Kluwer Arbitration Blog

Hong Kong Arbitration Week Recap: Has the Proliferation of Institutional Rules Caused International Arbitration to Lose Its Way?

Sian Knight, Ben Bury (Holman Fenwick Willan LLP) · Tuesday, October 22nd, 2019

Introduction

Even a cursory analysis of the history of the procedural rules of leading arbitral institutions demonstrates that procedural rules are increasing in number and becoming ever more comprehensive in their scope. Institutional rules now cover, largely without exception, joinder, consolidation, emergency arbitrator provisions, and expedited procedures. And adding to this, as institutions seeking to adapt to global developments, such as the growth of Belt and Road Initiative (BRI) disputes, the pressure for more rules seems inescapable.

Has this increasing breadth of rules created a bewildering morass? Or is it the reality that arbitration institutions are required to expand their procedural tools in order to effectively manage increasingly complex disputes, including those involving multiple parties and arbitration agreements.

On Monday, October 21, Holman Fenwick Willan LLP hosted a panel event on the topic of proliferation of institutional rules as an affiliated event of Hong Kong Arbitration Week 2019 (Chatham House Rules invoked).

This blog post provides an overview of the main themes addressed in the wide-ranging discussion.

The interplay and choice between institutional rules in contrast to *ad hoc* rules

The panel discussion raised the point that institutional rules exist to provide structure and form to arbitrations, and can be thought of as readily understandable means of setting out the rules of the 'arbitration' game.

In practical terms, arbitral rules provide institutions with the means to offer a raft of valuable services, ranging from appointment of arbitrators to consolidation of arbitrations. In that sense, choosing administered arbitration subject to institutional rules can operate as a comprehensive and structured alternative to the skeletal procedural provisions generally found in local arbitration laws.

It was discussed that having said that, where appropriate, parties may prefer "*ad hoc*" arbitrations

subject to local legislation over administered arbitrations. However, *Ad hoc* arbitration is not devoid of structure. It instead takes its form according to the law of the seat, and it is certainly open to parties to agree to a set of rules to supplement underlying legislation, such as the use of LMAA rules in such context. With an experienced arbitral tribunal, *ad hoc* arbitration can be a genuine and viable alternative to institutional arbitration.

The role of institutional rules in the parties' choice of institution

Further in the discussion, the point was made that regardless of preferences, the decision between *ad hoc* or administered arbitration should be carefully considered. In the same vein, parties opting for administered arbitration should spend time selecting the right rules, *i.e.*, ones that are fit for purpose in the context of a specific reference, since the rules provide essential procedural framework for an arbitration and will have a significant impact on the conduct of proceedings.

That said, there is not always the luxury of time or influence of a party over which rules to choose in the arbitration agreement when a commercial deal is cut. Arbitration agreements are often "11th hour" clauses in contracts, meaning that they are drafted at the last minute without sufficient regard to their wording.

On this point, the panel explained that, in practical terms and to the extent parties consider the drafting of their arbitration clauses, that parties are more likely to pay attention to the seat of the arbitration rather than which institutional rules to apply. Further, if an institution is deliberately chosen, it is often on the basis of its experience with institutions in terms of their administration of comparable disputes. This is reflected in the results of the Queen Mary University of London 2018 International Arbitration Survey, which confirms that the HKIAC, SIAC, ICC, LCIA and SCC are still the most preferred institutions based on *'general reputation and recognition'*.

The process and development of current institutional rules

Against this background, one may wonder why arbitral institutions seek to create new rules to adapt to change.

The panel discussed that there is no doubt that they do. By way of example, the HKIAC 2018 Administered Arbitration Rules undoubtedly put in comprehensive work in revising its Rules. New provisions have been introduced to recognise the pressure points in existing rules, and to seek input and consensus from the breadth of the interested arbitration community before embarking on change, which is a process not undertaken lightly.

There is nonetheless a point to make on whether institutions are creating new rules to cater for the changing needs of the parties.

Looking ahead to the future development of arbitration practice, we may reasonably expect more attention to be paid to environmental concerns. Many have taken the decision now to commit to the Green Pledge on arbitration. And looking even further ahead, we wonder how long it would take before the traditional physical hearing is defunct and be replaced with a virtual environment. This poses the question – should rules cater for this?

Leaving to one side was an academic discussion of the respective role of arbitration soft law, and the mandatory application of national law, as well as current concerns over the scope of institutional rules which go to the core of the arbitral process. For example, multi-party provisions may have to address concerns over fair treatment of all parties to an arbitration in terms of appointment of arbitrators.

The panel also discussed how the proliferation of rules may impact enforcement as a favourable award is only a good result when it translates into an enforceable award.

The role of an arbitrator and the strengths of the arbitral process

The panel concluded the session by discussing the role of an arbitrator. No consideration of institutional rules would be complete without doing so.

The panel expressed the view that although institutional rules may well facilitate the arbitration procedure, they are not the only factor at play. It was noted that the strength of an arbitral process is also heavily influenced by the caliber of the arbitrator pool in the respective seat.

An example would be, where parties have expressly committed to the use of expedited procedures or emergency arbitrator provisions, arbitrators are expected to be able to utilise the applicable provisions fully in order to drive the proceedings forward without delay.

More coverage from Hong Kong Arbitration Week is available here.

This entry was posted on Tuesday, October 22nd, 2019 at 2:01 am and is filed under HK Arbitration Week, Hong Kong, Institutional Arbitration, Institutional Rules, Procedure
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