

# What Causes Inter-Institutional Variations in the Duration of the Arbitration Process?

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### **What Causes Inter-Institutional Variations in the Duration of the Arbitration Process?**

A significant advantage that arbitration has over litigation is the speed with which proceedings are conducted. The duration of an arbitration, i.e. the time from the date of receipt of the Request for Arbitration to the date of release of the final award, is therefore one method of assessing the performance of an arbitration institution.

The most recent data published by the HKIAC, SIAC, SCC and LCIA show that the median<sup>[fn]</sup>While the reports provide statistics on both average and median duration, this post shall use median durations because the median is a more accurate representation of the central tendency. Averages are likely to be affected by outliers.<sup>[/fn]</sup> durations of their arbitrations are 14.3, 11.7, 13.5 and 16 months respectively. However, this post shall refer to their reports in 2016 as the SCC and the SIAC have not published statistics for 2017. This change affects the figures of the HKIAC alone - with a median duration of 11.6 months in 2016, it held the lowest median duration amongst the four institutions. This post shall consider the factors that determine arbitration duration and, from a comparison of the rules of the four institutions, highlight conditions that will likely allow quicker arbitrations.

The time between the final submissions and the award remains almost constant. This is evidenced by the LCIA's findings. Therefore, prolonged arbitrations are attributable to delays at the claim submission stage. Factors that affect the length of this stage include the following:

#### **Time-Limits on Submissions**

Strict time-limits do not always lead to punctual submissions. The LCIA, with a 16-month median duration, imposes the most stringent time-limit. As per Art. 15 of the LCIA Rules of 2014, only 28 days are provided for the submission of all statements unless, as under Art. 15.1, the parties have agreed or jointly proposed, or, the tribunal decides, differently. The other three institutions leave the time-period "to be determined by the tribunal" (Art. 24 of the 2007 and the 2010 SCC Rules, Art. 16 and 17 of the 2013 HKIAC Rules and Art. 17 of the 2013 SIAC Rules).

Assuming that the 28-day limit is a cause of delayed submissions in the case of the LCIA, this may have to do with the impracticality of the proposed period. This thought receives support from the practice of tribunals of the other three institutions in determining time-limits. While the SCC and the

SIAC do not place any ceiling on the time-limit, the HKIAC, under Art. 21 of the HKIAC Rules, places a 45 day ceiling on the time-limit unless an extension is deemed necessary by the tribunal. It is possible that the durations of the HKIAC's arbitration reflect the feasibility of the 45-day limit.

### **Tribunal's Powers in Cases of Delayed Submissions**

In cases of delayed submissions, the HKIAC, the SIAC and the SCC grant tribunals the power to terminate proceedings and to continue proceedings without considering delayed submissions. In contrast, the LCIA, under Art. 15.8, only recognises the power to proceed with arbitration, thereby giving LCIA tribunals the least power. This reduced power could possibly be linked to the lengths of LCIA arbitrations.

Under Art. 26 of the HKIAC Rules, tribunals are granted powers to deal with delayed submissions. The SIAC Rules vest tribunals with the same powers, albeit in a roundabout manner. While Art. 17.8 of the Rules grants tribunals the power to terminate proceedings in cases of delayed submissions specifically, Art. 17.9 allows tribunals to continue with proceedings in case of "failure to submit in the manner declared by the Tribunal". Although it appears that tribunals are granted powers to deal with different situations under both provisions, tribunals under Art. 17.9 are also granted powers to deal with delayed submissions alone. This is because the Rules already provide for the content of the submissions under Art. 17.3.

The SCC Rules meanwhile couch these powers in different language. Under Art. 30 of the SCC Rules, tribunals are granted said powers in case of failure to submit statements "in accordance with the provisions of Art. 24". Art. 24 considers the content of statements, the timely submission of such statements, and the authority of tribunals to demand additional statements. Thus, the SCC Rules allow tribunals to exercise their powers for reasons other than delayed submissions as well. This would enable tribunals to indirectly avoid extending the prescribed time-limit. For example, under the SCC, a tribunal may terminate proceedings in case the Statement of Claim was filed without a description of the evidence relied on, even if it was submitted in time. In the same situation, tribunals of the SIAC, the LCIA and the HKIAC would be forced to provide an extension for the submission of the corrected statement, thereby extending the duration of the claim submission stage as a whole.

### **Caseloads and Value of Claims**

A significant difference in the caseloads or in the amounts in dispute does not have any relation to the differences in durations of arbitration between the institutions. As an illustration, consider the statistics of the [SIAC](#) and the [SCC](#). The data shows that the SIAC significantly outnumbers the SCC on both fronts. Yet, of the two institutions, it is the SIAC that boasts shorter arbitrations.

### **Expedited Arbitrations per Institution**

As only the reports from the SCC and the HKIAC provide a breakdown of the nature of arbitrations conducted, it is probable that the reported median durations are not accurate indicators of the relative efficiency of the four institutions in disposing matters. If an institution takes on a greater proportion of expedited procedures, it is likely to reduce the median duration. However, this too seems unlikely after considering data from the HKIAC and the SCC. In 2016, the [HKIAC](#), hosted only 8 expedited procedures while the [SCC](#) hosted 55.

### **Discretion Exercised by the Tribunals**

While both the HKIAC and the LCIA recognise the tribunal's discretion to extend time-limits, they do so in different ways. The HKIAC, under Art. 21 of the HKIAC Rules, allows extensions on the already granted period of a maximum of 45 days, while the LCIA, under Art. 15.1 of the LCIA Rules, allows

tribunals to grant any period other than the prescribed 28 days. The Rules also remain silent on whether, in case of a motion for extended time-periods by the parties, tribunals are bound to recognise the period mutually set by the parties or not. Thus, while an HKIAC tribunal is led by the already elapsed 45-day period and is, thereby, likely to grant extensions keeping this in mind, an LCIA tribunal has complete discretion to decide an alternate time-limit before the start of the proceedings. This could make a significant difference in extensions granted by tribunals under both institutions.

The rules of the SCC and the SIAC meanwhile remain silent on whether tribunals can extend decided time-limits. It is highly probable that this silence will be interpreted in favour of the parties to the arbitration. For example, in 2017, SCC tribunals have granted at least two extensions in both PL Holdings v. Republic of Poland and I.P. Busta and J.P. Busta v. The Czech Republic.

## Conclusion

From a study of the available data and the rules of all four institutions, it appears that the ideal combination of factors to ensure quicker arbitration would include:

- **A reasonable time-limit on submissions.** While the utility of providing time-limits is unquestionable, it is imperative that these limits are fixed and regularly revised after studying the compliance rates to the prescribed time-limit, and comparing them with limits set by the other institutions. Whether, and, to what extent, these factors weigh into the limit setting process is currently unknown. For example, the original limit of 30 days under the 1998 LCIA Rules was reduced to 28 days under the 2014 version. While this amendment probably seeks to ensure that deadlines fall on working days, it is difficult to determine if the aforesaid factors were considered. It may also help to forego a uniform time-limit for all matters but instead provide different limits per tier of claim values/complexity.
- **Restrained exercise of the discretion to grant extensions and, only after the expiry of the original time-limit.** It is also worth mentioning that institutions may appear to differ in their attitude towards granting extensions as a result of their past awards and the time extensions granted therein. Tribunals, while deciding whether to grant extensions, may be influenced by this pattern. The institutions would therefore do well to study past patterns and advise their tribunals accordingly.
- **A broad power to terminate and continue proceedings.** Borrowing from the SCC, institutions should allow tribunals to exercise their powers in case of factors that may directly or indirectly lead to protracted submissions. Such factors would include non-compliance to requirements on the form and content of submissions, and failure to produce any documents additionally demanded.

*[As the reports use data for differing periods between 2007 and 2016, with the exception of the HKIAC, this post does not reference the most recent version of the rules of the arbitration institutions. This is to ensure that the data used is studied in relation the rules that governed proceedings at the time. This will however have no effect on the validity of the observations made in this post because the cited provisions remain intact under the new versions of the rules as well.]*

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