Reflections on Default Number of Arbitrators under Expedited Procedure Rules

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Wei Sun (Zhong Lun Law Firm)

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In this post, I will compare and discuss the expedited procedure rules ("**EP Rules**") used by various arbitral institutions in deciding on a default number of arbitrator(s) for such expedited procedure.

A core concern of Article V(1)(d) of the New York Convention is how to weigh between party autonomy and institutional control in arbitration proceedings. Arbitration practitioners may recall the failed attempt by Noble Resources International Pte. Ltd. ("***Noble Resources Case***") to enforce a SIAC award a few years back.

That award was rendered under the old SIAC Arbitration Rules' EP Rules though. In its Arbitration Rules 2016, SIAC made a detailed regulation on EP Rules by adding two new sub clauses [Rule 5.3 and Rule 5.4]. In particular, Rule 5.3 stipulates that "By agreeing to arbitration under these Rules, the parties agree that, where arbitral proceedings are conducted in accordance with the Expedited Procedure under this Rule 5, the rules and procedures set forth in Rule 5.2 shall apply '*even in cases where the arbitration agreement contains contrary terms*.'"[fn]Rule 5.2(b) prescribes that "the case shall be referred to a sole arbitrator, unless the President determines otherwise"[/fn] Under the 2016 Rules, the sole arbitrator is the default in expedited procedure, and parties are deemed to accept the default if they

choose SIAC, whose arbitration rules refer to the application of the EP rules if certain conditions are met, albeit their agreement otherwise.

In my view, this approach is a bit too hardline: when parties choose a certain set of arbitration rules, they have to accept all of them, without any deviations by agreeing otherwise. This might be detrimental to party autonomy, which is considered the foundation of arbitration, and the flexibility of arbitration procedure, which is a key factor of arbitration's success as an internationally preferred method of dispute resolution.

Similarly, the newly revised 2017 ICC Arbitration Rules achieve effectively the same result. The relevant provisions provide that "The court may, **notwithstanding any contrary provision of the arbitration agreemen**t, appoint a sole arbitrator." [Article II Appendix VI of the ICC's EP Rules]. In particular, Article 30 of the ICC Rules provides that "*By agreeing to arbitration under the Rules, the parties agree that this Article 30 and the Expedited Procedure Rules set forth in Appendix VI (collectively the 'Expedited Procedure Provisions') shall take precedence over any contrary terms of the arbitration agreement*".[fn]Also, in a press release dated 4 November 2016, ICC stated that "Under the Expedited Procedure Rules, the ICC Court will normally appoint a sole arbitrator, irrespective of any contrary term of the arbitration agreement."[/fn]

As a contrast, the 2018 HKIAC Rules has opted for a different approach. The HKIAC rules provide that "the case shall be referred to a sole arbitrator, **unless the arbitration agreement provides for three arbitrators**." [Article 42.2(a)]. Also, "If the arbitration agreement provides for three arbitrators, HKIAC shall invite the parties to agree to refer the case to a sole arbitrator. **If the parties do not agree, the case shall be referred to three arbitrators**." [Article 42.2(b)].

Similar to the HKIAC Rules, the CIETAC Rules provides that "**Unless otherwise agreed by the parties**, a sole-arbitrator tribunal shall be formed in accordance with Article 28 of these Rules to hear a case under the Summary Procedure." [Article 58]

The above institutional rules demonstrate two different approaches to the procedure of expedited proceeding: SIAC and ICC seem to treat the procedures in EP Rules superior than the arbitration agreement while HKIAC and CIETAC put more emphasis on party autonomy. Although it is unknown whether the *Noble*

Resources Case will be recognized by the Chinese Court if the 2016 SIAC Arbitration Rules applies, Chinese courts attach importance to party autonomy. In *Noble Resources Case*, the court put a lot emphasis on party autonomy, holding that the parties' particular agreement on a procedural matter is superior to the provisions in the arbitration rules. It is therefore suggested for foreign arbitrators and arbitration institutions to be cautious about parties' agreement, especially when the party expressed its concerns on the special arrangement on procedural matters during arbitration proceedings.