case, the Arbitration Agreement would be unworkable or in s 6 IAA parlance, it would be rendered "inoperative or

incapable of being performed". However, in order not to defeat the expectations of commercial parties, that is a conclusion that a court will not arrive at lightly, particularly when it can arrive at a commercially logical conclusion that upholds the sanctity and efficacy of the Arbitration Agreement, in accordance with the guiding principles mentioned above at [65]–[66]. In my view, the purpose behind the fallback provision in r 10.2 of the SIAC Rules 2016 is this. In cases where the parties are unable to come to an agreement on who to nominate or if for some reason the mechanism in the arbitration agreement becomes unworkable, the President may, in accordance with r 10.2, simply appoint the sole arbitrator and thereby allow the arbitral proceedings to validly continue. In my judgment, this reading of the Arbitration Agreement is to be preferred simply because it is (a) a commercially sensible interpretation and (b) one that does not render the Arbitration Agreement invalid or incapable of being performed.

80 Finally, the plaintiff also relies on paras 8.29–8.33 of *A Guide to the SIAC Rules* for the proposition that r 10.2 is not a "stopgap mechanism" which allows the President to appoint the arbitrator in all cases. Instead, it is just to facilitate the expedited formation of the tribunal so that neither party can delay the constitution of the tribunal.[80]

81 Paragraphs 8.29–8.33 of *A Guide to the SIAC Rules* states as follows:

> **2. Rule 10.2**
>
> **…**
>
> **a. Default procedure for the nomination and appointment of a sole arbitrator**
>
> **8.29** Parties have a limited time within which they can seek to reach an agreement on a sole arbitrator. This ensures that

[80] Zhao's affidavit at p 289.

> one or more parties cannot derail the arbitration simply by refusing to cooperate in the constitution of the tribunal.
>
> **8.30** Rule 10.2 provides that in the event the parties fail to reach an agreement on a sole arbitrator within 21 days after the date of the commencement of the arbitration (ie the receipt by the Registrar of the complete Notice of Arbitration (39)), or at any time if a party so requests, (40) the SIAC President 'shall appoint the sole arbitrator'. (41) The Registrar may decide (42) or the parties may agree to extend or reduce the 21-day time limit referenced in Rule 10.2 for the parties to reach an agreement on a sole arbitrator.
>
> **8.31** When required to act under Rule 10.2, the SIAC President generally chooses a candidate from the SIAC Panel of Arbitrators (which, as already noted, is not a constraint on the parties when making their nominations). … The SIAC President may appoint an arbitrator who is not on the SIAC Panel of Arbitrators but who appears on SIAC's so-called 'reserve list', which is often used for relatively low-value disputes. (45)
>
> **8.32** The SIAC President must take into account any criteria for the appointment of arbitrators agreed by the parties in their contract or set by relevant legislation. (46) The SIAC Practice Note for Administered Cases further provides that 'in all cases, the objective is to appoint an arbitrator with the attributes of integrity and competence, who is independent and impartial, and who will be perceived as such by the parties'. (47)
>
> **8.33** For cases with a large amount in dispute, involving State parties or involving complicated questions of law, the SIAC President may choose an arbitrator in consultation with two or more members of the SIAC Court and with the assistance of the SIAC Secretariat. …

82 From this extract, the plaintiff highlights footnote 41 which states "… Rule 10.2 refers to the 'appointment' of an arbitrator by the SIAC President. The SIAC President appoints all arbitrators pursuant to Rule 9.3. Thus, the reference to 'appointment' in Rule 10.2 refers to both the selection of an arbitrator candidate on a party's behalf and his or her appointment by the SIAC President".[81] The plaintiff argues that the comment in this footnote shows that there should be no split in appointment and nomination functions, unless parties

---

81 Zhao's affidavit at pp 290 and 292.

expressly and unequivocally provided that there is to be such a split.[82] The plaintiff argues that this is one such case.

83 In my view, the plaintiff's reliance on *A Guide to the SIAC Rules* is entirely misplaced. The footnote quoted above goes nowhere near supporting the plaintiff's argument. It merely states that where r 10.2 applies, the President selects and appoints the arbitrator, which in and of itself is an uncontroversial comment and a correct interpretation of r 10.2 – but that is as far as the footnote goes. In fact, the footnote acknowledges that under r 9.3 of the SIAC Rules 2016, the President appoints *all* arbitrators. Logically, this power operates even where parties have nominated an arbitrator or requested a third person to do so. In any case, the footnote comment does not detract from r 10.2 of the SIAC Rules 2016 being a fallback where there is no nomination of the sole arbitrator by the parties or a third person.

84 Under r 10.2 of the SIAC Rules 2016, where more than 21 days have passed after the date of commencement of the arbitration, and either (a) "the parties have not reached agreement on the nomination of a sole arbitrator" or (b) "if at any time either party so requests", the President shall appoint the sole arbitrator. In the present case, after 21 days from the commencement of Arbitration, the plaintiff did not reply to the defendant's proposed nomination of a sole arbitrator. Thus, parties were clearly unable to reach agreement on the nomination of a sole arbitrator. The Chairman was, as explained by the SIAC (see [17] above), also unable to nominate the sole arbitrator due to a conflict. Additionally, as stated above at [22], the defendant wrote to the SIAC on *three occasions* requesting the President to appoint a sole arbitrator because 21 days

---

82 PWS at paras 33 to 34.

had passed and parties had not agreed on the nomination of an arbitrator.[83] In these circumstances, r 10.2 was in my view triggered. Accordingly, the SIAC did not err in requesting the President to appoint the Arbitrator and thus, when the President appointed the Arbitrator, it was in accordance with the parties' agreement in the Arbitration Agreement.

85 Given that I have found that the Arbitrator has jurisdiction over the Arbitration, I do not see any merit to the plaintiff's contention that any resulting award in the Arbitration may face challenges in enforcement overseas – it does not provide a legitimate reason for the court to rule that the Arbitrator does not have jurisdiction. In any event, it is not the place of this court to second-guess the potential success or failure of any challenges that may be mounted against enforcement of any resulting award from the Arbitration. That a foreign enforcement court may come to a different view and decline enforcement is a feature and potential risk inherent within the very architecture of the Model Law and the New York Convention – parties are taken to have accepted that potential risk when they agree to arbitration as their choice of dispute resolution.

---

83 Zhao's affidavit at pp 32 to 33 (paras 82 to 84).

Conclusion

86 For the foregoing reasons, I rule that the Arbitrator's appointment was valid and that he had jurisdiction over the Arbitration. Accordingly, I dismiss OS 920.

87 I shall hear the parties separately on costs.

S Mohan
Judge of the High Court

Lee Wei Yuen Arvin, Lyssetta Teo Li Lin, Tay Ting Xun Leon and Wan Hui Ting, Monique (Wee Swee Teow LLP) for the plaintiff; Leong Lu Yuan and Ang Xin Yi, Penelope (Clasis LLC) for the defendant.