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January 25, 2017

International Arbitration Alert

New SIAC Investment Arbitration Rules

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The Singapore International Arbitration Centre ("SIAC") recently published a new set of Investment Arbitration Rules ("the Rules" or "the SIAC IA Rules"), which entered into force on 1 January 2017. The Rules – the first of their kind by a private arbitral institution – are a specialized set of arbitration rules catered to investment disputes involving States, State-controlled entities or intergovernmental organizations, whether arising out of a contract, treaty or statute. They incorporate a number of significant innovations that address several issues unique to investment arbitration, including concerns regarding inefficient procedures and a lack of transparency. The Rules also contain market-leading provisions that deal with emergency interim relief and third-party funding.

The Rules reflect SIAC's growing prominence as an arbitral institution and thought leader in the field. Like their commercial counterpart, the 2016 SIAC Rules for commercial arbitration, which are discussed further here, the Rules are the product of an extensive public consultation process in February 2016, with numerous comments received from law firms and in-house counsel based in more than 10 jurisdictions across Asia, Europe, the Middle East, Africa and North America.

Gary Born, President of the SIAC Court, chaired the SIAC Rules Revision Executive Committee, and was a member of the SIAC Court of Arbitration Subcommittee on Investment Arbitration. Senior Associate Jonathan Lim and Associate Dharshini Prasad, members of Wilmer Cutler Pickering Hale and Dorr's International Arbitration Practice Group, worked closely with the SIAC Secretariat and Subcommittee on Investment Arbitration in all aspects of the Rules' drafting process.

Key elements of the Rules are summarized below.

I. SCOPE OF APPLICATION

References to the Rules

The Rules apply by agreement of the parties. Rule 1.1 provides that where parties "have agreed to refer a dispute to arbitration in accordance with the SIAC Investment Arbitration Rules," such parties shall be deemed to have agreed that the arbitration shall be conducted pursuant to and administered by SIAC in accordance with the Rules.[1] Parties should note that

[1] SIAC IA Rules, Rule 1.1.

the Rules will need to be specifically referenced in order to apply; a mere reference to "SIAC" or "SIAC Rules" is unlikely to be sufficient and will trigger the application of the 2016 SIAC Rules for commercial arbitration instead.

In accordance with Rule 1.2, an agreement to refer a dispute to arbitration under the Rules may be expressed in a contract, treaty, statute or other instrument, or through an offer by a party in a contract, treaty, statute or other instrument, which is subsequently accepted by the other party by any means, including the commencement of arbitration.[2] The Rules further provide that it is open to the parties to agree to the application of the Rules at any time before or after a dispute has arisen, notwithstanding that parties may have previously consented, or that a party may have previously offered to consent, to arbitration in accordance with other arbitration rules.[3]

No Jurisdictional Criteria

The Rules provide that they may be agreed to and applied in any type of arbitration, and that such application will not be subject to additional jurisdictional criteria such as the requirement of the existence of qualifying "investor" or "investment."[4] However, the Rules also clarify that parties may nonetheless be bound by any jurisdictional criteria that may be contained in the underlying contract, treaty, statute or other instrument.[5]

This may be contrasted with Article 25(1) of the ICSID Convention, which limits ICSID's jurisdiction to disputes "arising directly out of an investment" and involving a "national of another Contracting State."[6] These jurisdictional criteria have been the subject of significant dispute, and have contributed to the increased cost and complexity of ICSID arbitration claims. The absence of such jurisdictional criteria in the Rules will be attractive to parties seeking an efficient mechanism for the resolution of investment disputes.

Immunity from Execution

Rule 1.3 provides that an agreement to refer a dispute to arbitration under the Rules constitutes a waiver by the State, State-owned entity or intergovernmental organization of any right to immunity from jurisdiction.[7] However, consistent with the position under international law, Rule 1.3 also recognizes that waiver of immunity from jurisdiction is distinct from immunity from execution, and that an agreement to refer a dispute to arbitration under the Rules therefore does not automatically impact immunity from execution.

II. EFFICIENT RESOLUTION OF INVESTMENT DISPUTES

The Rules include a number of provisions that streamline the investment arbitration process, drawing on SIAC's experience with resolving commercial arbitration disputes efficiently. These are intended to address perceptions by users that investment arbitrations take too long and cost too much. The Rules adopt many features of the 2016 SIAC Rules for commercial arbitration, including provisions that impose strict time limits and allow the early disposal of frivolous claims and defenses, with a number of adjustments to accommodate the interests of States, State-owned entities and intergovernmental organizations.

[2] SIAC IA Rules, Rule 1.2.
[3] SIAC IA Rules, Introduction (iii).
[4] SIAC IA Rules, Introduction (ii).
[5] SIAC IA Rules, Introduction (ii).
[6] ICSID Convention, Article 25(1).
[7] SIAC IA Rules, Rule 1.3.

Early Jurisdictional Objections

The Rules provide a mechanism for the determination of early jurisdictional objections. Under Rule 25.1, before an arbitral tribunal is constituted, parties may raise before the Registrar any objections regarding the existence or validity of the arbitration agreement, the applicability of the Rules, or the competence of the SIAC to administer the arbitration.[8] The Registrar shall determine whether such objection should be referred to the SIAC Court.[9] Rule 25.1 also provides that the SIAC Court shall make a *prima facie* ruling on the objections, without prejudice to the tribunal's power to rule on its own jurisdiction.

The Registrar's initial vetting of such objections, followed by the SIAC Court's *prima facie* determination on such objections, mirrors Rule 28.1 of the 2016 SIAC Rules for commercial arbitrations. It is also similar in function to the ICSID Secretary-General's power under Article 36(3) of the ICSID Convention to refuse to register a Request for Arbitration if it is "manifestly outside the jurisdiction of the Centre," except that under Rule 25.1, the Registrar shall decide whether to refer objections to the SIAC Court in response to a party's objection, rather than on its own volition. It is likely that only obvious objections will be upheld at this stage.

The Rules also impose time limits for parties to make jurisdictional objections. Rule 25.3(a) provides that any objection that the arbitral tribunal does not have jurisdiction shall be raised no later than in a Counter-Memorial or in a Rejoinder, or at any equivalent stage of the proceedings as determined by the arbitral tribunal.[10] Rule 25.3(b) provides that a party shall raise any objection that the tribunal is exceeding the scope of its jurisdiction within 28 days after the matter alleged to be beyond the scope of the tribunal's jurisdiction arises during the arbitration.

Early Dismissal of Claims and Defenses

The Rules also incorporate an early dismissal procedure that will empower tribunals to filter out manifestly unmeritorious claims or defenses under a number of different grounds, thus enhancing the efficient resolution of investment disputes under the Rules. At present, only ICSID, SIAC and the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") offer such a claim-filtering procedure.

Rule 26 provides for the early dismissal of a claim or defense on grounds that it is: (i) manifestly without legal merit; (ii) manifestly outside the jurisdiction of the arbitral tribunal; or (iii) manifestly inadmissible.[11] This provision is modelled after Rule 41(5) of the ICSID Arbitration Rules which allows the early dismissal of a claim if it is "manifestly without legal merit." However, Rule 26 provides more clarity by setting out additional grounds relating to the manifest lack of admissibility or jurisdiction, which are consistent with ICSID jurisprudence on the interpretation of Rule 41(5) of the ICSID Arbitration Rules, but which have yet to be expressly codified in those rules. Furthermore, the SIAC IA Rules permit early dismissal of both claims and defenses, whereas ICSID Rule 41(5) only permits the former. Nonetheless, an arbitral tribunal constituted under the SIAC IA Rules will likely be able to take into consideration existing ICSID jurisprudence on ICSID Rule 41(5).

An application under Rule 26 can be made at any time after the constitution of the arbitral tribunal. An initial proposal for requiring early dismissal applications to be made within a 30-day timeframe, which was included in the draft version of the Rules that was released for public consultation on 1 February 2016, was not eventually adopted in the rules. The absence of a

[8] SIAC IA Rules, Rule 25.1.
[9] SIAC IA Rules, Rule 25.1.
[10] SIAC IA Rules, Rule 25.3.
[11] SIAC IA Rules, Rule 26.1.

time limit for early dismissal applications expands the potential application of Rule 26, and makes it a flexible and powerful tool for arbitral tribunals to filter out frivolous or obviously unmeritorious claims and defenses.

To prevent any potential abuse of the early dismissal procedure under Rule 26, Rule 26.3 provides that the arbitral tribunal has complete discretion in deciding whether to allow a Rule 26 application to proceed.[12] This allows the tribunal to consider, among other things, the timing of the application and whether it is being improperly used to derail or disrupt proceedings. Should the arbitral tribunal decide to hear an early dismissal application, Rule 26.4 provides that it must render is decision within 90 days of the date of application, and that such decision may be in summary form.[13] In any event, the arbitral tribunal may take into account any abuse of Rule 26 in allocating costs between the parties.[14]

Rule 26 is substantially similar to Rule 29 of the 2016 SIAC Rules for commercial arbitration, except that it provides for the early dismissal of claims or defenses on the additional ground that such claims or defenses are "manifestly inadmissible"; and requires arbitral tribunals to make a decision on the early dismissal, if the application is allowed to proceed, within 90 days rather than 60 days from the date of application.

Memorial-Style Written Submissions

Consistent with international best practices in investment arbitration, Rule 17 provides for a default system of memorial-style submissions whereby parties are required to submit comprehensive written submissions in support of their case, in the form of Memorials or Counter-Memorials.[15] Parties may also seek leave under Rule 17.4 to make a further round of submissions, by way of either a Reply or Rejoinder, although this is not provided for as a matter of right.[16] The Memorial or Counter-Memorial must include a statement of facts, legal arguments and authorities and supporting factual evidence, such as witness statements and expert reports.[17] This is a departure from the 2016 SIAC Rules for commercial arbitration, which provide for a pleading-style of written submissions and does not require parties to submit witness statements and expert reports with their pleadings.[18]

A memorial-style approach to written submissions is consistent with the written procedure in ICSID arbitrations under ICSID Rule 31 and has several advantages, particularly in the investment arbitration context. It can clarify the issues in dispute and create incentives for settlement, and has the potential to significantly reduce the length and cost of arbitration proceedings.

Time Limits for Closure of Proceedings and Awards

Under Rule 30.1, an arbitral tribunal must declare the proceedings closed as promptly as possible, after consulting with the parties and upon being satisfied that there are no further evidence or submissions to be presented.[19] This is similar to the 2016 SIAC Rules for commercial arbitration.[20] After proceedings are closed, the arbitral tribunal must submit its draft

[12] SIAC IA Rules, Rule 26.3.
[13] SIAC IA Rules, Rule 26.4.
[14] *See* SIAC IA Rules, Rule 35.
[15] SIAC IA Rules, Rule 17.
[16] SIAC IA Rules, Rule 17.4.
[17] SIAC IA Rules, Rule 17.2 and Rule 17.3.
[18] 2016 SIAC Rules, Rule 20.
[19] SIAC IA Rules, Rule 30.1.
[20] 2016 SIAC Rules, Rule 32.1.

award to SIAC for scrutiny within 90 days.[21] This time limit, which can only be extended by the parties or the Registrar, is twice as long as the 45-day limit under the SIAC 2016 Rules for commercial arbitration and the draft Rules that were submitted for public consultation. Neither the PCA nor the ICSID Rules provide any time limits for the submissions of awards. The strict timeframe under the Rules is an important distinguishing feature, and will be crucial in helping to ensure the expeditious resolution of the dispute.

III. CONSTITUTION OF THE ARBITRAL TRIBUNAL

The constitution of the arbitral tribunal is a key procedural step for parties to an arbitration, because the composition of the arbitral tribunal can significantly impact how a dispute is resolved. The importance of the tribunal's composition can be amplified in investment disputes, which may involve complex legal issues and raise significant public policy questions. The appointment of an arbitrator is also notoriously vulnerable to delay tactics in the context of ICSID investment arbitration.[22] The Rules seek to maximize party participation in the appointment process while enhancing the efficiency of the appointment process through strict timelines and a streamlined process to determine arbitrator challenges.

Number of Arbitrators and Time Limits for Appointments

The Rules provide that the default number of arbitrators is three arbitrators, unless the parties agree otherwise or the SIAC Court considers that a sole arbitrator is appropriate.[23] This is similar to the default rule for a three-member arbitral tribunal in Article 37(2)(b) of the ICSID Convention and Article 7 of the PCA Rules.[24] The default three-member panel reflects that investment disputes may sometimes involve difficult or complex issues, and that direct party involvement in selection of the tribunal members is desirable. In contrast, under the 2016 SIAC Rules for commercial arbitration, the default number of arbitrators is one unless the parties otherwise agree or the complexity of the dispute warrants a three-member panel.[25]

Recognizing that certain complexities involving States, State-controlled entities and intergovernmental organizations may impact their ability to act with the same speed as private commercial parties, the Rules provide for longer timelines than the 2016 SIAC Rules for commercial arbitration, by which parties have to make or agree on appointments before the SIAC Court steps in. Under Rule 6.2, the parties are afforded 42 days to reach agreement on a sole arbitrator, as opposed to 21 days under the 2016 SIAC Rules for commercial arbitration.[26] Under Rule 7.2, in the context of a three-member panel, the parties are afforded 35 days from the date of receipt of the other party's nomination to nominate an arbitrator, as opposed to 14 days under the 2016 SIAC Rules for commercial arbitration.[27]

List Procedure for SIAC Court Appointments

Under the Rules, the SIAC Court appoints an arbitrator in a number of different scenarios: (a) where the parties are unable to agree on a sole arbitrator; (b) where the parties have not agreed on a procedure for appointing the presiding arbitrator or if such agreed procedure does not result in a nomination within an agreed period; or (c) where there are more than two parties to

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[21] SIAC IA Rules, Rule 30.3.
[22] For example, of all the newly registered ICSID cases in 2012, it took an average of 220 days to constitute a tribunal, with the fastest taking 91, and the slowest, 546 days. *See* A Raviv, *Achieving a Faster ICISD*, in J. Kalicki and A. Joubin-Bret (eds.), RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM (Brill Nijhoff, 2015), at p. 664.
[23] SIAC IA Rules, Rule 5.2.
[24] ICSID Convention, Article 37(2)(b); PCA Rules, Article 7.
[25] 2016 SIAC Rules, Rule 9.1.
[26] SIAC IA Rules, Rule 6.2; 2016 SIAC Rules, Rule 10.2.
[27] SIAC IA Rules, Rule 7.2; 2016 SIAC Rules, Rule 11.2.

the arbitration and the parties fail to jointly nominate the sole arbitrator, their co-arbitrator or the presiding arbitrator.[28] Rule 8 provides that, in making such appointments, the Court shall use a list procedure, unless parties otherwise agree that the list procedure shall not be used or the Court determines that the list procedure is not appropriate.[29]

Modelled after Article 8 of the PCA Arbitration Rules, the list procedure balances the need for efficiency with party autonomy, by maximizing the parties' opportunity to participate in the constitution of the tribunal even if they cannot agree on specific candidates. A default list procedure is not found in the ICSID, SCC, ICC or LCIA Rules.

The list procedure is described in detail in Rule 8. The SIAC Court begins by providing the parties with identical lists of five candidates, taking into account the circumstances of the case and the parties' views, if any, on the qualifications of the arbitrators.[30] Furthermore, in preparing its list, and where the parties are of different nationalities, the SIAC Court should ensure that any proposed sole or presiding arbitrator does not have the same nationality of either party, unless the parties agree otherwise.[31] Within 15 days of receiving the list, the parties are entitled to strike any names suggested and list the remaining candidates in order of preference.[32] The SIAC Court must make its appointment based on the lists submitted by the parties.[33] If for any reason an appointment cannot be made pursuant to the list procedure, for example, through non-participation of a party, the SIAC Court retains the discretion to make appointments independently of the parties, including by appointing an arbitrator from outside the list communicated to the parties.[34]

Multi-Party Appointments

The appointment of a three-member arbitral tribunal (or any larger odd number) in a multi-party dispute raises unique fairness concerns. In particular, where an appointing authority makes an appointment for one side that has failed to agree on its appointed arbitrator, in circumstances where the other side has either appointed or agreed to appoint an arbitrator, it might be argued that there is inequality because only one side has been able to directly appoint its arbitrator without the intervention of the appointing authority. The French Court of Cassation set aside an award on this very basis in the notorious *Dutco* case.[35]

To address this, Rule 9.2 requires the Claimants and Respondents to jointly make their respective nomination within 42 days.[36] In the event either side fails to make a joint nomination, the SIAC Court will appoint all the arbitrators on the basis of the list procedure in Rule 28, notwithstanding that one of the sides successfully made a joint nomination.[37] This is similar to Rule 12.2 of the 2016 SIAC Rules for commercial arbitration.

Challenges to Arbitrators

The Rules adopt substantially the same procedure as the 2016 SIAC Rules for commercial arbitration on the challenge of arbitrators. This procedure differs from the challenge procedure

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[28] SIAC IA Rules, Rules 6.2, 7.3, 9.1-2.
[29] *See generally* SIAC IA Rules, Rule 8.
[30] SIAC IA Rules, Rule 8(a).
[31] SIAC IA Rules, Rule 5.7.
[32] SIAC IA Rules, para. 8(c).
[33] SIAC IA Rules, Rule 8(d).
[34] SIAC IA Rules, Rule 8(e).
[35] *Siemens AG and BKMI Industrieanlagen GmbH v Dutco Construction Co*, French Cour de Cassation decision of January 7, 1992, Revue de l' arbitrage 470 (1992).
[36] SIAC IA Rules, Rule 9.2.
[37] SIAC IA Rules, Rule 9.2.

under ICSID arbitration in several important ways that are aimed at minimizing the risk of challenges being used as a diversionary or delay tactic.

First, Rule 11 provides that an arbitrator may be challenged if there are justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess the qualifications agreed on by the parties.[38] The adoption of the "justifiable doubts" standard – which is found in a majority of institutional arbitration rules, and has been interpreted by arbitral tribunals, national courts and instruments such as the IBA Guidelines on Conflicts of Interest – will provide a degree of certainty to parties and arbitrators.

Second, under Rule 12.4 of the Rules, a challenge does not operate as an automatic stay on proceedings, unless so ordered by the Registrar.[39] This significantly reduces the incentive for parties to launch challenges in an attempt to derail proceedings.

Third, Rule 13 provides that if either the non-challenging party or the challenged arbitrator fail to accept the challenge, the challenge will be decided by the SIAC Court, which is required to provide a reasoned decision, unless otherwise agreed by the parties.[40] This means that the tribunal can focus on resolving the dispute between the parties, minimizing the distraction caused by a challenge, which may proceed in parallel.

The Rules also set strict timelines for arbitrator challenges, although these timelines are longer than those under the 2016 SIAC Rules for commercial arbitration. A party must raise a challenge within 28 days of the party becoming aware of the circumstances giving rise to the challenge, as opposed to 14 days in 2016 SIAC Rules for commercial arbitration.[41] The SIAC Court rules on the challenge if it is not resolved within 21 days of the challenge being filed, as opposed to 7 days in the 2016 SIAC Rules for commercial arbitration.[42]

IV. ENHANCED TRANSPARENCY OF PROCEEDINGS

Confidentiality is a hallmark of international arbitration, and the Rules provide that all matters relating to arbitral proceedings and the award are confidential, subject to defined exceptions.[43] However, in the context of investment disputes, which often implicate issues of public policy and matters of public interest, parties' expectations of confidentiality will need to be balanced against the need for the arbitral tribunal to consider a diversity of viewpoints and desires by some users for greater public participation and transparency. In line with these desires, the Rules introduce a number of provisions that allow the publication of information on the dispute, and submissions by non-disputing parties and non-disputing contracting parties.

Publication of Information Relating to the Dispute

Rule 38.1 allows SIAC to publish information on proceedings conducted under the Rules.[44] To allow the publication of information about proceedings, the Rules do not provide that the fact and existence of the proceedings is confidential, unlike Rule 39.3 of the 2016 SIAC Rules for commercial arbitration.

Rule 38.2 defines what information SIAC may publish under the Rules, without needing further consent from the parties, namely: the nationality of the parties; the identity and nationality of the

[38] SIAC IA Rules, Rule 11.
[39] SIAC IA Rules, Rule 12.4.
[40] SIAC IA Rules, Rule 13.
[41] SIAC IA Rules, Rule 12.1; 2016 SIAC Rules, Rule 15.1.
[42] SIAC IA Rules, Rule 13.1; 2016 SIAC Rules, Rule 16.1.
[43] SIAC IA Rules, Rule 37.
[44] SIAC IA Rules, Rule 38.1.

tribunal; the treaty, statute or other instrument under which the arbitration has been commenced; the date of commencement of the proceedings; whether the proceedings are on-going or have been terminated; and redacted excerpts of the tribunal's and SIAC Court's reasoning.[45] Under Rule 38.3, if parties so agree, SIAC may also publish further information on: the identity of the parties; the contract under which the arbitration has been commenced; the identity of the parties' counsel; the sector to which the dispute relates; the value of the dispute; details of the procedural history; and any orders or awards rendered.[46]

Participation by Non-Disputing Third Parties

Arbitral tribunals and commentators have increasingly recognized that the participation of non-disputing third parties in proceedings may be beneficial and warranted in particular cases, and a number of investment treaties and arbitral rules now have provisions on non-disputing party submissions. In line with this trend, and the desires of users, the Rules introduce provisions that allow non-disputing parties to participate in the arbitration by filing written submissions, and where parties so request or the arbitral tribunal so decides, attending a hearing to elaborate on or be examined on its written submissions.

Rule 29.1 permits submissions by non-disputing contracting parties on questions of treaty interpretation that are directly relevant to the dispute.[47] Rule 1.5 defines a non-disputing contracting party as a party to a treaty pursuant to which the dispute has been referred to arbitration in accordance with the Rules and that is not a party to the arbitration.[48] Such parties may make submissions within the scope of Rule 29.1, without the leave of the tribunal or the consent of the parties.[49] Under Rule 29.1, the arbitral tribunal also may, after considering the views of the parties and having regard to the circumstances of the case, invite written submissions from a non-disputing contracting party.[50]

Rule 29.2 provides for non-disputing parties, whether they are contracting parties or not, to apply to the arbitral tribunal to make submissions on matters within the scope of the dispute.[51] Submissions under Rule 29.2 are not limited to questions of treaty interpretation that are directly relevant to the dispute. In deciding whether to allow an application under Rule 29.2, the arbitral tribunal must consider the views of the parties, as well as a number of factors.[52] These factors include the extent to which: the non-disputing party's submissions would assist the arbitral tribunal in the determination of a factual or legal issue by "bringing perspective, particular knowledge or insight that is different" from that of the parties; the non-disputing party's submissions would only address a matter within the scope of the dispute; the non-disputing party has a "sufficient interest" in the arbitral proceedings and/or related proceedings; and allowing the written submissions would violate the parties' right to confidentiality.[53]

Where submissions by non-disputing parties are allowed under Rule 29.2, the arbitral tribunal may determine the form and content of such submissions, and the parties shall have the right to respond.[54] The arbitral tribunal may fix time periods for communicating such submissions, and decide what further written submissions may be required.[55] It may also, if parties so request or the arbitral tribunal so decides, hold a hearing for the non-disputing party to elaborate on or be

[45] SIAC IA Rules, Rule 38.2.
[46] SIAC IA Rules, Rule 38.3.
[47] SIAC IA Rules, Rule 29.1.
[48] SIAC IA Rules, Rule 1.5.
[49] SIAC IA Rules, Rule 29.1.
[50] SIAC IA Rules, Rule 29.1.
[51] SIAC IA Rules, Rule 29.2.
[52] SIAC IA Rules, Rule 29.3.
[53] SIAC IA Rules, Rule 29.3.
[54] SIAC IA Rules, Rule 29.5.
[55] SIAC IA Rules, Rule 29.6.

examined on its submissions.[56] The provisions on confidentiality under Rule 37 bind any third parties making submissions under Rule 29.[57]

V. OTHER KEY ASPECTS OF THE RULES

Third-Party Funding

SIAC is the first major arbitral institution to address the issue of third-party funding, an increasingly complex and controversial area in investment arbitration. The Rules contain two notable provisions on third-party funding.

First, Rule 24.l expressly empowers the arbitral tribunal to order the disclosure of the existence of a third-party funding arrangement and/or the identity of the third-party funder.[58] It also empowers the arbitral tribunal to order, where appropriate, disclosure of the funder's interest in the outcome of the proceedings and whether the funder has committed to undertake adverse costs liability.[59] Although some investment tribunals have relied on their inherent powers to make similar orders in particular cases, especially where there is a potential conflict of interest,[60] the position is by no means settled. Rule 24.l provides further clarity on whether an arbitral tribunal has the power to order disclosure in proceedings under the Rules, although the question of whether to exercise such powers under Rule 24.l is a matter for the arbitral tribunal's discretion. SIAC's approach is consistent with the findings of the 2015 Queen Mary Survey on international arbitration where parties indicated widespread support for disclosure of information on the use of third- party funding (76%) and the identity of the funder (63%).[61]

Second, Rule 33.1 empowers the tribunal to take into account any third-party funding arrangements in apportioning the costs of the arbitration. In light of Rule 24.1, the tribunal may also have information on whether the third-party funder has obtained after-the-event insurance for adverse costs liability, and can consider, on a case-by-case basis, the nature and extent of the third-party funder's involvement in the proceedings.

The Rules do not include a provision from the public consultation draft version of the Rules which would have permitted the arbitral tribunal to make adverse costs orders against third-party funders "where appropriate."[62] Such a power raises complex and unsettled questions regarding an arbitral tribunal's jurisdiction over a third-party funder, and its ability to make costs orders against such funders. This is an area of law that is still developing, and it remains to be seen whether SIAC will address this in future editions of the Rules.

Urgent Interim Relief

Many commercial arbitration rules, including those promulgated by SIAC, set out emergency arbitration mechanisms that permit a party to seek interim relief prior to the constitution of the tribunal. Such awards are typically rendered in expedited fashion (within 14 days under the 2016 SIAC Rules for commercial arbitration). However, save for the SCC Rules, emergency arbitration is not a familiar feature of investment disputes. The ICSID and PCA Rules do not

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[56] SIAC IA Rules, Rule 29.7.
[57] SIAC IA Rules, Rule 37.1 and Rule 37.2.
[58] SIAC IA Rules, Rule 24.l.
[59] SIAC IA Rules, Rule 24.l.
[60] *See Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, Procedural Order No. 3, ICSID Case No. ARB/12/6* and *South American Silver Limited v. The Plurinational State of Bolivia*, *Procedural Order No. 10, PCA case No. 2013-15.*
[61] Queen Mary University of London and White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, available at http://www.arbitration.qmul.ac.uk/research/2015/.
[62] Draft SIAC IA Rules, Rule 34.

contain emergency arbitrator provisions. There are several reasons that may have contributed to the relative unpopularity of emergency arbitrator provisions in the investment arbitration context. For example, the compressed timeframes for applications, responses and decision-making in emergency arbitrator procedures may be unsuitable for investment arbitrations with complex jurisdictional questions. There is also a risk that such emergency arbitrator procedures may conflict with mandatory cooling-off periods in investment treaties.

The Rules provide that the emergency arbitrator provisions set out in Schedule 1 will apply where parties have expressly agreed that they will apply.[63] Rather than take a categorical stance on the suitability of emergency arbitrator provisions to investment disputes, the Rules provide for an "opt-in" system whereby emergency arbitrator provisions will be available only where the parties have expressly agreed to it. Emergency interim relief is therefore not available in all cases under the Rules; instead, States have the discretion to determine what protections, if any, they wish to confer on investors, in the form of the right to obtain expedited interim relief, and under what circumstances or under which treaties.

VI. CONCLUSION

The SIAC Investment Arbitration Rules are designed as a hybrid between modern commercial arbitration rules and specialized arbitration rules used for investment disputes. They are a genuine innovation and address efficiency and transparency concerns raised by users of investment arbitration, in addition to topical issues such as emergency interim relief and third-party funding. It remains to be seen how States will view the Rules, and whether they will include the Rules in bilateral and multilateral treaties currently under negotiation. Nonetheless, the Rules cement SIAC's growing importance as a global arbitral institution and market leader, and will offer an efficient and reliable alternative for investors, States, State-controlled entities or intergovernmental organizations to arbitrations administered by other established centers for the resolution of investment disputes, such as ICSID or the PCA.

FOR MORE INFORMATION ON THIS OR OTHER INTERNATIONAL ARBITRATION MATTERS, CONTACT:

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[63] SIAC IA Rules, Rule 27.4.