Arbitrating in Singapore — The 2016 SIAC Rules

The revised Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules') entered into force on 1 August 2016. Unless otherwise agreed by the parties, the 2016 SIAC Rules apply to any arbitration subject to the SIAC Rules commenced on or after 1 August 2016. With this latest revision, SIAC has aligned its arbitration rules with the most prominent sets of arbitration rules around the globe. In particular, it successfully tackles the growing complexity of disputes that are submitted to international arbitration. Going beyond what other sets of rules offer, the new SIAC Rules contain innovative changes that confirm SIAC's role as one of the world's leading international arbitration centres.

Background

Since commencing operations in1991, SIAC arbitration has experienced phenomenal growth. In 2015, SIAC recorded the highest ever number of cases filed, number of administered cases and total sum in dispute in the history of SIAC.[1] SIAC's case filings have increased by over 250 per cent in the past 10 years.[2]

While SIAC has a proven track record in providing quality and neutral arbitration services in a very pro-arbitration and stable jurisdiction, there was a common desire of users and practitioners alike to update the previous 2013 SIAC Rules, not only to reflect current trends in international arbitration, but to set new standards.

The revision process was run by the SIAC Rules Revision Executive Committee in collaboration with a number of subcommittees. They were supported by the SIAC Users' Council, comprising arbitration practitioners and corporate counsel from over 30 jurisdictions. Finally, in order to allow the broadest possible input from users worldwide, draft rules were released in December 2015 for an extensive six-month public consultation process.

Early Dismissal of Claims and Counterclaims

The most remarkable amendment to the SIAC Rules is the introduction of a procedure for the early dismissal of claims and defences. As two commentators recently remarked, '[t]he perceived absence of summary judgment procedures in international arbitration is a frequent concern for many businesses across a range of industries.'[3] SIAC has now addressed this concern. In line with its pioneering role, SIAC is the first major international arbitration centre to provide for such a procedure in commercial arbitration.[4]

Under the new Rule 29, a party may apply to the arbitral tribunal for the early dismissal of a claim or defence on the basis that a claim or defence is (1) manifestly without legal merit; or (2) manifestly outside the arbitral tribunal's jurisdiction.[5]

Rule 29 provides for a two-step process for the arbitral tribunal to deal with applications for early dismissal. First, the arbitral tribunal decides, at its discretion, whether an application for early dismissal should be allowed to proceed at all.[6] Then, if the application is allowed to proceed, the tribunal must give the parties the opportunity to be heard before issuing—as the case may be—an order or an award, which must state the reasons in summary form, within 60 days of the filing of the application.[7]

It remains to be seen how these 'dispositive motions' will be handled in practice. The fact that the SIAC Rules do not set a time limit to file the application for early dismissal bears the danger of eliciting untimely applications. Although the tribunal will probably not allow an untimely application to proceed under the two-step process described above, such an application is likely to waste time and money. It also remains to be seen how tribunals will interpret the new provision, which—as with any new provision—entails a risk of inconsistent application. More importantly maybe, tribunals may generally be reluctant to grant applications for early dismissal for due progress considerations. Therefore, parties filing an application for early dismissal will be well advised to demonstrate to the tribunal that granting 'summary judgment' will not offend rules of natural justice.

Notwithstanding these reservations, Rule 29—when duly applied by a robust tribunal—can be expected to result in significant time and costs savings. It also sets the revised SIAC Rules apart from other institutional rules and will serve as an additional selling point for SIAC arbitration.

Dealing with Complex Arbitrations—Joinder, Consolidation and Multiple Contracts

Introduction

The new provisions in Rules 6, 7 and 8 take into account the increasing number of complex disputes that go to arbitration involving multiple contracts and/or multiple parties.[8] While the 2013 SIAC Rules included a provision on joinder in Rule 24(b), there were no provisions expressly dealing with consolidation of multiple arbitrations or arbitrations concerning disputes arising out of a multitude of contracts.

Rules 6, 7 and 8 generally reflect current practice in international arbitration with regard to joinder, consolidation and multiple contract scenarios, but are noteworthy in that, in some aspects, they go beyond what other institutions offer and grant parties to SIAC arbitrations greater flexibility in dealing with complex arbitrations than other sets of arbitration rules do.[9]

Joinder of Additional Parties

The new Rule 7 pertains to the issues of joinder. 'Joinder', according to the SIAC rules, refers to the adding of one or more parties as a claimant or a respondent to an existing arbitration. Joinder may occur upon the request of one of the original parties to that arbitration, but can also be requested by a non-party seeking to join the arbitration in question.

The joinder provision in the 2016 Rules goes beyond the joinder provision in the 2013 Rules. It also gives parties to SIAC arbitrations more options to join additional parties to an existing arbitration than under other sets of arbitration rules.

Rule 7 expressly allows for joinder both before and after the constitution of the arbitral tribunal. Prior to the appointment of any arbitrator, joinder is possible provided that

(1) the party to be joined as a claimant or a respondent is *prima facie* bound by the arbitration agreement; or,

(2) that all parties, including the additional party to be joined, consent to the joinder.[10]

At this stage, the decision to join an additional party lies with the SIAC Court.[11] After the commencement of the arbitration, it is for the arbitral tribunal to rule on any joinder request.[12] The tribunal may join an additional party under the same conditions as the Court.[13]

A party having failed to join another party before the constitution of the tribunal is given a second bite at the apple and can apply again to the tribunal once constituted.[14] This acknowledges the fact that the Court may not in all cases be in a position to make an informed decision at such an early stage of the proceedings, either because joinder may not seem appropriate at that time or because the information available is insufficient to make a conclusive determination.

Rule 7.4 and Rule 7.10 confirm that Rule 7 only sets out the procedural framework for joining an additional party to a pending arbitration. It does not create a jurisdictional basis for the party to be joined.[15] In other words, the party seeking to join or have another party joined in the arbitration will still have to establish, on the basis of the applicable legal principles (not the SIAC Rules), that there is a valid arbitration agreement binding the party to be joined. This important distinction appears to be overlooked at times, when 'joinder' is used as a synonym to or basis for extending an arbitration agreement to a 'non-signatory'.

Where an application for joinder is granted, any party who has not participated in the constitution of the arbitral tribunal is deemed to have waived its right to nominate an arbitrator or otherwise participate in the constitution of the arbitral tribunal.[16]

Consolidation

The new Rule 8 deals with consolidation; that is, the merging of two or more arbitrations into one. The 2013 SIAC Rules did not contain any express provision to that effect.

Like the provision on joinder, Rule 8 provides for two distinct situations of consolidation, one by the Court prior to the appointment of the arbitral tribunal[17] and the other by the arbitral tribunal after its constitution.[18]

Prior to the full constitution of the arbitral tribunal, consolidation is possible in three situations, namely:

(1) if all parties agree to consolidation;

(2) if all claims made in the arbitrations fall under the same arbitration agreement; or,

(3) where the arbitration agreements are compatible and (a) the disputes in the arbitrations concern the same legal relationship(s); (b) the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or (c) the disputes arise out of the same transaction or series of transactions.[19]

The Court's decision to grant an application for consolidation is without prejudice to the arbitral tribunal's power to subsequently decide any question as to its jurisdiction. Similarly, the Court's decision to reject the application is without prejudice to a party's right to apply for consolidation to the arbitral tribunal once it is constituted. So here, too, the parties get a second chance to consolidate their arbitrations.

After the constitution of the arbitral tribunal in any of the arbitrations sought to be consolidated, the request for consolidation must be made to that arbitral tribunal. The arbitral tribunal may consolidate two or more arbitrations

pending under the SIAC Rules into a single arbitration, provided that:

(a) all parties to the arbitrations agree to consolidation;

(b) all the claims in the arbitrations are made under the same arbitration agreement, the same arbitral tribunal has been appointed in each of the arbitrations or no arbitral tribunal has been constituted in the other arbitration(s); or,

(c) the arbitration agreements are compatible, the same arbitral tribunal has been appointed in each of the arbitrations or no arbitral tribunal has been constituted in the other arbitration(s) and the disputes arise out of (i) the same legal relationship(s); (ii) contracts consisting of a principal contract and its ancillary contracts; or (iii) the same transaction or series of transactions.[20]

In line with most other sets of arbitration rules,[21] consolidation is admissible in both scenarios even if not all parties agree to consolidation, provided that the stipulated prerequisites are met.

Multiple Contracts

The new Rule 6 introduces a process for parties to commence arbitral proceedings arising out of or in connection with multiple contracts. The 2013 SIAC Rules did not contain any express provision to that effect.

Rule 6 provides an innovative approach to multi-contract proceedings by creating a direct link between arbitrations brought under multiple contracts and consolidation of arbitrations. Under this provision, the party who wishes to initiate arbitration proceedings under multiple contracts and/or arbitration agreements has two avenues: it can either:

(1) file a Notice of Arbitration in respect of each arbitration agreement invoked, and concurrently submit an application for consolidation under Rule 8.1; or

(2) file a single Notice of Arbitration in respect of all the arbitration agreements invoked, which shall include a statement identifying each contract and arbitration agreement invoked and a description of how the applicable criteria under Rule 8.1 are satisfied.[22] In this case, the Claimant shall be deemed to have commenced multiple arbitrations, one in respect of each arbitration agreement invoked, and the Notice of Arbitration shall be deemed to be an application to consolidate all such arbitrations pursuant to Rule 8.1.[23]

An Even More Efficient Process

The 2016 SIAC Rules have also introduced a number of changes aimed at further optimising the arbitral process under the SIAC Rules. These changes relate, *inter alia*, to improvements to the existing emergency arbitrator and expedited procedures.

Emergency Arbitrator

SIAC was, and still remains, one of the pioneers of emergency arbitration. The emergency arbitrator procedure under the SIAC Rules has been a true success story. Provisions on an emergency arbitrator procedure were already included in the 2010 and 2013 SIAC Rules and SIAC has administered 50 such proceedings as of 1 June 2016,[24] far exceeding the numbers of most other institutions. The most recent amendments will further enhance the efficiency and cost-effectiveness of the emergency arbitrator process for the benefit of its users.

The new Rules shorten the overall schedule of the emergency arbitrator proceedings. At the outset of the process, the appointment of an emergency arbitrator must be made within one day (instead of, as previously, one business day) of the application for emergency interim relief and payment of the administration fees and deposits.[25] Furthermore, the revised Rules provide that the emergency arbitrator's order or award shall be made within 14 days from the emergency arbitrator's appointment, unless—as an exception—the Registrar extends the time.[26]

The powers of the emergency arbitrator have been expanded in that the emergency arbitrator not only has the power to order or award any interim relief that he or she deems necessary, but now also has the express power to make preliminary orders pending any hearing, telephone conference or written submissions by the parties.[27] This allows the emergency arbitrator to issue so-called holding orders in cases of extreme urgency or where there is an imminent risk that a party might dissipate assets or otherwise frustrate the purpose of the interim relief sought from the emergency arbitrator. The provision is a very welcome clarification of the powers of an emergency arbitrator, although it does not allow for the issuance of true *ex parte* interim relief in that a preliminary order can be granted prior to the notification of the request to the responding party.[28]

The amendments made to the emergency arbitrator procedure reflect SIAC's aspiration to offer an expedient and straightforward process for emergency interim relief proceedings. These changes will improve an already efficient process and will reinforce SIAC's role as a frontrunner in terms of emergency arbitrator procedures.

Expedited Procedure

The expedited procedure under the SIAC Rules has been slightly modified. To allow more cases to be submitted to this procedure, the monetary threshold for the applicability of the expedited procedure has been raised from SGD 5 million to SGD 6 million. Rule 5.2(b) further specifies that when the expedited procedure applies, the case shall be referred to a sole arbitrator even where the arbitration agreement provides for more than one arbitrator.

While the 2013 SIAC Rules provided that, as a default rule, the arbitral tribunal had to hold a hearing, new Rule 5.2(c) stipulates that it is for the tribunal, in consultation with the parties, to decide if the dispute shall be decided on the basis of documentary evidence only, or if a hearing is required.

Outlook—The SIAC Investment Arbitration Rules

The 2016 revision of the SIAC Rules will be complemented by the introduction of an entirely new set of rules specifically designed for investment disputes: the SIAC Investment Arbitration Rules.

The draft SIAC Investment Arbitration Rules are based on the SIAC Rules but are tailored to the particularities of investment arbitration. They aim at an efficient resolution of investment disputes by addressing the complaints frequently raised in relation to investment dispute resolution, namely the length, costs and constraints of investment arbitration proceedings.

Among the most significant innovations, the SIAC Investment Arbitration Rules impose strict timelines on the arbitral tribunal's appointment and challenge process, introduce recourse to an emergency arbitrator for emergency interim relief, provide for an early dismissal mechanism in case of manifestly unmeritorious claims or in case the tribunal manifestly lacks jurisdiction, and set out provisions that deal with third-party funding, which are nonexistent in many other rules. They also provide for specific rules regarding submissions by non-disputing parties, recognising that investment disputes often involve matters of public interest.

At the time of writing, the consultation process is in its final stages and the SIAC Investment Arbitration Rules are expected to enter into force at the end of 2016 or early 2017.

Conclusion

With the adoption of the 2016 SIAC Rules, SIAC successfully tackles the growing complexity of international commercial disputes and introduces innovative changes that confirm SIAC's role as one of the world's leading international arbitration centres.

The SIAC Rules now enable parties to resolve, where appropriate, all relevant disputes in a single arbitration, preventing the duplication of work and the risk of contradictory or conflicting results. SIAC has also made state-of-the-art changes to improve time efficiency and cost effectiveness of the arbitral process, in particular by refining and clarifying its emergency arbitrator and expedited procedures. By introducing an innovative manner to allow for the early dismissal of claims and defences, and soon a whole new set of Investment Arbitration Rules, SIAC positions itself not only as a leading arbitration institution but as a pioneer in the development of international arbitration practice.

Notes:

1 SIAC Annual Report 2015 available at www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/annual-report.
2 *Ibid*.
3 Philip Chong, Blake Primrose, 'Summary Judgment in International Arbitrations Seated in England', *Arbitration International* (2016), pp 1-17, at p 1.
4 The Stockholm Chamber of Commerce (the 'SCC') is following suit in the context of the revision of its arbitration rules by introducing a provision on early dismissal: see Article 39 of the 2017 draft SCC Rules. The early dismissal of claims and defences provision is inspired by investment arbitration practice, in particular by Article 41(5) of the ICSID Arbitration Rules. The Arbitration Rules of the Netherlands Arbitration Institute include provisions on 'summary arbitral proceedings: see Article 36 of the NAI Rules. These provisions, crafted after the so-called *kort geding* proceedings in Dutch civil procedure law, are closer to interim relief proceedings than provisions providing for the early dismissal of claims and defences.
5 Rule 29.1.
6 Rule 29.3.
7 Rule 29.4.
8 It has been reported that around one third of arbitration proceedings worldwide nowadays involve more than two parties: see Ruth Stackpool-Moore, 'Joinder and Consolidation—Examining Best Practice in the Swiss, HKIAC and ICC Rules', in *10 Years of Swiss Rules of International Arbitration*, ASA Special Series No 44, 2014, at p 16; Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', in *50 Years of the New York Convention: ICCA International Arbitration Conference 14 ICC Congress Series*, 2009, at p 343.
9 See e.g., Articles 7-10 of the 2012 Rules of International Arbitration of the International Chamber of Commerce (the 'ICC Rules') on multiple parties, multiple contracts, joinder and consolidation; Article 4 of the 2012 Swiss Rules of International Arbitration (the 'Swiss Rules') on consolidation and joinder; Article 22.1(viii) to (x) of the 2014 London Court of International Arbitration (the 'LCIA Rules') on joinder and consolidation; Articles 27-29 of the 2013 Hong Kong International Arbitration Centre (the 'HIAC Rules') on joinder, consolidation and multiple contracts; and Articles 18 and 19 of the 2015 China International Economic and Trade Arbitration Centre (the 'CIETAC Rules') on joinder and consolidation.
10 Rule 7.1.
11 Rule 7.1.
12 Rule 7.10.
13 Rule 7.8.
14 Rule 7.4.
15 Similarly for the Swiss Rules, see Philippe Bärtsch, Angelina Petti, *Swiss Rules of International Arbitration, Commentary* (2nd edn, 2013), ad Article 4, at para 48.
16 Rule 7.12.
17 Rule 8.1.
18 Rule 8.7.
19 Rule 8.1.
20 Rule 8.7.
21 *See* Article 10 of the ICC Rules; Article 28.1 of the HKIAC Rules; Article 22.1(x) of the LCIA Rules; Article 4(1) of the Swiss Rules.
22 Rule 6.1.
23 Rule 6.1.
24 Statistics available at www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics.
25 Schedule 1, Rule 3.
26 Schedule 1, Rule 9.
27 Schedule 1, Rule 8.
28 Rule 1 of Schedule 1 still provides that the party making a request for emergency relief must, at the same time as it files the application for emergency interim relief, send a copy of the application to all other parties. Presumably, this is a mandatory provision.

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