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What US GCs Should Know About Choosing an Arbitral Institution and Rules

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If parties have opted for international arbitration as a method of dispute resolution, it will be necessary to consider whether to choose a particular arbitral institution with its rules which will govern any dispute when the dispute resolution clause in the contract is being drafted. Although most of the major institutional rules have many similar features (for example, emergency arbitrator provisions or rules on challenges to jurisdiction), there are significant differences to be aware of when selecting the most appropriate institution and set of arbitral rules to apply. This is an important choice because it will govern who will appoint the arbitrator if the parties cannot agree and what procedural rules will govern the arbitration. It will also determine how the fees payable to the arbitrator and institution will be calculated.

There are several different institutions and rules to choose from. This note covers the main differences between four popular choices for parties in an arbitration clause: the London Court of International Arbitration (LCIA) (rules revised in 2014); the International Chamber of Commerce (ICC) (2012); the Singapore International Arbitration Centre (SIAC) (2016 effective 1 August 2016); and United Nations Commission on International Trade Law (UNCITRAL) (2013). We also explain what will happen if no choice is made.

Differences in fees

Most institutions use one or a combination of two methods for calculating the costs of the arbitrators' and institutional fees: a defined hourly rate or a rate calculated by reference to the amount in dispute (*ad valorem*). Under the ICC and SIAC rules fees are charged on an *ad valorem* basis adjusted at the discretion of the institution to take into account the complexity of the matter. This will give parties an accurate estimate as to the likely costs of the arbitration at the outset. The LCIA charges 5% of the fees payable to the tribunal plus time spent at an hourly rate. The arbitrators' fees are determined based on hourly rates, which are capped at rates set out in a schedule to the LCIA rules. This may be significantly more economical than *ad valorem* fees in high value arbitrations where the issues in dispute are not complex. However, an hourly rate may not give the parties much upfront certainty about the likely cost of the arbitration.

According to a study published on the LCIA website (available here) comparing the average cost of arbitrations where the awards were rendered between 1 January 2013 and 15 June 2015, the LCIA was the cheapest compared to the ICC and SIAC for disputes of less than $1 million but for disputes greater than $1 million, the costs of the three institutions were comparable.

Differences in speed

Under the ICC rules, there are two procedural requirements which may lengthen the duration of proceedings. Terms of Reference (**ToR**) must be drawn up after the appointment of the tribunal (Art 23). The ToR sets out a summary of the claim and issues in disputes, and addresses, amongst other things, procedure. This may lead to a more focused arbitration; however, the requirement to draft and agree the ToR may become a point of contention between the parties and lead to delay. The LCIA, SIAC and UNCITRAL rules do not require ToR to be submitted.

Furthermore, the ICC rules (Art 33) require draft awards to be submitted to the ICC Court for approval. The ICC Court may lay down modifications as to the form of the award and draw a tribunal's attention to points of substance. This vetting process lengthens the arbitral process. The SIAC rules contains a similar provision (Rule 32.3) where draft awards must be submitted to the SIAC Registrar for approval prior to rendering. The LCIA and UNCITRAL rules do not contain any similar vetting provisions.

Finally, the SIAC rules allow applications for early dismissal of Claims and Defences which are manifestly without

legal merit, or manifestly outside the jurisdiction of the Tribunal (Rule 29). This has the potential to provide significant savings of time and costs. Currently no other major commercial arbitral rules contain such a provision.

Other key procedural differences

As well as the differences in speed and fees, parties should be aware of other key procedural differences which are summarised and compared below.

	LCIA 2014	ICC 2012	SIAC 2016	UNCITRAL 2010
Default number of arbitrators	One, unless it appears to the LCIA that three is more appropriate (Art 5.8)	One, unless it appears to the Court that the dispute warrants the appointment of three arbitrators (Art 12.2)	One, unless it appears to the Registrar that the dispute warrants three (Rule 9.1)	Three (Art 7)
Process for selection of arbitrator(s)	LCIA is empowered to appoint arbitrators taking into account any written agreement, joint nomination, or selection criteria put forward by the parties (Art 5.7 and 5.9)	One - Parties can nominate if in agreement; if no agreement then Court will appoint (12.3) Three - Each party to nominate one. President to appoint third if no agreement reached on procedure to nominate third. (12.5)	One - Parties can nominate if in agreement; if no agreement then President will appoint (Rule 10) Three - Each party to nominate one. President to appoint third if no agreement reached on procedure to nominate third (Rule 11)	One - If no agreement reached between parties, then appointing authority (Secretary of the Permanent Court of Arbitration) shall appoint (Art 8.1) Three - Each party to appoint one and the appointed arbitrators to appoint the third who will act as presiding arbitrator (Art 9)

Default restrictions where parties are different nationalities	Sole Arbitrator or Chairman cannot be the same nationality of any party (Art 6.1)	Sole Arbitrator or Chairman cannot be the same nationality of any party (Art 13.5)	N/A	N/A
Time limit for challenging arbitrator	14 days (Art 10.3)	30 days (Art 14.2)	14 days (Rule 15.1)	15 days (Art 13)
Consolidation	Permitted subject to the approval of the LCIA where all parties consent; or where both arbitrations have been commenced: (1) under the LCIA's auspices; (2) under the same or a compatible arbitration agreement;(3) between the same parties; and (4) no tribunal has been appointed or the composition of the tribunal in both disputes is the same (Art 22.1 (ix) and(x))	Consolidation permitted of pending ICC arbitrations where all parties agree, and both claims made under the same arbitration agreement; or the second dispute concerns: (1) the same parties; (2) the same legal relationship; and (3) the arbitration agreements are compatible (Art 10)	Consolidation permitted of pending SIAC arbitrations where all parties agree and both claims made under the same arbitration agreement; or the arbitration agreements are compatible and the dispute arises out of the same legal relationship arising out of a principal and ancillary contracts or the disputes arise of the same transaction or series of transactions (Rule 8)	N/A

Availability of interim measures	Tribunal has discretion to order the Respondent to provide security for all or part of the amount in dispute, and preserve, order sale or disposal of property or thing under the control of any party and relating to the arbitration (Art 25.1)	Tribunal has the discretion to grant any interim or conservatory measure the tribunal deems appropriate	Tribunal may grant an injunction or any other interim relief the tribunal deems appropriate (Rule 30)	Permitted including measures to maintain and preserve assets or evidence and restore the status quo pending determination of the dispute (Rule 26.1)
Joinder	Permitted only on application by a party, if the new party consents and the new party is required to be part of the same arbitration (Art 22.1(viii))	Permitted on request and only prior to confirmation or appointment of an arbitrator (Art 7.1)	Permitted on application before or after constitution of the Tribunal where additional party is prima facie bound by arbitration agreement or all parties have consented (Rule 7)	Permitted on request and only if the third party to be joined is party to the arbitration agreement; further the joinder cannot prejudice any party (Art 17.5)
Confidentiality	Proceedings and any materials disclosed are confidential (Art 30)	Parties can apply for confidentiality of proceedings or to protect trade secrets and confidential information (Art 22.3)	Proceedings are confidential. Disclosure permitted in limited circumstances as specified in the Rules, (Rule 39)	Proceedings are confidential; however the award may be made public in limited circumstances (Art 34.5)

Availability of Expedited Procedure	Available (Art 9A)	N/A	Available (Rule 5)	N/A
Time limit for issuing award	N/A	Within 6 months of ToR subject to extension (Art 30)	Draft must be submitted to Registrar within 45 days of close of proceedings (Rule 32.3)	N/A

Ad hoc arbitration

In ad-hoc arbitration (where no institution and rules are selected in the contract or agreed by the parties when the dispute commences) there is no supervision or support from any institution in relation to the conduct of the proceedings. The main advantage is the opportunity to save time and costs by allowing the parties the flexibility to set their own rules and timelines, or modify existing ones, along with avoiding the payment of institutional fees. However, there may be no savings where the parties are unable to co-operate in a sensible manner and there is no rule framework which applies. Having said that, most jurisdictions have their own arbitral legislation which will provide the basic framework, for example the Arbitration Act 1996 applies to all arbitrations seated in the UK, and therefore it is important to specify the choice of governing law of an arbitration clause.

Conclusion

Frequently, little thought is given at the time of agreeing a contract to the precise rules and framework that will apply to an arbitration in the event of a dispute. The parties are often surprised by the process, which can have significant variations in procedure and cost based on which institution was selected, if any. We hope this short guide gives insight into the issues to be considered when agreeing an arbitration clause.

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