Insights

COMPOSITE REQUESTS: ONE STEP FORWARD OR TWO STEPS BACK?

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Procedural flexibility is one of the pillars of international arbitration. In the past year and a half, we have seen how procedural flexibility enables international arbitration to meet and rise above the challenges of a global pandemic. Arbitration practitioners around the world seamlessly and efficiently extended the existing use of video conferencing from case management conferences and procedural hearings to substantive hearings and arbitrator deliberations.

The LCIA was in the process of updating its arbitration rules when the pandemic took hold. This gave the LCIA the opportunity to address explicitly some changes in practice, including the increased use of virtual hearings and the primacy of electronic communication. It also allowed the LCIA to introduce other amendments designed to increase efficiency, including tools allowing arbitrators to expedite proceedings and a new, explicit provision for early dismissal determination. However, one amendment is proving slightly less than effective in practice: the introduction of a new procedure for the filing of a composite request for arbitration.

Background

The catalyst for the introduction of the new composite request mechanism in the 2020 LCIA Rules was likely the decision of Mr Justice Phillips in A v B [2017] EWHC 3417 (Comm).

In A v B, the court considered whether a single request for arbitration under the 2014 LCIA Rules was valid. The claimant in its single request sought to refer disputes under two similar contracts made between the same parties. The two contracts concerned the sale of crude oil with the same general terms and conditions. Both contracts were governed by English law and provided for LCIA arbitration.

Phillips J found that “the [2014] LCIA Rules treat a single request as giving rise to a single arbitration”. Further, in holding that the request for arbitration was invalid, he implicitly endorsed A’s unchallenged submission that a single LCIA arbitration could only encompass a single dispute as governed by a single arbitration agreement/clause under the 2014 LCIA Rules.

The decision in A v B sits in stark contrast to another English decision; Agarwal Corporation(s) Pte Ltd v Harmony Innovation Shipping Pte Ltd [2017] EWHC 3556 (Comm). In Agarwal, the English court held that a notice of ad hoc arbitration, which referred disputes relating to a series of contracts with identical arbitration clauses, had commenced a single arbitration. These contrasting decisions highlight the English courts' readiness to apply literally and strictly the terms of applicable institutional rules, even to the potential detriment of a central pillar to the arbitration regime (in this case, procedural flexibility).

The A v B decision also highlighted a gap in the 2014 LCIA Rules. Other international arbitral institutions' rules, such as Article 9 of the ICC Rules, Article 29 of the HKIAC Rules and Article 14(1) of the SCC Rules, expressly provide for the commencement of a single arbitration with respect to claims arising out of or in connection with more than one contract/arbitration agreement. For example, Article 9 of the ICC Rules reads in part that: "claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules".

The 2014 LCIA Rules did not contain any such provisions and the court in A v B instead based its decision upon the use of terms in singular form in Article 1 of Rules. The updating of the LCIA Rules provided an opportunity to address this issue but, rather than broadening the scope of an LCIA arbitration to allow for claims made under more than one contract/arbitration agreement, the LCIA chose to introduce a new composite request mechanism in the 2020 LCIA Rules.

The New Composite Request Mechanism in the 2020 LCIA Rules

The new composite request mechanism, at Articles 1.2 and 2.2 of the 2020 LCIA Rules, allows a claimant to commence more than one arbitration under the LCIA Rules with one composite request. It refers to the commencement of "more than one arbitration under the LCIA Rules (whether against one or more Respondents and under one or more Arbitration Agreements)". The mechanism appears to be designed to address A v B and the procedural inefficiencies that may arise from the restrictive interpretation of the LCIA Rules in that decision.

This new composite request mechanism is similar to Rule 6 of the SIAC Rules, which allows for the filing of one notice of arbitration in respect of each arbitration agreement invoked. However, the new LCIA mechanism does little to cure the procedural inefficiencies arising from the A v B decision. On the contrary, from experience, the applicability of the mechanism is questionable and whether claimants choose to proceed with a composite request makes little difference in the treatment of the arbitrations commenced.

First, it is uncertain whether claimants with similar disputes against the same respondent(s) could take advantage of the composite request mechanism. The use of the singular "claimant" in Article 1.2 gives rise to arguments, akin to those argued in A v B, that only a single claimant could file a composite request to commence more than one arbitration under one or more arbitration

agreements. Article 1.6 could have resolved this ambiguity (and potentially the ambiguities in Article 1.1, which the court restrictively interprets in A v B). However, that provision only refers to the interpretation of "claimant" in the context of the arbitration agreement/clause.

Second, the provision in Article 1.2 that "the requirements of Article 1.1 are complied with to the satisfaction of the LCIA Court in respect of each arbitration" is also problematic. A claimant is required to pay registration fee with respect to each arbitration commenced in a composite request - unlike the mechanism under the SIAC Rules which only required payment of registration fee for one arbitration unless the consolidation application is rejected by the tribunal (Rule 6.2). Further, on a literal and strict reading of this requirement, a claimant would simply be preparing separate requests, one for each arbitration, in one document. The composite nature of this mechanism does not actually increase efficiency or reduce costs. On the contrary, the drafting of Article 1.2 gives rise to further ambiguities that may result in procedural objections from respondents.

Lastly, as provided for in the last sentence of Article 1.2, the LCIA administers each arbitration commenced by a composite request as a standalone arbitration. Most claimants will be commencing multiple arbitrations under a composite request because of the *A v B* decision and will ultimately aim to consolidate the arbitrations. Despite this, administratively speaking, there is little difference between commencing multiple arbitrations with separate requests or with one composite request. The LCIA will still send parties separate communications with respect to each arbitration commenced, even if the content of each communication is the same. It also does not make a difference in terms of the treatment of any consolidation applications under Articles 22.7 or 22.8.

This provision in Article 1.2 and the LCIA's practice in dealing with composite requests differ from the approach adopted under Rule 6 of the SIAC Rules. Rule 6 of the SIAC Rules provides that the registration fee only needs to be paid once and seems to suggest that the SIAC will administer the proceedings as if it is one arbitration unless and until the consolidation application is rejected by the tribunal.

One step forward or two steps back?

The English court's restrictive interpretation of the scope of an LCIA arbitration in *A v B* had an adverse impact on the procedural flexibility of the commencement process of an LCIA arbitration. Unfortunately, the introduction of the composite Request mechanism does not appear to have improved matters.

Unlike the mechanism under Rule 6 of the SIAC Rules, the LCIA's composite Request mechanism contains ambiguities that may result in procedural objections from respondents. Further, the administration of arbitrations commenced by a composite request is not as efficient as it could be and is likely to result in the LCIA and the parties incurring additional costs prior to the consolidation of the arbitrations.

The LCIA could have broadened the scope of an LCIA arbitration to allow claimants to commence one arbitration with respect to claims relating to multiple arbitration agreements/contracts. This is the approach adopted by the ICC, HKIAC and SCC and is arguably the simplest way of resolving the procedural flexibility, costs and efficiency issues arising from the *A v B* decision. However, if the LCIA intends to maintain the composite request mechanism, it may wish to consider revising the provisions so that they do in fact offer a cost effective and efficient mechanism for commencing multiple arbitrations.

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