

Institutional Overreach? Institutional Arbitral Rules versus Parties' Express Agreement

Kluwer Arbitration Blog

January 17, 2013

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Please refer to this post as: Kah Cheong Lye, 'Institutional Overreach? Institutional Arbitral Rules versus Parties' Express Agreement', Kluwer Arbitration Blog, January 17 2013, <http://arbitrationblog.kluwerarbitration.com/2013/01/17/institutional-overreach-institutional-arbitral-rules-versus-parties-express-agreement/>

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Like computer programs, the length of time between updates for institutional rules seems to get shorter and shorter. New editions of institutional arbitral rules were introduced by the SIAC in 2010, the ICC in 2012, and the HKIAC's revised Administered Arbitration Rules (**Draft HKIAC Rules**) are expected in the first quarter of 2013. A general theme in recent revisions is the desire of institutions to "brand" their arbitrations, and to move away from institutions being a mere postbox and appointing authority. Institutions now want the power to shape the arbitral process.

An expression of this theme is the inclusion of provisions which empower arbitral institutions to override parties' agreement on composition of the tribunal, even where such agreement is expressly set out in the arbitration clause. Let us call these the **Overriding Provisions**.

Have arbitral institutions overreached themselves? Do Overriding Provisions contravene party autonomy?

A party's right to nominate an arbitrator – Draft HKIAC Rules: Once the Draft HKIAC Rules apply, the HKIAC has the power to order the joinder of an additional party into an arbitration, and also to order a consolidation of two or more arbitrations. It appears this can happen even if one or more parties object.

Where an additional party is joined to an existing arbitration, Article 8.3 of the Draft HKIAC Rules states that

"all parties to the arbitration shall be deemed to have waived their right to designate an arbitrator, and the HKIAC may revoke the appointment of any arbitrators already designated or confirmed".

In those circumstances, the HKIAC shall appoint the arbitral tribunal. Similarly, where there is consolidation of two or more arbitrations, Article 8.4 of the Draft HKIAC Rules states that parties will be deemed to have waived their right to make appointments and the HKIAC may revoke existing appointments.

So it seems that even when an arbitration clause expressly allows each party the right to nominate an

arbitrator, this right may be disregarded in the event there is a consolidation of arbitrations, or joinder of an additional party. Even further, where an arbitrator has already been appointed pursuant to a party's nomination, consolidation may have the effect of revoking the appointment. This revocation takes place in spite of the parties' express right to nominate their own arbitrators and the fact that these arbitrator(s) had already been appointed.

2012 ICC Rules: A more conservative approach is seen in Article 10 of the 2012 ICC Rules, which also allows for the consolidation of arbitrations. Unlike the Draft HKIAC Rules, there is no express provision in the ICC Rules which waives parties' right to nominate an arbitrator or which explicitly empowers the ICC Court of Arbitration (**the ICC Court**) to revoke existing arbitrator appointments. Indeed, there does not appear to be a specific provision detailing how the arbitrator(s) are to be appointed in the event there is consolidation. Article 10 of the ICC Rules does state that,

“When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties”.

It is possible that separate arbitrations (which are consolidated), which each arise out of an agreement with its own distinct mechanism for the appointment of the arbitrator(s), and which are different from the appointment mechanism in the arbitration that had commenced first in time or any applicable mechanism set out in the ICC Rules. The consolidation of these separate arbitrations will therefore deny effect to parties' agreed mechanisms for the appointment of arbitrator(s).

Having said that, it appears that the ICC Court will adopt a cautious approach in determining whether to consolidate arbitrations. For example, Article 10(c) of the ICC Rules states that, where the arbitrations are made under more than a single arbitration agreement, one condition for consolidation is that the arbitration agreements must be “*compatible*”. While not defined, it is stated in the ICC Secretariat's Guide to ICC Arbitration (2012) that the clauses must be “*substantively compatible*”, e.g. the different arbitration agreements must not provide for a different number of arbitrators. Similar provisions on the “compatibility” of arbitration clauses are also found in the Draft HKIAC Rules, but (as noted above) that set of rules expressly states that parties have waived their right to appoint arbitrators and also empowers the HKIAC to revoke existing arbitrator appointments. In addition, it is also noted in the Secretariat's Guide that the ICC Court will not be able to consolidate arbitrations if arbitrators had been confirmed in more than one of the arbitrations.

Number of Arbitrators – SIAC Rules: Overriding Provisions are also present in the 2010 SIAC Rules. The 2010 SIAC Rules state that any case under the Expedited Procedure

“shall be referred to a sole arbitrator, unless the Chairman [of the SIAC] determines otherwise>” (Rule 5.2(b)).

We are aware of a case where the SIAC had appointed a sole arbitrator for an arbitration conducted pursuant to the SIAC Expedited Procedure (which was successfully invoked in that case), notwithstanding the parties' express agreement on a three-member tribunal in their arbitration agreement.

The SIAC's approach in that case contrasts with the Singapore High Court's decision in *NCC International AB v Land Transport Authority of Singapore* [2008] SGHC 186 (NCC). NCC also concerned the number of arbitrators to be appointed for an arbitration. In the arbitration clause, the parties expressly agreed for any dispute to be referred to “*an Arbitrator*”. However, the plaintiff wanted three

arbitrators to hear the case. The plaintiff relied on Rule 5.1 of the 2007 SIAC Rules, which provided the Registrar of the SIAC with discretion to order for three arbitrators if that was warranted by the circumstances of the particular case. One argument raised by the plaintiff was that the Registrar had the discretion to order for a tribunal of three arbitrators, even if the parties had expressly agreed on the number of arbitrators in their arbitration clause. In rejecting this argument, Justice Tay held that, where parties have expressly agreed on the number of arbitrators and also adopted a set of institutional rules, the better interpretation ought to be that parties have adopted the institutional rules subject to the number of arbitrators expressly agreed between the parties (unless parties have expressly assented to the institutional rules taking precedence).

Where lies Party Autonomy? – It is a basic question. Where the Overriding Provisions are used to defeat what parties have expressly said in the arbitration clause, where lies party autonomy? Do we say what the parties have chosen is what they have expressly provided in the arbitration clause, or do we say what the parties have chosen is to follow the institutional rules designated in the arbitration clause?

It is a question of some practical importance. There are potentially two serious consequences.

First, the use of such Overriding Provisions may lead to the setting aside of an eventual award, on the ground that

“the composition of the arbitral tribunal or arbitral procedure was not in accordance with the agreement of the parties” (Article 34(2)(a)(iv) of the 2006 UNCITRAL Model Law).

Recognition and enforcement of the award may also be refused on similar grounds (Article 36(1)(a)(iv) of the 2006 UNCITRAL Model Law, and Article V(1)(d) of the New York Convention).

Second, it raises the question whether overriding what the parties’ have expressly agreed concerning composition of the tribunal could, in certain circumstances, result in there no longer being an agreement to arbitrate. In other words, it may be that the parties’ express agreement concerning tribunal composition is so integral to their agreement to arbitrate, such that the agreement to arbitrate would not subsist at all if that express choice were replaced by alternatives set out in the institutional rules, i.e. the agreement to arbitrate is premised on what the parties’ have expressly agreed concerning composition of the tribunal being given effect. Such a concern is reflected in the English Court of Appeal’s holding in the *Jivraj* case (*Jivraj v Hashwani* [2010] EWCA Civ 712), albeit in a different context. There, the parties had expressly agreed to arbitrate before an arbitrator of the Ismaili faith. The English Court of Appeal held that the requirement for an Ismaili arbitrator was unlawful, and that this requirement could not be severed from the rest of the arbitration clause, as this would render the remaining clause substantially different from that which the parties originally intended. The arbitration clause had to stand or fall as a whole. As the Ismaili requirement was void, the remainder of the clause could not be upheld.

There are provisions in the Draft HKIAC Rules which attempt to address these validity and enforceability issues with awards where such Overriding Provisions have been used to override what the parties’ have expressly agreed concerning composition of the tribunal. For example, Article 27.6 of the Draft HKIAC Rules states that the parties

“waive any objection, on the basis of HKIAC’s decision to consolidate, to the validity and/or enforcement of any award made by the arbitral tribunal in the consolidated proceedings”.

This provision may not prevent a successful challenge to the eventual award – first, different jurisdictions adopt varying positions on the ability of parties to contract out of a challenge to an award; second, the provision may be read narrowly to only preclude challenges based on the decision to consolidate the existing arbitrations, and not on the grounds set out above.

The counter argument is that such “overriding” of parties’ express agreement pursuant to the Overriding Provisions does not run counter to the principle of party autonomy: The parties have agreed to the institutional arbitral rules, so they have agreed to these Overriding Provisions. The parties have therefore consented to what the parties’ have expressly agreed concerning composition of the tribunal to be overridden by the relevant institutional arbitral rule. In effect, the parties have agreed that their express agreement is subject to institutional discretion. There is therefore no derogation from the principle of party autonomy.

We have reservations with such an argument. In the first place, parties (and even counsel) often do not consider in detail the interplay between the institutional rules and the parties’ express agreement as set out in the arbitration clause. This is not surprising, given that (i) parties often focus less on the dispute resolution clause in their agreements; and (ii) there are many potential areas of interplay between the express agreement and institutional rules that the issues are often only recognized when they arise. Furthermore, one can sensibly suppose that commercial parties generally expect their express agreement in the arbitration clause to govern and to trump the institutional rules.

It seems to us that the best way forward is to adopt a tailored and case-specific approach. Depending on a multitude of factors (the importance of the clause to the parties, the institutional rule in question, whether parties had knowledge of the institutional rule at the time of executing the agreement etc.), it may be that institutional rules could be construed as “trumping” parties’ express agreement in certain cases but not others. There should not be a single rule which applies to all potential conflicts between Overriding Provisions and parties’ express agreement, whereby the Overriding Provisions or the parties’ express agreement will always prevail. A concern with the case-specific approach is that it could potentially lead to considerable uncertainty.

In carrying out the above analysis, one should certainly place significant weight on the fact that the parties have expressly agreed on a particular issue in the arbitration clause. This case-specific approach makes sense doctrinally, as the reconciliation of the parties’ express agreement and the institutional rules is ultimately a matter of contractual interpretation, which will (in the legal systems we are aware of) depend on the factual matrix of each individual case.