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SIAC's Retreat From Publication Of Awards Without Consent Strikes The Right Balance

Benson Lim (Associate Editor) (Hogan Lovells) and Kent Phillips · Wednesday, October 5th, 2016

There has been a lot of attention paid to the various innovations in the new SIAC Rules 2016 such as the possibility of an early dismissal of claims under the new Rule 29.

One of the changes to the Rules which has generally been overlooked is that they now require consent of the parties and the tribunal before SIAC may publish an award (Rule 32.12). In contrast, the previous set of Rules 2013 permitted SIAC to publish awards in redacted forms without the parties' or tribunal's consent (Rule 28.10).

This amendment on publication of arbitral awards reflects the lack of general consensus in the wider arbitration community on this issue. Leading arbitral institutions such as HKIAC continue to maintain that awards should not be published in any form while ICC's practice generally is to publish awards in redacted forms with or without the parties' consent.

Amongst the key arguments canvassed in support for publication of awards by arbitral institutions is transparency in commercial arbitration. It has been argued that publishing awards gives broader visibility of the arbitrators' work to existing and potential users of arbitration. Greater visibility arguably strengthens the legitimacy of the arbitration system and promotes arbitration as a viable dispute resolution method. Publishing awards may also provide greater certainty and predictability for international businesses as parties may be able to predict more accurately the outcomes in future situations which are analogous to those in the published awards.

Further, there have been concerns raised that the development of the common law is being stifled by non-publication of commercial arbitral awards. In a March 2016 lecture the Lord Chief Justice of England and Wales delivered a lecture entitled "*Rebalancing the Relationship between the Courts and Arbitration*" in which it was observed that widespread use of international arbitration in commercial disputes means that commercial and legal norms are increasingly being developed in private tribunals rather than in national courts and that this impacts on the development of the common law. This is arguably more so in Singapore, where arbitration has made relatively significant inroads, potentially impacting on the development of Singapore law as a distinct body at a time when it is an increasingly important choice of law for

parties in Asia.

These above reasons would support publication of awards in redacted forms, even without consent. However there are powerful arguments requiring consent.

Obviously the reasons for publication of judgments – which have the status of binding precedents – do not apply to awards. Although helpful it is not clear whether awards would contribute to the development of common law in the same way as judgments.

In any event the concerns of users of arbitration should arguably take precedence over the need for development of national jurisprudence in commercial law. Arbitral institutions apply the laws of many countries – SIAC's 2015 report indicates that the governing law in 41% of its new cases filed in 2015 is not Singapore law – and are not the flag-bearers for the laws of any particular jurisdiction.

Further, users have diverging views on publication. Our experience is that, rightly or wrongly, many users are strongly resistant to publication of awards, even in redacted form. Others, however, appear to be more relaxed. We note that some Singapore High Court cases about arbitrations have not been sealed, with the parties evidently willing to allow their names and nature of dispute to be made public (see, for example, *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] SGHC 126). This divergence in user preferences suggests merit in requiring consent on a case by case basis.

It is also relevant that redaction of awards is sometimes difficult (without being so extensive as to render the product meaningless) without allowing other industry players to discern the parties to the dispute. The arbitral institution may not be as well placed to work out if this is one of those cases. This too supports the need for consent.

For these reasons the amendment in the SIAC 2016 Rules to require consent before publication of awards reflects an appropriate balance struck between the competing needs of meeting user expectations and transparency.

What is less controversial is the revised SIAC Rule 16.4 which requires the Court's decisions on challenges to arbitrators to be reasoned. While a positive step towards transparency, there may be same reasons to extend the same treatment to at least some of the other decisions made by SIAC's Court or President which can significantly impact on the course of an arbitration. Candidates include applications for expedited procedure (rule 5) and applications under the new joinder and consolidation provisions (rules 7 and 8). Publication of these decisions may well assist users and enhance the legitimacy of the arbitration process without the potential difficulties associated with publishing awards in the redacted form.

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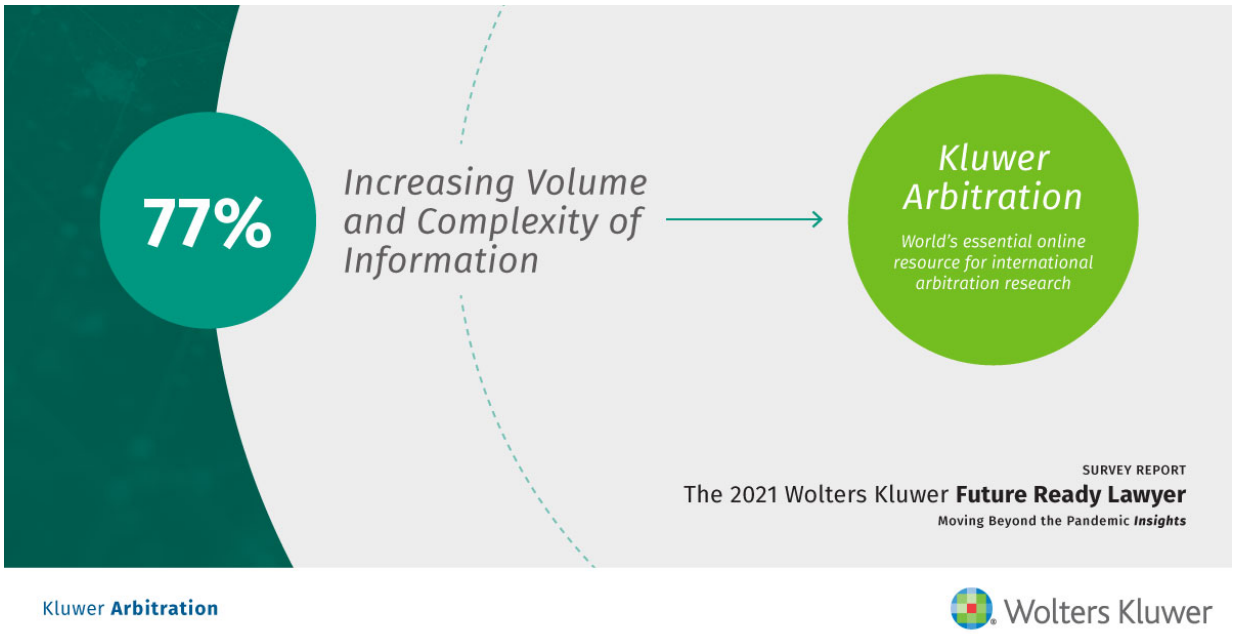

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