E-Update 2012/3 – MARCH 2012

The New International Chamber of Commerce ("ICC") Rules 2012: Hybrid Arbitration Agreements & Emergency Arbitrator Provisions

In our last e-update ("The New ICC Rules", February 2012), we highlighted four major changes to the ICC Rules:

1. Measures to discourage hybrid arbitration agreements;
2. The Emergency Arbitrator provisions;
3. Multi-Party Proceedings; and,
4. Measures to increase the cost efficiency and effectiveness of arbitration.

In this update, we examine in detail the first two of these changes.

1. Hybrid Arbitration Agreements

Hybrid arbitration agreements are those where parties choose the arbitration rules of one arbitral institution to be administered by another arbitral institution. In Singapore, this situation most famously arose in the case of ***Insigma Technology Co. Ltd. v Alstom Technology Co. Ltd. ([2009] 3 SLR(R) 936) ("Insigma v Alstom")***. The arbitration agreement in that case stipulated that the Singapore International Arbitration Centre ("SIAC") was to administer an arbitration using ICC Rules. In our last e-update, we opined that hybrid arbitration agreements are "fraught with difficulties" although they may appear cost-effective (and hence attractive). In this update, we take you through the rationale behind this statement.

The ICC's Position

In the new ICC Rules:

- The International Court of Arbitration (the "Court") is made the only body authorised to administer arbitrations under the ICC Rules [Article 1(2)].

- Agreeing to arbitration under the ICC Rules means that parties agree for the arbitration to be administered by the Court [Article 6(2)].

These amendments were made to discourage hybrid arbitration agreements. In addition, John Beechey (Chairman of the ICC Court) has said that in keeping with these amendments, the ICC would refuse to administer an arbitration using the arbitral rules of any other institution and that the ICC hopes that other arbitral institutions would do likewise. Accordingly, the ICC will not administer any case involving a hybrid arbitration agreement.

Other institutions administering arbitrations using ICC Rules

Despite the clear wording of Article 1(2) and 6(2) of the ICC Rules (above), the ICC cannot stop other institutions from administering arbitrations using ICC Rules. John Beechey and Jason Fry (Secretary General of the ICC) have stated that the ICC would

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not go so far as to take legal action to stop other institutions from administering arbitrations using ICC Rules or object to enforcement of awards rendered pursuant to such hybrid arbitration agreements. Be that as it may, challenges to the validity of the agreement or enforceability of an award can be raised by one of the parties to the arbitration agreement itself.

Hybrid Arbitration Agreements – An Unwarranted Risk

In a significant number of cases, the relationship between the parties would have broken down so completely that one party will do all it can to resist the arbitration. Such a party may challenge the jurisdiction of the arbitral tribunal, seek a court order for a declaration that the arbitration agreement is void, boycott the arbitral proceedings entirely or resist enforcement of the Award. The party may go so far as to do all of the above. In each of the instances mentioned above, the party will rely on Articles 1(2) and 6(2) of the new ICC Rules for strong support. If in any of those instances, the party manages to get the arbitration agreement declared invalid, the entire arbitral process would go to waste. This is a huge risk for the innocent party to take. In our view, it is an entirely unwarranted risk since the simple use of a standard arbitration clause would avoid all that risk.

Hybrid Arbitration Agreements – Increased Costs and Delays

In addition, even if the risks can be justified and all challenges to the arbitration proceedings are successfully overcome, the inherent costs and delays will surely wipe out any perceived benefits of a hybrid arbitration agreement. Taking the case of Insigma v Alstom as an example, Alstom first filed a Request for Arbitration with the ICC in August 2006. After Insigma objected and referred to the hybrid nature of the arbitration agreement, Alstom commenced arbitration through the SIAC in November 2006. Insigma raised objections again. When the arbitral tribunal ruled it had jurisdiction to arbitrate in December 2007, Insigma then applied to the High Court of Singapore, which rendered its judgment in August 2008. Insigma finally appealed to the Court of Appeal, which rendered its judgment in June 2009. In the premises, the parties took nearly 3 years from the time Alstom first filed its Request for Arbitration to obtain a final determination on whether the hybrid arbitration agreement was valid.

For these reasons, regardless of any arguments for party autonomy or perceived cost savings, the practical realities of contentious arbitrations weigh heavily against the use of hybrid arbitration agreements. If you have incorporated any hybrid arbitration clauses into your contracts, we suggest that you amend them before any disputes occur, so as to avoid these difficulties.

2. Emergency Arbitrator (EA)

The EA provisions in the new ICC Rules allow a signatory of the arbitration agreement to apply to an EA for urgent interim or conservatory relief (such as provisional attachment orders or search and seizure orders) before the arbitral tribunal is constituted. The party applying for an EA must pay US$40,000 up front, although the Court may subsequently divide the costs between the parties [Appendix V Article 7(1) and 7(3)]. The ICC may also increase the fees and failure to pay the increased fees within the time limit automatically terminates the EA proceedings [Appendix V Article 7(2)].

Inherent Delays and Notice

While the EA provisions are certainly a step in the right direction, one criticism is of the inherent delays built into the EA procedure:

• The President is given an indefinite amount of time to appoint an EA although that is “normally” done within 2 days.

• Any party to the arbitration agreement can object to the EA within 3 days from the notification of

appointment or from the date the facts on which it relies became known to it, whichever is later [Appendix V, Article 3(1)].

- The EA can make its order at any time up to 15 days from the transmission of the file to him/her [Appendix V, Article 6(4)].

The above provisions leave room for the party against whom the interim order is sought to delay both the commencement of the EA proceedings and the making of the EA's order. However, the crux of the problem is not the amount of time taken for an EA's order but rather the fact that the opposing party is notified of the EA's impending appointment and of the order that is being sought. This allows an unscrupulous party to defeat the purpose of the EA application by destroying the sought after documents or dissipating the desired assets. This inherent weakness in the EA provisions means that parties should avoid blindly invoking the EA provisions if a more robust alternative is available.

Interim Injunctions from National Courts

In most English common law jurisdictions (such as England, Hong Kong and Singapore), the national courts are able to grant orders for urgent interim or conservatory relief in support of an arbitration. In an appropriate case, the order can be issued:

- by a Judge within an hour or so of hearing the applicant;
- before the Request for Arbitration has been filed; and
- without first notifying the opposing party.

In the premises, where the urgent interim orders are sought against a party in Singapore or other similar jurisdictions, the applicant may stand a better chance of getting a meaningful order by approaching the courts rather than invoking the EA provisions of the ICC Rules.

The Strengths of the EA Provisions

Vice-versa, in jurisdictions where the courts do not support arbitrations, do not grant interim orders or do not act promptly, the EA provisions will probably be the better route for the applicant. In addition, the EA provisions are particularly useful in multi-party arbitrations where interim orders are sought against two or more parties in different jurisdictions. This avoids the complications of approaching multiple courts for the same orders and the risk of inconsistent results.

In conclusion, the EA provisions are a welcome addition to the ICC Rules but they are not the universal panacea where urgent interim injunctions are required. Recourse to the national courts may still prove to be the best medicine in some cases.

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Our next e-update will deal with multi-party proceedings and increasing the cost effectiveness and efficiency of arbitrations.

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