
Singapore High Court alters the Arbitration Agreement

S Ravi Shankar¹

In normal circumstances courts, do not alter any contract because parties have the supremacy to decide the provisions of a contract, however fair or unfair it may be. But many a times interpretation of arbitration clauses have been a challenge to the courts. In a recent judgement, *BNP and another Vs BNR (2017) SGHC 269* dated 31st October 2017, Singapore High Court substituted the word “Umpire” mentioned in an Arbitration Agreement, to the word “President”, to interpret the said clause in line with the intention of the parties to arbitrate under ICC Rules with a seat in Singapore. While doing so the court reasoned as follows “The Court will give effect to the meaning of the party’s agreement reasonably discovered from the written agreement itself and background, even though it involves departing from or qualifying words used, especially if the words in the written agreement would lead to inconsistency with the rest of the instrument. See: Chitty on Contracts at (13-074). The court also cited *Miramaz Corp Vs Holborn Oil Trading Ltd (1984) AC 676* in which a similar interpretation was given by the court. That means, the Court can substitute certain words of the contract, if there is an inconsistency between that word and the rest of the contract (intention of the parties).

Facts of the case: The clause in the shareholder’s agreement provided for a three-member Arbitration Tribunal for resolving disputes and stated that the arbitration shall happen under ICC Arbitration Rules. The clause further provided for an appointment procedure for appointment of arbitrators. As per the said clause, either parties shall jointly appoint a sole arbitrator or both the parties shall appoint one arbitrator each. The umpire shall be appointed by the two arbitrators appointed by the parties and in case of failure, umpire shall be appointed as per the rules. But the applicable institution rules are ICC rules, which does not provide for an umpire and it provides only for the President.

The contention of the petitioner was that the arbitration clause provides for a three-member tribunal with an umpire and administered under ICC rules. But it is not enforceable since ICC Rules does not provide for umpire and provides only for the President. It further argued that ‘umpire’ and ‘the president’ does not denote same type of position with similar powers. As per English Arbitration Act 1996(UK), the role of an umpire is a passive one. The umpire can be present in an arbitration, but he does not decide anything till the other two arbitrators differ on some issue. But the president as per ICC rules takes an active role from the beginning. Hence the arbitration clause is not enforceable.

Conclusion of the Court: English Arbitration Act, 1996 and Hong Kong Arbitration ordinance there is a provision which explains the role of an umpire. But there is no such

¹ The author is an International arbitration lawyer and a Senior Partner of Law Senate Arbitration law firm , India

provision in the Singapore International Arbitration Act (IAA) which is applicable in the present case. Moreover, an interpretation of a clause of a Contract should lead to the actual intention of the parties. Hence, Court decided to permit to substitute the word “Umpire” which in this shareholder’s agreement, for the word “President”

