

ALLEN & OVERY

After the wave of revised and new, specialised rules of arbitration – did the choice get any easier?

ASA below 40

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A wave of new rules

- ICC (2012)
- CIETAC (2012)
- Swiss Rules (2012)

But also...

- UNCITRAL (2010)
- SIAC (2010)
- SCC (2010)

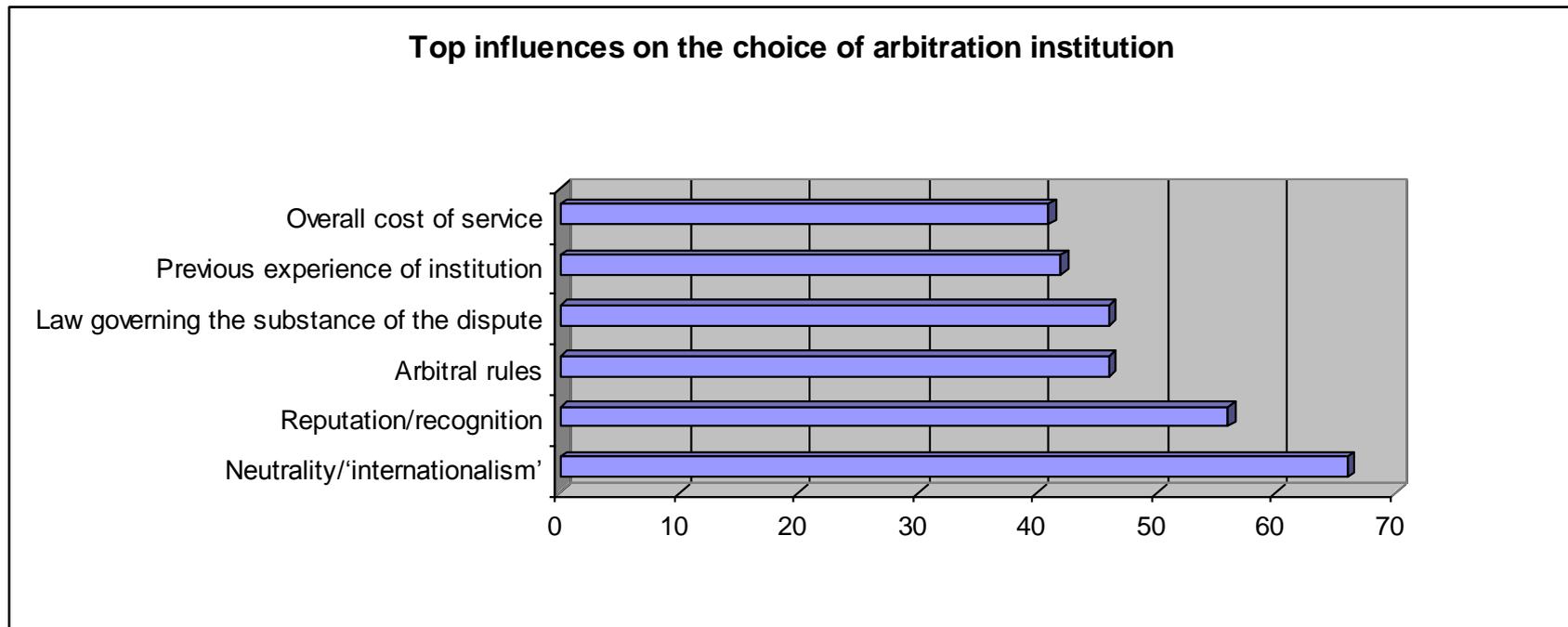
And...

- P.R.I.M.E. Finance (2012)

Was the choice ever easy?

When negotiating an arbitration clause:

- 74% of arbitration users are willing to concede the arbitration rules
- 14% have no preference as to the rules



Source: Queen Mary University / White & Case
2010 Survey on International Arbitration

Why new rules?

- Need for modernisation
- Increased competition between institutions, including specialised institutions
- Address criticisms regarding international arbitration
 - Time and cost
 - Transparency
 - Difficulty in dealing with multi-party and multi-contract situations
 - Availability of pre-arbitral interim measures

A trend towards harmonisation...

...or different solutions to the same problems?

- Increased efficiency
- Pre-arbitral interim measures
- Complex arbitrations

Efficiency

- Initiation of the proceedings
 - *Prima facie* jurisdictional control
 - Contents of the request for arbitration
- Constitution of the Tribunal
 - Role of the institution or appointing authority
- Conduct of the proceedings
 - Express obligation to conduct the arbitration efficiently
 - Case management techniques
 - Declaration of availability
 - Date for submission of draft award
 - Cost orders

Pre-arbitral interim relief

- Recent trend for institutions to offer facilities to obtain interim and conservatory relief prior to constitution of the tribunal
- SCC (6 applications since January 2010) ; SIAC (4 applications since July 2010) ; AAA (14 applications between 1 May 2006 and December 2010)
- ICC, Swiss Rules, P.R.I.M.E. Finance

Pre-arbitral interim relief (continued)

- ICC Emergency Arbitrator procedure (Art. 29 and App. V)
 - Conditions for appointment of Emergency Arbitrator:
 - Interim or conservatory measures cannot await the constitution of the Tribunal
 - File has not been transmitted to the Tribunal
 - The party applying for emergency measures must file a Request for Arbitration within 10 days of the application for emergency measures
 - Emergency Arbitrator's decision:
 - Interim or conservatory measures issued in the form of an order
 - The order will be made within 15 days of the filing of the application
 - The order will not bind the arbitral tribunal
 - NB: Parties can opt out of the procedure in their arbitration agreement

Joinder

- CIETAC
 - No joinder provisions
- LCIA (Art. 22(1)(h))
 - Joinder allowed provided that the party seeking the joinder and the party to be joined agree
- Swiss Rules (Art. 4(2))
 - A tribunal may agree to join a third party to the proceedings, at the request of the parties to the proceedings or the third party, after consulting with all parties, taking into account all relevant circumstances
 - It is not necessary for a claim to be filed against the third party
- UNCITRAL and P.R.I.M.E. Finance (Art. 17(5))
 - No joinder prior to constitution of the Tribunal
 - Joinder possible after the constitution of the Tribunal provided the person to be joined is a party to the arbitration agreement and provided the joinder does not cause prejudice to any of the parties.

Joinder (continued)

- ICC (Art. 7)
 - Joinder is allowed if:
 - An arbitration agreement under the ICC Rules binds all parties (Art. 6(4)(i))
 - There are claims against the party to be joined
 - No confirmation or appointment of arbitrators has taken place
 - Procedure:
 - Request for Joinder
 - Additional Party can file Answer
 - Additional Party participates in the constitution of the Tribunal

Multi-party and multi-contract arbitrations

- UNCITRAL and P.R.I.M.E. Finance
 - Article 4(2)(f): A respondent can formulate a claim against a party to the arbitration agreement other than the claimant
 - Provisions regulating the appointment of the Tribunal where there are multiple parties:
 - Article 10(1): multiple claimants or respondents must appoint an arbitrator jointly; and
 - Article 10(3): in case of failure to constitute a Tribunal, at the request of any party, the appointing authority shall constitute the Tribunal.
- CIETAC (Art. 27(3))
 - If either side defaults in appointing its arbitrator, the Chairman will appoint all three arbitrators
- SCC (Art. 13(4))
 - Multiple claimants or respondents, jointly, shall appoint an equal number of arbitrators. If either side fails to make such joint appointment, the Board shall appoint the entire Tribunal.

Multi-party and multi-contract arbitrations (continued)

- ICC Rules
 - Claims between multiple parties (Art. 8)
 - Claims may be made by any party against any other party
 - Where there are more than two parties, the arbitration proceeds between those of the parties with respect to which the ICC Court of Arbitration is satisfied that an arbitration agreement under the ICC Rules binds them all.

 - Constitution of the Tribunal where there are multiple parties (Art. 12)
 - Article 12(6): Multiple claimants or respondents must appoint an arbitrator jointly
 - Article 12(8): In the absence of a joint nomination, the Court may appoint all three arbitrators.

 - Multiple contracts (Art. 9)
 - Claims arising out of more than one contract may be made in a single arbitration provided that:
 - The arbitration agreements under which the claims are made may be compatible; and
 - All parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.

Consolidation

- No provision for consolidation under UNCITRAL, P.R.I.M.E. or LCIA Rules
- CIETAC (Art. 17)
 - Only if all parties consent
- Swiss Rules (Art. 4(1))
 - The Court may consolidate proceedings even if the parties to the new proceedings are not identical to the parties in the existing proceedings
 - The Court shall take into account all circumstances to decide whether to consolidate
 - Where the Court decides to consolidate the cases, it may revoke the appointment and confirmation of arbitrators and appoint new arbitrators if necessary

Consolidation (continued)

- ICC (Art. 10)
 - Under the 1998 Rules, the Court only consolidated proceedings where the parties were identical and the cases related to the same legal relationship.

 - Under the 2012 Rules, proceedings will be consolidated if:
 - The parties have agreed to consolidation;
 - All claims are made under the same arbitration agreement; or
 - Different arbitration agreements but same parties, same legal relationship and arbitration agreements are compatible.

Questions?

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