Dechert LLP

The application of new rules to old arbitration agreements: fair or foul?

Legal update from Dechert's International Arbitration practice

July 2015

Summary

A number of international arbitral institutions have adopted innovative procedures in recent times. These include the ability to appoint an emergency arbitrator, the fast-tracking of certain arbitrations through the use of expedited procedures, the consolidation of related cases into a single arbitration, and increased oversight and scrutiny of arbitrators.

The vast majority of arbitration users have responded positively to these developments. So has the Singapore High Court, which has confirmed that the new rules adopted by the Singapore International Arbitration Centre (SIAC), and those of other bodies, are valid and enforceable. Significantly for the purposes of this briefing, the Singapore High Court has also recently confirmed that procedural innovations in the rules of arbitration can be applied to contracts which came into existence before the innovations were introduced. (In doing so, the Singapore High Court relied upon a leading guide to Singapore arbitration co-authored by Dechert's Mark Mangan.)

Not all users of international arbitration, however, have welcomed the evolution taking place in institutional rules of arbitration. Some are wary of allowing their contracts to be subject to uncertain future rule changes, the efficacy of which may not be fully tested by the time an arbitration commences, or which may be more advantageous for their opponent. As explained below, if that is the case, the new rules, or specific innovations therein, can be avoided through the careful drafting of an arbitration agreement.

In this briefing we provide:

(a) an update on the recent procedures adopted by major arbitral institutions;

(b) statistics on the popularity of these measures;

(c) an analysis of a recent Singapore High Court decision in which the application of procedural innovations to a contract which was agreed before the innovations came into force was approved; and

(d) tips on how to avoid the application of new rules of arbitration to an old arbitration agreement.

Procedural innovations – all change at the top

After years of relative stability in the rules of many international arbitral institutions, the leading institutions are in something of an arms race when it comes to their rules. Thus:

- the Hong Kong International Arbitration Centre (HKIAC) updated its rules in 2008 and 2013;
- SIAC modified its rules in 2010 and 2013;
- the Korean Commercial Arbitration Board (KCAB) adopted revised rules in 2011;
- the International Court of Arbitration of the International Chamber of Commerce Court (ICC) did likewise in 2012; and
- the London Court of International Arbitration (LCIA) modified its rules in 2014.

The procedural innovations recently introduced by these institutions include:

- a right to have an arbitration expedited in certain circumstances (adopted by SIAC and HKIAC);
- the ability to have an emergency arbitrator appointed to provide interim relief before the full tribunal has been constituted (SIAC, LCIA, ICC, HKIAC);
- a mechanism for the consolidation of related cases (ICC and HKIAC);
- the introduction of a court or council structure to supervise the administration of arbitrations (long a hallmark of the ICC, and now adopted by SIAC and HKIAC);
- confirmation that claims arising under multiple related contracts between the same parties can be pursued in a single arbitration (HKIAC, ICC);
- the scrutiny of awards (traditionally done by the ICC, and now also performed by SIAC); and
- increased transparency of the arbitral process through the publication of awards and certain administrative decisions (ICC, LCIA, and SIAC).

Many of these institutions are contemplating further revisions to their rules over the coming years.

Users voting with their feet (and their applications)

The response of the arbitral community to these developments has been generally positive.

The first number in the table below shows the number of applications received by several leading arbitral institutions for expedited procedures, emergency arbitrators and the consolidation of related cases. The second number indicates the number of such applications which were approved, if that information is publically available.

Table 1: Applications received/granted by arbitral institutions

Institution	Expedited procedures applications/granted	Emergency arbitrator applications/granted	Consolidation applications/granted
SIAC	159/107 (since July 2010)	42 applications (since July 2010)	Not offered
ICC	Not offered	17 applications (since January 2012)	Not publically available
HKIAC	9/4 (since Nov 2013)	2/1 (since Nov 2013)	4/3 (since Nov 2013)
LCIA	158/71 (since Jan 1998)	Zero applications (since Oct 2014)	Not offered

Misgivings with the innovations

While the introduction of the aforementioned innovations into arbitral rules has been applauded by most users of arbitration, this appreciation has not been universal. As a recent case considered below demonstrates, there is some uncertainty as to how (or at least when) the innovations will be applied in practice. Further, a party which expects that it is more likely than not to be a respondent in a future dispute may not want its opponent to have the option of obtaining interim relief from an emergency arbitrator. It may prefer to compel the likely claimant to face the often more daunting prospect of obtaining interim relief from a municipal court. Similarly, a party may not want the consolidation of related arbitrations, preferring instead to take its chances with multiple tribunals (and thus the prospect of potentially conflicting awards). Equally, claimants and respondents may bristle at the thought of an arbitration award rendered by a tribunal today being published in a journal tomorrow (albeit in redacted form) notwithstanding their choice of arbitration having been motivated in part by a desire to avoid the publicity which often accompanies court proceedings. And given the importance of a particular contract or dispute, a party may not want expedited proceedings before a single arbitrator in any circumstances. As explained below, the new innovations can be avoided in certain circumstances.

The retrospective application of new arbitral rules to old contracts

It is generally presumed that the rules in force at the time an arbitration commences (including any modifications to the rules since an arbitration agreement was negotiated) will be applied to an arbitration. This presumption can be displaced in two ways. First, parties can expressly stipulate in an arbitration agreement (or later) that a specific iteration of the arbitral rules, or those in force as of a certain date, should be applied to any future arbitration. This effectively 'stabilizes' the arbitration agreement as it concerns the applicable rules of arbitration (but not the applicable law). SIAC, for instance, continues to receive and administer new arbitrations which are expressly subject to the SIAC Rules in force in 2007 or 2010. Likewise, the HKIAC has confirmed that it will administer a new arbitration in accordance with an earlier version of the HKIAC Rules than that which is currently in force if that is agreed by the parties.

Second, the Singapore Court of Appeal has recognized that a change in procedural rules after an arbitration agreement has been formed should not be applied if it affects a party's substantive rights *(Black & Vetach Singapore Pte Ltd v Jurong Engineering Ltd* [2004] 4 SLR 19 at paragraphs 15, 19–20). Similar rulings have been made by courts in the United States and Australia.

Arbitral institutions also appear wary of subjecting users to certain procedural rules which may have a substantive impact on their rights if adopted after an arbitration agreement has been formed. Thus, the LCIA and ICC Rules provide that the new emergency arbitrator provisions adopted by those institutions do not apply to contracts agreed before the new rules were adopted. Similarly, the HKIAC has stipulated that its new provisions regarding emergency arbitrators, the consolidation of related arbitrations, and the ability to combine claims arising under multiple related contracts into a single arbitration, shall not apply to contracts agreed before the new rules took effect (i.e., 1 November 2013), unless otherwise agreed by the parties.

SIAC, on the other hand, does not expressly exempt contracts which were agreed before the rules relating to emergency arbitrators and expedited proceedings were adopted by SIAC

(i.e., 1 July 2010) from the application of those provisions. Whether they could be applied to such antecedent contracts was considered by the Singapore High Court in the case of *AQZ v. ARA* [2015] SGHC 49.

The application of the SIAC expedited procedure to an antecedent contract upheld

The parties in *AQZ v. ARA* had agreed a contract in December 2009 which provided for the determination of disputes by a panel of three arbitrators under the SIAC Rules. An arbitration was commenced in March 2013 pursuant to the 4th edition of the SIAC Rules, which came into force on 1 July 2010, and which for the first time allowed a party to apply for certain proceedings to be expedited. Specifically, Rule 5 provides that a party may apply to have an arbitration expedited: (a) if the aggregate amount in dispute does not exceed S$5 million; (b) if mutually agreed by all parties; or (c) in case of exceptional urgency. Importantly, the 4th and 5th editions of the SIAC Rules further provide that if such an application is accepted by the SIAC President, the case shall be referred to a sole arbitrator unless the SIAC President determines otherwise.

The SIAC President approved the claimant's application for expedition and appointed a sole arbitrator to determine the case, notwithstanding the respondent's objections. Two years later, the key issue under consideration by the Singapore High Court was whether the SIAC President was right to do so given that the parties had expressly agreed to three arbitrators in late 2009, some six months before the new rules on expedition were introduced by SIAC.

Justice Judith Prakash of the Singapore High Court took a "commercially sensible approach" to interpret the parties' arbitration agreement. In doing so, Her Honour relied upon *A Guide to the SIAC Arbitration Rules* (2014, Oxford University Press), co-authored by Dechert's Mark Mangan. It is noted at paragraph 7.10 of that treatise that while the SIAC Rules do not expressly exclude the application of the new expedited procedures to antecedent contracts (unlike some other rules, as noted above), the date of the parties' contract is something the SIAC President will consider when determining whether to appoint a sole arbitrator to an expedited case. Justice Prakash noted that there was no evidence that the SIAC President did not do in this instance what the authors of *A Guide to the SIAC Arbitration Rules* suggested should be done. It was further noted that the respondent had not expressly relied in its submissions to the SIAC President on the fact that the contract had been agreed before the new rules on expedition had come into force.

It would also appear that the respondent in the arbitration did not make submissions to the High Court on whether the SIAC President's decision to appoint a sole arbitrator rather than a panel of three arbitrators, as had been agreed by the parties, constituted a retrospective amendment to a substantive right, and therefore arguably something that could not be done without the consent of all parties. It thus remains an open question under Singapore law whether an arbitral institution can override an express agreement by the parties on the number of arbitrators on the basis of an institutional rule introduced after the arbitration agreement had been negotiated and agreed by the parties.

Drafting tips

As noted above, most users of arbitration have warmly welcomed the new rules of procedure being promulgated by leading arbitral institutions. If a party wishes to avoid being subject to the new rules, or any particular innovations incorporated therein, however, it can do so in a variety of ways.

First, parties can stipulate in the arbitration agreement that a specific version of the arbitral rules, or those in force as of a certain date, are to be applied to any future arbitrations.

Second, parties can seek to opt out of certain procedures contained in an arbitral institution's rules. An express agreement by the parties not to apply to their contract arbitration rules relating to such things as the consolidation of related arbitrations, expedited procedures, or access to an emergency arbitrator will be respected by those within the arbitral institutions tasked with exercising a discretion as to whether an application by a party for such things should be granted.

Third, parties can choose a set of institutional rules that do not contain a particular procedural mechanism that causes concern. The SIAC Rules do not (at present) allow for the consolidation of related arbitrations; the ICC and LCIA Rules do not have provisions for the expedited conduct of an arbitration; and the HKIAC does not publish awards even in redacted form. Parties should choose the rules of arbitration most appropriate for the types of disputes which might arise and which reflect their preferences for how an arbitration should be conducted.

Fourth, parties can forgo institutional arbitration altogether by crafting an ad hoc arbitration agreement tailored to their specific needs (which, while providing flexibility, does have its pitfalls) or adopt the UNCITRAL Arbitration Rules, which has less bells and whistles than its institutional counterparts.

Summary of the action to be taken by counsel when negotiating arbitration clauses:

- decide whether you want the rules of arbitration applicable to a possible future arbitration to be stabilized or subject to change
- decide which rules of arbitration are most appropriate for the types of dispute that are likely to arise under a contract
- decide whether there are particular features of the chosen rules that you would wish to avoid through the exercise of any opt out rights

Summary of the action to be taken by counsel engaged in arbitrations:

- consider whether there are arbitration rules being applied to a dispute which were adopted after the relevant contract was agreed and which could potentially be argued retrospectively modify the parties' substantive rights in a manner which is impermissible

This update was authored by Dechert partner Mark Mangan.

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