Kluwer Arbitration Blog

Are All Institutional Rules Now Basically The Same?

Jonathan Lim (Wilmer Cutler Pickering Hale and Dorr LLP) · Friday, April 10th, 2015 · YSIAC

Most institutional rules share a common procedural framework for arbitral proceedings—the origins of which are traceable to the first set of ICC Rules in 1922. This skeletal framework broadly describes the lifecycle of the arbitration, and provides for the order of pleadings, constitution of a tribunal, conduct of proceedings, and making of the award, in a manner that accords parties and arbitrators substantial leeway to tailor the process to their needs.

Certain other features are by now common to virtually all modern institutional rules, whether they are promulgated in Cairo, Vienna or Singapore. Convergence here, as in the field of international arbitration more generally, has seemed inevitable. Most if not all rules contain provisions that guarantee a basic level of fairness to parties or the process; and also provisions that reduce the risk of technical defects that can frustrate proceedings, such as rules on competence-competence or corrections to awards.

That is not to say that all institutional rules are the same. Arbitral institutions are ultimately competitors, both as quasi-regulators and as service providers, and this has driven innovation amongst institutions that have encouraged appreciable differences between rules.

This post maps out, based on a sample of four leading arbitral institutions—the ICC, ICDR, LCIA, and SIAC—some key practical differences between institutional rules, in terms of speed, cost, and professional oversight.

Need for Speed

Speed and efficiency have traditionally been regarded as advantages enjoyed by arbitration over national court proceedings. In recent years, however, arbitral proceedings have attracted criticism for more-significant-than-expected expense and delay.

Some of this criticism may not always be justified—but institutions have nevertheless responded with a range of new offerings to address this perception. These include provisions ranging from full expedition of the arbitral process to emergency arbitrator provisions.

Among the institutional rules surveyed, only the ICDR and SIAC Rules contain expedited procedures. The ICDR's International Expedited Procedures were recently introduced in 2014. They apply either where "no disclosed claim or counterclaim exceeds US$250,000", or where parties agree to their application (ICDR Rules, Art. 1.4). There is a presumption that cases up to US$100,000 will be decided on documents only, without the need for an oral hearing. Where they

apply, the parties get by default, unless agreed otherwise: the expedited appointment of a sole arbitrator within 10 days of ICDR's transmission of a list of arbitrators, an expedited timetable for pleadings and/or a hearing within 60 days of the arbitrator's procedural order, and an award within 30 calendar days of the close of hearings/submissions (International Expedited Procedures, Art. E-6-10). This high-speed, truncated process seems appropriate for small and relatively straightforward cases.

The SIAC Expedited Procedure has a potentially wider scope of application. Under the SIAC Rules, at any time before the constitution of the tribunal, any party may apply to the Registrar in writing for the arbitral proceedings to be conducted in accordance with the Expedited Procedure. This is available so long as any one of three criteria is satisfied—that is, where: (a) the aggregate amount in dispute[1] does not exceed SGD$5,000,000; (b) the parties agree; or (c) in cases of "exceptional urgency" (Rule 5.1).

Compared to the ICDR procedure, the SIAC Expedited Procedure provides a greater role for the arbitral institution and tribunal, thus allowing for a more flexible process. The determination as to whether the procedure applies is left to the discretion of the President of the SIAC Court (Rule 5.2). A sole arbitrator is appointed by default, although the President may choose to appoint otherwise. The SIAC Rules do not specify timelines for each stage of the expedited process, besides stipulating that an award needs to be rendered within 6 months of the tribunal's constitution, and that the Registrar may shorten any time limits under the SIAC Rules. All this leaves the control of arbitral proceedings largely in the hands of the arbitral tribunal, supported by the SIAC as necessary.

The SIAC Expedited Procedure has been around since July 2010, and has been relatively popular with parties. From July 2010 to December 2014, the SIAC received a total of 159 applications, of which 107 requests for the Expedited Procedure were granted. In 2014 alone, the SIAC received 44, and granted 23, applications (Annual Report).

The ICC and LCIA Rules contain no such fast-track procedures. The ICC rules do, however, incorporate procedures that are designed to enhance efficiency, such as its trademark Terms of Reference procedure, and provisions requiring parties and the arbitral tribunal to "make every effort to conduct the arbitration in an expeditious and cost-effective manner" (Arts 22.1, 23). The LCIA Rules include provisions allowing for the expedited formation of the arbitral tribunal in a case of "exceptional urgency," and the expedited appointment of a replacement arbitrator (Arts. 9A, 9C).

Emergency arbitrator provisions allowing parties to obtain interim relief before the constitution of a tribunal are available under all the institutional rules surveyed.

Among the institutions surveyed, the ICDR was the first to introduce the emergency arbitrator provisions (2006), followed by the SIAC (2010), the ICC (2012) and then the LCIA (2014). The ICDR and SIAC have had the most experience. Indeed, as of December 2014, the SIAC has seen 42 applications, with emergency arbitrators appointed in all 42 cases, and interim relief granted in whole or in part in 24 cases (Annual Report).

There are only nuanced differences between the emergency arbitrator provisions, which are otherwise similar. Only the SIAC and ICDR Rules fix a timeframe for appointing of the emergency arbitrator, with the ICDR committing that it "shall appoint" an emergency arbitrator "[w]ithin one

business day" (Art. 6.2), and the SIAC Rules providing that the President "shall… seek to appoint" an emergency arbitrator "within one business day" (Schedule 1, para. 2). The LCIA Rules merely state that the LCIA Court "shall determine the application as soon as possible" (Art. 9B), and the ICC Rules provide for an emergency arbitrator to be appointed "within as short a time as possible, normally within two days" (Appendix V, Art. 2).

As for the emergency arbitrator's decision, the ICDR, LCIA and SIAC Rules provide that this may be either take the form of an "order" or "award," while the ICC Rules provide that the emergency arbitrator's decision may only take the form of an "order."

Counting the Cost

The choice of an arbitral institution has obvious implications on the costs of the arbitration. In addition to the arbitrators' fees, the costs of an institutional arbitration include the institutions' administrative fees, filing fees and the costs of any expert or other assistance the tribunal may require.

Institutional rules incorporate different cost structures, and use one or a combination of two methods for calculating and fixing costs: a defined hourly rate; or a rate calculated by reference to the amount in dispute (*ad valorem*). Costs vary depending on the institution, the size and complexity of the dispute, and whether or not the dispute goes to a hearing.

Under the ICC Rules, the ICC International Court of Arbitration (the "ICC Court") fixes both the arbitrators' and the institution's fees on an *ad valorem* basis according to a fee scale, or alternatively at the ICC Court's discretion where the amount is not stated (Art. 37.1, Appendix III, Arts. 2.1, 2.5, 4). The ICC Court has the discretion to depart from the fee scale, but only where it is "deemed necessary due to the exceptional circumstances of the case" (Art. 37.2). Under the ICC Rules, decision-making on the arbitrators' fees lies exclusively with the ICC Court (Art. 37.3); there is no provision for party agreement to override the ICC Court's determination on costs.

The SIAC Rules likewise adopt an *ad valorem* remuneration scheme for the arbitrators' and the institution's fees. As a recent survey on Global Arbitration Review demonstrates, the SIAC costs on the *ad valorem* scale are lower than the ICC's for any and all amounts in dispute. Also, unlike the ICC Rules, the arbitrators' fees are calculated *ad valorem* only by default under the SIAC Rules. There is flexibility for parties to opt out by agreeing to "[a]lternative methods of determining the tribunal's fees" prior to the constitution of the tribunal (Rule 30.1).

Among the institutional rules surveyed, the LCIA Rules uniquely provide for both the arbitrators' and the institution's fees (with the exception of the one-time registration fee) to be determined based on hourly rates, which are capped in the Rules' Schedule of Arbitration Costs (Art. 28.1). Arbitrators are to agree in writing on their hourly rate before they are appointed by the LCIA Court. The LCIA Rules also provide for a refund of the deposit paid by the parties if the actual arbitration costs are less than the amount of deposit provided (Art. 28.7).

Like the LCIA Rules, the ICDR Rules provide for arbitrators to be compensated on a daily or hourly rate (Art. 35.2). Unlike the LCIA Rules, however, the ICDR Rules do not provide a cap for the hourly rate. Also, the determination of the rate under the ICDR Rules is made after the constitution of the tribunal (Art. 35.2), rather than at the pre-appointment stage under the LCIA Rules. As for the administrative fees, the ICDR adopts an *ad valorem* system in accordance with its Administrative Fee Schedules, and has two options for claimants and counterclaimants: a standard

fee schedule with a two-payment schedule, and a flexible fee schedule, which has a three-payment schedule that offers lower (but non-refundable) initial filing fees but with potentially higher total administrative costs if the case proceeds to hearing.

The *ad valorem* system adopted by the SIAC and ICC has the advantage of transparency and certainty for the end-user; there is upfront clarity about what the fees would look like for any given arbitration.[2]

One potential downside, however, is that the amount in dispute does not necessarily correlate with the complexity of the dispute, and so the arbitrator and/or institution may be under-compensated in a low-value but complex dispute, or over-compensated in a simple but high-value dispute. Institutions such as the SIAC and ICC address this by assessing the actual costs of the arbitration at the end of a case, based on factors such as complexity, number of hearings, the arbitrators' efficiency and so on (Rule 32.1, 2014 Practice Note, at para. 15). According to the SIAC, actual costs tend to fall within 75-80% of the initial estimated fee cap based on the sum in dispute, and any excess deposits after this assessment are refunded to parties.

In contrast to the *ad valorem* system, a fixed hourly rate for the arbitrators' fees, as set by the LCIA or ICDR, may be fairer in compensating arbitrators in relation to the complexity and scale of a case; it may also ultimately be cheaper for parties than *ad valorem* fees in a big case. However, the downsides of an hourly rate are that it may not encourage efficiency on the part of the arbitrators, and that it does not give the parties much upfront certainty about the likely cost of their arbitration.

Professional Assistance and Oversight

One of the strengths of institutional arbitration is the access to professionalised supervision by the arbitral institution, which is usually staffed by specialised professionals capable of giving input or deciding on important issues such as challenges to arbitrators, the selection of a seat and so on. Different institutions do this in varying degrees.

The ICC's supervisory role is organized around a professional Secretariat and the ICC Court, with the former staffed by qualified and experienced lawyers who are specialists in the field, and the latter comprising experienced arbitration professionals from all over the world. Under the ICC Rules, awards can only be rendered after they have been scrutinized, for issues of not just form but also substance, and then approved by the ICC Court as to their form (Art. 33). This review and scrutiny process has been cited as a key attraction of ICC arbitration, and is often used to justify the ICC's higher fees.

The SIAC's organizational structure is similar to the ICC's. It has a Court of Arbitration that also comprises leading arbitration professionals from the world over, and an experienced Secretariat with specialist qualified lawyers to manage the administration of cases. Similar to the ICC, under the SIAC Rules, all SIAC awards are scrutinized in draft by the Registrar for issues of both form and substance, and can only be rendered by the tribunal if approved by the Registrar as to their form (Rule 28.2). Under the SIAC Rules, the Registrar manages the formal review and scrutiny process, although the Registrar may, where appropriate, consult the SIAC Court before approving the draft award as to its form (2014 Practice Note, at para. 31). According to the SIAC, timelines for scrutiny are shorter than at the ICC: 2 to 4 weeks for draft final awards, and 2 days in the case of emergency arbitrator orders and awards.

In contrast, the LCIA and ICDR Rules do not expressly contemplate any formal review or scrutiny.[3] However, while not expressly required under their rules, the LCIA and ICDR offer a reduced form of professionalised assistance and oversight. The ICDR's practice, for instance, is to have a case manager assigned to every case, who would review the award for any clerical, typographical or arithmetical errors, or whether it contains all necessary elements for enforcement, before it is finalized and signed.[4] Similarly, the LCIA Secretariat provides "proofreading" services if required by the arbitral tribunal.

Conclusion

There are many other differences, besides those mentioned above, between the institutional rules of leading arbitral institutions. These include important innovations such as the Arb-Med-Arb clause[5] developed jointly by the SIAC and the Singapore International Mediation Centre, as well as the new Article 18 and Annex to the 2014 LCIA Rules that purport to regulate professional conduct. Despite the general trends towards convergence and harmonization, it is clear that points of divergence between institutional rules remain. That should be seen as a good thing; after all, such differences expand the range of choices available to corporate counsel and other users of arbitration.

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[1] That is, the aggregate of the claim, counterclaim and any set-off defence. *See* 2013 SIAC Rules, Art. 5.1(a).

[2] Under the fee schedule, the SIAC caps its administration fees at SG$95,000, where the sum in dispute is above SG$100 million, and caps the arbitrator's fees at SG$2 million, where the sum in dispute is above SG$500 million. *See* 2013 SIAC Rules, Schedule of Fees.

[3] *See* LCIA Frequently Asked Questions; S. Wade and Ors, *Commentary on the LCIA Rules 2014*, (2015, Sweet & Maxwell), ("LCIA Commentary"), at para. 26-017; M.F. Gusy, J.M. Hosking, and F. Schwarz, *A Guide to the ICDR International Arbitration Rules*, (2011, Oxford), ("ICDR Guide"), at para. 27-02.

[4] *See* ICDR Guide, at paras. 1.98, 1.113 and 27.02.

[5] Arb-Med-Arb is a tiered process where a dispute is first referred to arbitration before mediation is attempted. If parties are able to settle their dispute through mediation, their mediated settlement may be recorded as a consent award. The consent award is generally accepted as an arbitral award, and, subject to any local legislation and/or requirements, is generally enforceable in approximately 150 countries under the New York Convention. If parties are unable to settle their dispute through mediation, they may continue with the arbitration proceedings.

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