Kluwer Arbitration Blog

‘The Grandfathers I Never Had’: Should We Choose Arbitral Rules with Grandfathering Provisions?

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Many arbitration centres trumpet innovativeness as their selling point. One commonly cited proof of innovativeness is ‘software upgrades’, i.e., centres revising rules to introduce new arbitral procedures. These are intended to make arbitration cheaper, faster, and fairer.

Introducing New Arbitral Procedures – First Movers

New procedures introduced over the past decade include emergency arbitration (“**EA**“), expedited procedure (“**EP**“), consolidation, joinder, and early dismissal.

However, how do we tell if one institution is *more* innovative than another? One simple way would be to judge them by the speed at which they introduce new rules.

Some institutions are typically ‘first movers’. For example, the SIAC and SCC introduced EA provisions in 2010. The ICC, HKIAC, and LCIA then followed suit between 2012 and 2014. Further, among these institutions, the SCC was the first to expressly provide for consolidation, and with the SIAC were, up to 31 October 2018, the only commercial institutions expressly providing for early dismissal/summary determination.

However, the ‘first mover’ advantage can be eroded by homogenisation: other institutions introducing *similar* features. For example, between 2010 and 2014, the world’s top 5 most preferred institutions (based on the Queen Mary 2018 International Arbitration Survey) all introduced EA. Further, all 5 institutions have now introduced consolidation and joinder provisions.

Therefore, to properly distinguish between these institutions, a deeper understanding of their attitudinal differences is required.

One litmus test of an institution’s approach towards innovation is whether it complements new procedures with grandfathering provisions. A grandfathering provision states that an old rule continues to apply to existing situations, while the new rule will apply to future cases. It is an express departure from the default position, that the applicable version of a set of arbitral rules are “those in force when the time for invoking…[those rules] arises” (*Bunge SA v Kruse* [1979] 1 Lloyd’s Rep 279).

Grandfathering – Divergent Approaches

Among the leading institutions, there is a discernible difference in grandfathering approaches.

For example, the current rules of the HKIAC[1], ICC[2] and LCIA[3] expressly state that their EA provisions do not apply to arbitration agreements entered into before these provisions came into force (unless parties agree otherwise). On the other hand, the SIAC and SCC are more aggressive – their rules do not contain grandfathering provisions for EA.

This difference in approach can significantly affect how disputes are resolved. While the more aggressive approach enables parties to avail themselves of the latest features of the rules and can therefore theoretically provide shorter routes to relief, it can sometimes result in protracted enforcement battles.

Case Studies – JKX v Ukraine, AQZ v ARA, and Noble Resources v Shanghai Good Credit

JKX v Ukraine[4], *AQZ v ARA*[5] and *Noble Resources v Shanghai Good Credit*[6] are instructive examples. These cases have been discussed in previous posts on this blog (JKX, AQZ, Noble Resources).

JKX v Ukraine – In 1998, Ukraine ratified the Energy Charter Treaty (the "**ECT**"). The ECT provides for SCC arbitration. At that time, EA was not part of SCC arbitration.

Fast forward to 2014 – Ukraine received notice of a claim by a UK-headquartered MNC, JKX, under the ECT. Within 2 months, Ukraine was ordered by an SCC emergency arbitrator to stop applying a particular domestic law on gas production royalties to JKX. Six months later, the arbitral tribunal issued an interim award, effectively mirroring the terms of the emergency arbitrator's decision.

It is unclear whether the emergency arbitrator's decision was ultimately enforced. However, at least at first instance the Ukrainian courts found that the SCC EA procedure was in accordance with the parties' agreement.[7]

On the other hand, both *AQZ* and *Noble Resources* involved EP under the SIAC Rules.

In *AQZ*, parties concluded a coal shipment contract in 2009. The SIAC arbitration clause therein provided for disputes to be settled by *three* arbitrators. At that time, the SIAC Rules did not contain an EP.

Fast forward to 2013 – the claimant successfully applied for arbitration conducted under the EP. The SIAC Rules then in force (2010 version) stipulated that under the EP a *sole* arbitrator would be appointed, unless the SIAC decided otherwise. The SIAC-appointed sole arbitrator then issued an award, which the respondent applied to set aside.

However, the Singapore High Court said it was "commercially sensible" to interpret the arbitration agreement as conferring the SIAC with discretion to appoint a sole arbitrator, provided the SIAC took into account the fact that the arbitration agreement pre?dated the EP coming into force. The Court also observed that unlike the ICC's EA provisions, the SIAC Rules do not contain grandfathering provisions. The Court said this "fortified" the conclusion that the EP provisions

"override parties' agreement for arbitration before three arbitrators."

Noble Resources involved similar facts, save that the arbitration agreement *post*-dated the coming into force of the SIAC EP provisions.

However, the Shanghai First Intermediate Court refused enforcement, on the grounds that appointment of a sole arbitrator under application of the EP was not in accordance with the parties' agreement for three arbitrators.

These cases amply demonstrate how, in the absence of grandfathering, claimants can attempt a faster route to relief, under relatively new arbitral procedures such as EA and EP. This is so even if the parties' chosen arbitral rules did not contain such procedures at the time of contracting / time of the respondent's consent to arbitration.

Subsequent enforcement battles can raise question marks over the efficacy of the relief obtained (discussed here). However, claimants may nonetheless regard the threat of enforcement, adverse publicity, potential impact on respondents' credit lines, etc. as useful pressure points.

Familiarity with New Procedures – Differing Levels of Experience

As 'first movers' and 'non-grandfathers', the SIAC and SCC have gained significantly more experience than other institutions in administering new procedures.

For example, as of 2016, the SIAC and SCC have administered 76 EA applications in total, against 2,626 new cases – 2.9%. This compares favourably to the 60 EA applications administered in total by the ICC, HKIAC and LCIA, against 5,145 new cases – 1.2%.[8)]

Grandfathering – Suited to Taste

Given the differences in grandfathering approaches, businesses should carefully choose their arbitral institutions. This is particularly so for long-term contracts, since the chosen arbitral rules are more likely to be updated during the lifetime of the contract. For example, between 2007 and 2016 the SIAC revised its rules 4 times.

There is no 'one size fits all' approach, whereby the most aggressive or most conservative institution must be the best fit for all businesses in all situations.

For example, in infrastructure projects, a contractor as payee is more likely to make than face claims. It may therefore prefer an institution that takes a more aggressive approach towards innovation. This is because institutions typically introduce procedures that short-cut a claimant's route to relief, and the absence of grandfathering provisions would allow the contractor to utilise such procedures.[9)]

Risk appetite matters too. For example, listed/governmental entities may prefer arbitral centres that take a more measured approach towards rule revision. This can provide shareholders/public with greater certainty about the arbitral procedures eventually applicable when a dispute does arise. Alternatively, parties could specify in their contracts that the applicable arbitral rules shall be a specific version, e.g., the 2014 LCIA Rules, to avoid being subject to unpredictable future rule revisions.

Parties should also consider the potential jurisdictions where any award/order is likely to be enforced (particularly the enforcement of relief rendered under less conventional or truncated procedures), before opting for a 'non-grandfathering institution'.

Conclusion

In summary, when choosing an arbitral institution, parties should go beyond evaluating the institution's track record or its current set of rules. Instead, parties should also factor in something more fundamental: "What bargain does this institution strike with its users?" Does it lean towards respectful assistance, or proactive legislation? The answer to that question may well hold the key to how satisfactorily a party's disputes are resolved.

Note: Clifford Chance Asia is a Formal Law Alliance in Singapore between Clifford Chance Pte Ltd and Cavenagh Law LLP.

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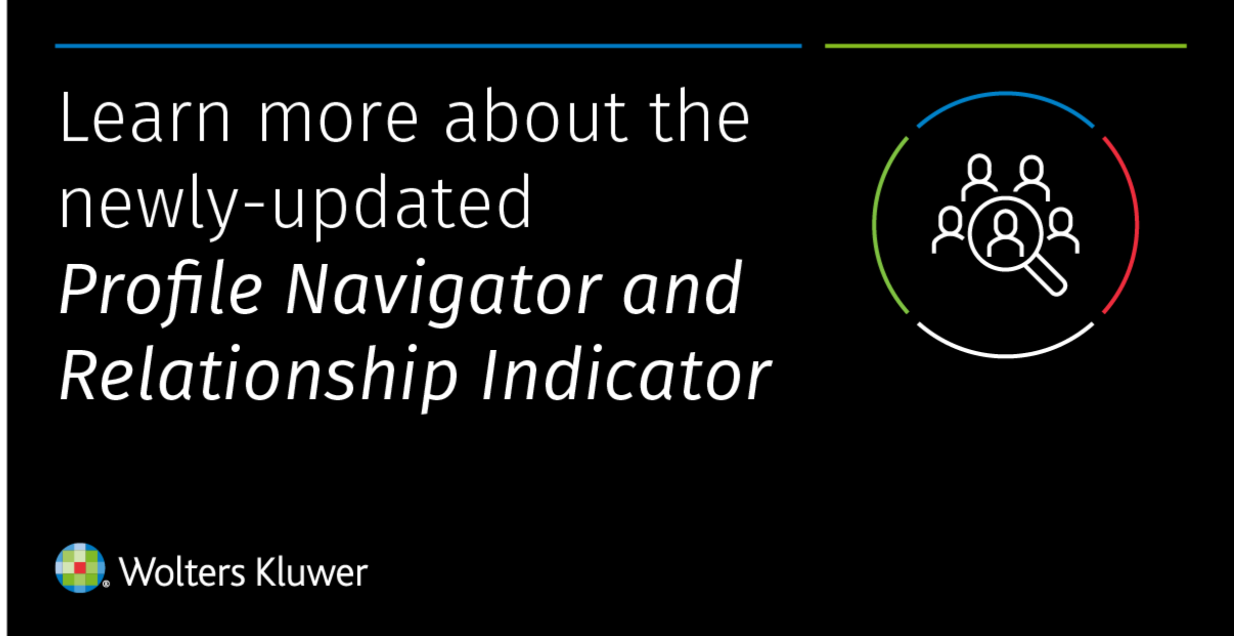

References

?1 HKIAC Administered Arbitration Rules 2018, Art. 1.5.

?2 ICC Rules of Arbitration 2017, Art, 29(6)(a)

?3 LCIA Arbitration Rules 2014, Art. 9.14.

?4 SCC EA 2015/002; discussed in Ipp, "SCC Practice Note: Emergency Arbitrator Decisions Rendered 2015-2016", Section 3.1 (accessed on 7 November 2018)

?5 [2015] SGHC 49

?6 [2016] Shanghai No. 1 Intermediate People's Court

?7 Hamama and Sendetska, "Interim measures in support of arbitration in Ukraine: lessons from *JKX Oil & Gas et al v Ukraine* and the recent reform of Ukrainian legislation" https://academic.oup.com/arbitration/article/34/2/307/5033005 (accessed on 7 November 2018)

?8 We have used statistics from their respective annual reports to compute the number of EA applications and arbitrations administered by the SIAC, SCC, ICC, LCIA and HKIAC during 2010-2016, 2011-2016, 2012–2016, and 2014-2016 (the LCIA and HKIAC) respectively.

?9 In choosing a 'non-grandfathering institution', a party would have to accept some uncertainty, and perhaps trust that, in Michael McIlwrath's words, "*we are far from a day when an arbitration institution might go too far in developing a [procedure] that is more efficient and proportionate to the value of the dispute.*"

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