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SIAC Investment Arbitration Rules

SIAC Investment Arbitration Rules (2017)—an overview

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An introduction to the SIAC Investment Arbitration Rules (2017)

On 1 January 2017, the Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules (SIAC IA Rules) entered into force, applying by agreement to investment arbitrations commenced on or after that date.

References:

SIAC IA Rules 2017

While the SIAC IA Rules are specially designed for use in investment disputes involving states, state-controlled entities or intergovernmental organisations, they adopt features of SIAC rules for international commercial arbitration to simplify and streamline the investment arbitration process. The rules aim to address a number of concerns raised by users of investment arbitration, including perceptions that proceedings take too long, or that the arbitration process lacks transparency. The SIAC IA Rules also include a number of innovative provisions that address topical issues such as third-party funding and emergency interim relief.

The SIAC IA Rules are the product of an extensive public consultation process that began on 1 February 2016, when SIAC released a draft version of the SIAC IA Rules for comment—see News Analysis: Draft SIAC Investment Arbitration Rules 2016—an overview. SIAC received and considered numerous comments from law firms and in-house counsel based in jurisdictions across Africa, Asia, Europe, the Middle East and North America. The draft rules were revised in a number of respects on the basis of the comments received before being finalised in the form of the SIAC IA Rules.

In this Practice Note, we discuss the specific aspects of the SIAC IA Rules and their significance. Where appropriate, comparisons are made to the draft version of the SIAC IA Rules and other rules specially promulgated for, or are used widely in, investment arbitration, such as those by the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

References:

PCA Arbitration Rules 2012

ICSID Convention and Rules

SCC Rules 2017

Scope of application

The SIAC IA Rules apply where parties 'have agreed to refer a dispute to arbitration in accordance with the SIAC Investment Arbitration Rules' (SIAC IA Rules, Rule 1.1). Rule 1.2 provides that such agreement 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 (SIAC IA Rules, Rule 1.2). The SIAC IA Rules are, therefore, intended to apply not only in investment treaty disputes, but also in a variety of other types of disputes that may involve states, state-controlled entities or intergovernmental organisations, including disputes arising out of commercial contracts.

Significantly, the parties' agreement alone is sufficient to trigger application of the SIAC IA Rules. The Introduction to the SIAC IA Rules clarifies that such application will not be subject to additional jurisdictional criteria such as the requirement of the existence of qualifying 'investor' or 'investment'—unless such criteria is contained in the underlying contract, treaty, statute or other instrument (SIAC IA Rules, Introduction (ii)). This clarifying language did not appear in the draft SIAC IA Rules, and was introduced to avoid any arguments about the applicability of such criteria.

This approach simplifies the question of whether the SIAC IA Rules apply and should reduce the number of jurisdictional determinations to be made by the tribunal. In contrast, under Art 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' (ICSID Convention, Art 25(1)), parties frequently contest whether such criteria has been satisfied. This often contributes to the increased cost and complexity of ICSID arbitration proceedings.

References:

ICSID Convention and Rules

The PCA and SCC Rules do not impose additional jurisdictional criteria; however, unlike the SIAC IA Rules, there is no express clarification that those rules do not impose such requirements. Arguably, the approach under the SIAC IA Rules preempts a number of potentially time-consuming jurisdictional contests, saving time and costs for parties.

Structure of the SIAC IA Rules

The SIAC IA Rules are structured as follows:

- Rule 1—Scope of application and interpretation
- Rule 2—Notice and calculation of periods of time
- Rule 3—The Notice of Arbitration
- Rule 4—The Response to the Notice of Arbitration
- Rules 5–10—Appointment of arbitrators and qualifications of arbitrators
- Rules 11–15—Challenge of arbitrators and replacement
- Rule 16—Conduct of the proceedings
- Rule 17—Submissions
- Rule 18—Seat of the arbitration
- Rule 19—Language
- Rule 20—Party representation
- Rule 21—Hearings
- Rule 22—Witnesses
- Rule 23—Tribunal appointed experts
- Rule 24—Additional powers of tribunal
- Rule 25—Jurisdiction of the tribunal
- Rule 26—Early dismissal of claims and defences
- Rule 27—Interim and emergency relief
- Rule 28—Applicable law, amiable compositeur and ex aequo et bono
- Rule 29—Third-party submissions
- Rules 30–31—The award
- Rules 32–35—Fees, deposits and costs
- Rule 36—Exclusion of liability
- Rule 37—Confidentiality
- Rule 38—Publication
- Rule 39—Decisions of the President, the Court and the Registrar
- Rule 40—General
- Schedule 1—Emergency arbitrator
- Schedule of fees

Procedural steps of an arbitration under the SIAC IA Rules

The procedural steps of an arbitration under the SIAC IA Rules are broadly similar to proceedings conducted under SIAC's commercial arbitration rules and those of other major institutional rules.

Notice of Arbitration, response and other preliminary matters

To commence proceedings, the claimant is required to serve a Notice of Arbitration on the respondent and the Registrar (SIAC IA Rules, Rule 3.3) and pay the requisite filing fee (S$2140 for Singaporean parties and S$2000 for non-Singaporean parties) (Schedule of Fees).

The Notice of Arbitration must, among other things:

- identify the parties to the arbitration and their counsel (if known)
- provide a brief summary of the facts giving rise to the dispute and the reliefs claimed
- identify and attach a copy of the arbitration agreement, and
- identify and attach a copy of the contract, treaty, statute or other instrument giving rise to the dispute (SIAC IA Rules, Rule 3.1)

Within 35 days, the respondent must serve its Response on the claimant and the Registrar. The Response must, among other things:

- provide a brief summary of the facts giving rise to the dispute and the reliefs claimed (including any counterclaims), and
- a response to the claims and allegations raised in the notice of arbitration (SIAC IA Rules, Rule 4.1)

Where a counterclaim is raised, the respondent must pay the requisite filing fee (SIAC IA Rules, Rule 4.1(e)).

After the Notice and Response have been served, the Registrar sets the amount of deposits to be paid by the parties towards the costs of the arbitration. The Registrar may revise the amount of deposits during the course of the proceedings (SIAC IA Rules, Rule 32.4).

The Registrar also determines if any jurisdictional objections raised in the response should be referred to the SIAC Court, which shall in turn decide the objections on a *prima facie* basis (SIAC IA Rules, Rule 25.1). Dismissed jurisdictional objections may be raised again before the tribunal that will review the objections *de novo*.

Tribunal constitution

The process of tribunal constitution begins with the Notice of Arbitration and Response. The claimant must propose a sole arbitrator, or, in the case of a three-member tribunal, nominate its arbitrator in its Notice of Arbitration (SIAC IA Rules, Rule 3.1(i)).

In its Response, the respondent must in turn respond to any proposals by the claimant for a sole arbitrator, or nominate its arbitrator, in the case of a three-member tribunal (SIAC IA Rules, Rule 4.1(d)).

If the parties reach agreement on a sole arbitrator, the Registrar determines whether to confirm the appointment (which usually occurs).

Where the SIAC Court is required to appoint any arbitrator—either the presiding arbitrator or any arbitrators the parties are unable to reach agreement on—the SIAC Court adopts a list-procedure in making the appointment (SIAC IA Rules, Rule 8) (discussed below).

Conduct of proceedings

Once constituted, the tribunal typically convenes an initial case management conference with the parties to discuss the procedural timetable and any outstanding procedural issues (SIAC IA Rules, Rule 16.3). The procedural timetable sets the framework for the arbitration by establishing the timing and sequence of submissions, expert and witness statements, any document production phase, any pre and post-hearing submissions and the dates for the evidentiary hearing. A party that wishes to propose bifurcated proceedings (for instance, for the preliminary determination of jurisdictional issues before the merits), is advised to make its bifurcation application before the tribunal at the earliest date, ideally before the procedural timetable is finalised. During the course of proceedings, parties may also make other preliminary applications before the tribunal including applications for the early dismissal of claims and defences (discussed below), security for costs or urgent interim relief (discussed below).

Award

After the parties have had the opportunity to present their case (usually at the end of the evidentiary hearing), the tribunal will declare the proceedings closed and commence deliberations (SIAC IA Rules, Rule 30.1). The rules require the tribunal to submit a draft of its award to the Registrar within 90 days of the close of proceedings, although the Registrar or the parties may extend this date (SIAC IA Rules, Rule 30.3). The Registrar scrutinises the award to propose any modifications as to the form (but not the substance) of the award.

Once the tribunal submits a finalised award to the Registrar, the Registrar will transmit certified copies to the parties upon full settlement of the costs of the arbitration (ie tribunal fees, SIAC's administrative fees and costs and the fees of any tribunal-appointed expert) (SIAC IA Rules, Rule 30.8). The parties have 30 days from receipt of the award to request any corrections, interpretations or additional awards (SIAC IA Rules, Rule 31).

Specific features of the SIAC IA Rules

The following sections analyse specific aspects of the SIAC IA Rules that seek to improve efficiency and transparency and address third-party funding in investment arbitration.

Optimised efficiency for investment disputes

Much ink has been spilled about the need to expedite investment arbitration proceedings, particularly in ICSID arbitrations (see, eg, A Raviv, *A Few Steps to a Faster ICSID* (2013) Vol. 8(5) Global Arb Rev 23). According to a 2014 study, investment arbitrations take an average of three years and eight months to complete, with average party costs nearing $US 4.5m. A review of 231 ICSID awards in 2015 suggests that the average duration of proceedings from case registration to award is slightly higher at 1381 days, ie three years and ten months (J Commission, *How Long is Too Long To Wait For An Award?* (2016) Global Arb Rev).

References:

M. Hodgson, Investment Treaty Arbitration: How much does it cost? How long does it take? (2014)

The SIAC IA Rules tackle this issue of delay head-on, and include several provisions that speed up and streamline proceedings. However, the Rules aim to do so without sacrificing due process or quality, and accommodate the fact that states, state-controlled entities and intergovernmental organisations may not necessarily be able to act with the same agility as private commercial parties. These provisions are described in further detail below.

Constitution of the tribunal

The SIAC IA Rules incorporate strict timelines for parties to appoint or agree on arbitrators, failing which the SIAC Court will make the relevant appointment(s).

Rule 6.2 provides that parties have 42 days to reach agreement on a sole arbitrator (SIAC IA Rules, Rule 6.2). Rule 7.2 provides that parties have 35 days from the date of receipt of the other party's nomination to nominate an arbitrator (SIAC IA Rules, Rule 7.2). These timelines are longer than the 21 and 14 days respectively that are provided for these steps under the 2016 SIAC Rules for commercial arbitration (2016 SIAC Rules, Rules 10.2 and 11.2), and the 28 days provided under the draft SIAC IA Rules (draft SIAC IA Rules, Rules 6.2 and 7.2).

The extended timelines in the SIAC IA Rules account for the fact that states, state-controlled entities and intergovernmental organisations may have internal procedures that make it more difficult to comply with the tight timelines typically adopted for commercial arbitrations.

The PCA Rules include similar timelines to the SIAC IA Rules, and provide 30 days each for:

- parties to appoint a sole arbitrator from the date of first proposal of a candidate, and
- in the case of a three-member panel, for a party to nominate its party-appointed arbitrator from the date of recipient of the other party's appointment (PCA Rules, Art 9(2))

These timelines are slightly shorter than those in the SIAC IA Rules (ie 42 and 35 days respectively).

In contrast, the ICSID Convention does not impose any strict timelines for the constitution of the tribunal. Article 37(1) of the Convention only calls for the tribunal to be constituted 'as soon as possible' after registration of a request for arbitration (which could itself take up to a month) (A Raviv, *A Few Steps to a Faster ICSID* (2013) Vol. 8(5) Global Arb Rev 23 at p 23). If the tribunal is not constituted within 90 days, either party may request the Secretary-General to make the appointment(s). According to a 2014 study, in practice, it takes on average seven months to constitute an ICSID tribunal after case registration (A Raviv, *A Few Steps to a Faster ICSID* (2013) Vol. 8(5) Global Arb Rev 23 at p 23).

The SIAC IA Rules also include a number of provisions that enhance the parties' participation in constituting the tribunal. Where the SIAC Court appoints an arbitrator (SIAC IA Rules, Rules 6.2, 7.3, 9.1–2), Rule 8 provides that the Court shall use a list procedure in making the appointment, unless the parties otherwise agree or the Court determines that the list procedure is not appropriate (see generally, SIAC IA Rules, Rule 8).

Under the list procedure, the SIAC Court provides the parties with identical lists of five candidates, and the parties can, within 15 days of receiving the list, strike any names suggested and list the remaining candidates in order of preference. The SIAC Court must make its appointment based on the lists submitted by the parties, unless an appointment cannot be made pursuant to the list procedure, eg where one party does not participate in the procedure (SIAC IA Rules, Rule 8(d)–(e)).

This list procedure gives parties the opportunity to participate in the constitution of the tribunal even if they cannot agree on specific candidates, while the strict timelines under Rule 8 ensure that the procedure will be used efficiently.

The list procedure, which was also contained in the draft SIAC IA Rules (draft SIAC IA Rules, Rules 7.3 and 8), is modeled after the PCA Rules (PCA Rules, Art 8(2)). It is also adopted in practice in ICSID arbitrations, although this practice is not codified in either the ICSID Convention or the ICSID Rules. Most commercial arbitration rules, including SIAC's, do not contain an equivalent process.

References:

D Caron, ICSID in the Twenty-First Century: An Interview with Meg Kinnear: Introductory Remarks (2010) 104 Am. Soc. Intl. Law 413 at p 422

Arbitrator challenges

The SIAC IA Rules set out a procedure for challenges to arbitrators that is aimed at minimising delays and unnecessary diversion of resources from the main proceedings.

Rule 11 provides that parties may challenge an arbitrator 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 (SIAC IA Rules, Rule 11).

Under Rule 12.4, a challenge does not operate as an automatic suspension of proceedings, unless the Registrar so orders (SIAC IA Rules, Rule 12.4). This minimises any delay or disruption to the main proceedings that may be caused by a tactical challenge. Under Rule 13, the SIAC Court (not the tribunal) decides the challenge and is required to provide a reasoned decision, unless the non-challenging party or the challenged arbitrator accept the challenge, or otherwise agreed by the parties (SIAC IA Rules, Rule 13).

The SIAC IA Rules also set timelines for parties to raise and for the SIAC Court to decide on challenges. Under Rule 12.1, a party must raise a challenge within 28 days of receiving the notice of appointment of the challenged arbitrator or within 28 days after the circumstances for challenge become known or should have become reasonably known to the party (SIAC IA Rules, Rule 12.1). The SIAC Court must decide the challenge within 21 days of receipt of the notice of challenge (SIAC IA Rules, Rule 13.1).

The PCA Rules have a similar system for arbitrator challenges to the SIAC IA Rules. Challenges may be made on the same grounds of 'justifiable doubts' as to an arbitrator's independence or impartiality, and decisions on challenges are made by the appointing authority, rather than the arbitral tribunal (PCA Rules, Arts 12(1), 13(4)). Article 13 of the PCA Rules states that a party intending to challenge an arbitrator shall send notice of its challenge within 30 days after it has been notified of the appointment of the challenged arbitrator, or within 30 days after the circumstances for challenge became known to the party (PCA Rules, Art 13). However, the PCA Rules differ from the SIAC IA Rules in two ways:

- there is no express provision that states that an arbitrator challenge will not operate to automatically suspend proceedings, and
- reasons for challenge decisions are permitted but not mandatory (PCA Rules, Art 13(4)–(5))

The system for arbitrator challenges in an ICSID arbitration is markedly different. The standard for disqualifying an arbitrator under Article 57 of the ICSID Convention is not one of 'justifiable doubts' as to an arbitrator's independence and impartiality, and instead requires showing a 'manifest lack' of independence, 'high moral character and recognised competence' (ICSID Convention, Art 57). Under the ICSID Rules, the tribunal determines the challenge, and not the appointing authority or some other institutional third party, unless the tribunal is composed of a sole arbitrator or the challenge relates to a majority of the tribunal (ICSID Rules, Rules 9(2)(a), 9(4)). In addition, under ICSID Rule 9(6), a challenge to an arbitrator operates as an automatic stay on proceedings. This increases the potential for arbitrator challenges to be used as a diversionary tactic in ICSID arbitrations. Finally, the ICSID Convention and ICSID Rules do not contain timelines for challenge, ICSID Rule 9(1) merely states that a party is required to raise a challenge 'promptly' (ICSID Rules, Rule 9(1)). Tribunals have interpreted this as imposing a duty to make challenges in a timely fashion, although timeliness is determined on a case-by-case basis (see, eg, *Burlington Resources v Ecuador* (ICSID Case No ARB/08/05)).

References:

Burlington Resources Inc. v Republic of Ecuador, ICSID Case No. ARB/08/05, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuna, 13 December 2013, at paras [72]–[75]

For more information on ICSID challenges, see Practice Note: ICSID—procedure of an ICSID arbitration—proposals to disqualify arbitrators.

Multi-party appointments

The SIAC IA Rules include provisions that deal with the appointment of arbitrators where there are more than two parties to the arbitration and more than one arbitrator to be

appointed. Rule 9.2 requires the Claimants and Respondents to jointly make their respective nomination within 42 days (SIAC IA Rules, Rule 9.2). For reasons explained above, this is significantly longer than the 28 days originally provided in the draft SIAC IA Rules and SIAC's commercial rules (draft SIAC IA Rules, Rule 9.2). 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 8, notwithstanding that one of the sides successfully made a joint nomination (SIAC IA Rules, Rule 9.2). This rule reflects the decision in the *Dutco* case, where the French Court of Cassation set aside an International Chamber of Commerce (ICC) award on grounds of inequality of arms because the appointing authority made an appointment for only one side that failed to jointly nominate an arbitrator, but not the other side that successfully reached agreement (*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)—not reported by LexisNexis®UK).

Neither the ICSID nor the PCA Rules have adopted special rules to deal with multi-party appointments. The SCC Rules adopt a similar approach to the SIAC IA Rules with respect to multi-party appointments, and the SCC Board may appoint the entire tribunal, should either side fail to make a joint appointment (SCC Rules, Art 17(5)). Unless the parties have agreed otherwise, the SCC Board typically sets the time for each side to make their joint nominations (SCC Rules, Art. 17(2) and 17(5)).

Time limits for closure of proceedings and awards

According to the 2015 Queen Mary Survey on international arbitration, a requirement for Tribunals to commit to a schedule for deliberations and delivery of the award was considered the most effective procedural innovation to reduce delays and costs of proceedings (Queen Mary University of London and White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* at p 3—see News Analysis: 2015 International Arbitration Survey published). Reflecting this, the SIAC IA Rules provide strict time limits to close proceedings, although these may be extended by the parties or the Registrar. Under Rule 30.1, the tribunal must declare the proceedings closed as 'promptly' as possible, after consulting with the parties and if it is satisfied that there is no further evidence or submissions to be presented (SIAC IA Rules, Rule 30.1). Once proceedings are closed, the tribunal must submit its draft award to SIAC for scrutiny within 90 days, although, again, this may be extended by the parties or the Registrar (SIAC IA Rules, Rule 30.3). The Rules contain more generous time frames than those introduced in the draft SIAC IA Rules, which required proceedings to be closed within 30 days of the last hearing or submissions (draft SIAC IA Rules, Rule 29.1), and the award to be rendered within 45 days thereafter (draft SIAC IA Rules, Rule 29.2).

In similar terms, Rule 38(1) of the ICSID Arbitration Rules provides that proceedings shall be declared closed once the parties complete their presentation of the case, except that the tribunal may reopen proceedings where there are exceptional circumstances as set out in Rule 38(2) (ICSID Arbitration Rules, Rule 38). The award must be rendered within 120 days of the closure of proceedings, unless the tribunal (as opposed to the parties or the Secretary-General) extends that time by a further 60 days (ICSID Arbitration Rules, Rule 46). In practice, however, ICSID Tribunals take an average of 379 days (ie over a year) to render an award after the end of the final hearing, close to twice the amount of time provided for in the rules (J Commission, *How Long is Too Long To Wait For An Award?* (2016) Global Arb Rev).

Emergency interim relief

It is now commonplace for many commercial arbitration rules to include an emergency arbitration mechanism that permits parties to seek interim relief from an emergency arbitrator prior to the constitution of the tribunal. However, such mechanisms are less frequently used in investment arbitration; their suitability in the investment arbitration context is less settled, among other things, because of potential conflicts with mandatory cooling-off periods (see, eg, S Koh, *The Use of Emergency Arbitrators in Investment Treaty Arbitration*, ICSID Rev 31(3) 534).

Given this evolving position, the SIAC IA Rules set out emergency arbitration provisions that apply on an opt-in basis. Under Rule 27.4 of the SIAC IA Rules, parties may have recourse to the emergency arbitration provisions in Schedule 1, but only if the parties have expressly agreed that they would apply. Thus, agreeing to arbitrate under the SIAC IA Rules, does not automatically result in the application of the emergency arbitration provisions. In order to be able to seek urgent interim relief from an emergency arbitrator before the tribunal is constituted, parties will have to specifically agree that such mechanisms will be available, whether in their underlying contract, treaty, statute or other instrument.

Where applicable, Schedule 1 provides for a highly expedited process where the SIAC Court must appoint an emergency arbitrator within one day of the Registrar receiving the application for emergency interim relief, and the emergency arbitrator must render his or her decision within 14 days of his or her appointment (SIAC IA Rules, Sch 1, paras 3, 9). Notably, all references to 'business day' or 'business days' in Schedule 1 of the draft SIAC IA Rules (eg the requirement that an emergency arbitrator be appointed within one business day), have been changed to 'day' or 'days', ensuring that applications are not delayed due to intervening public holidays or weekends (see: draft SIAC IA Rules, Sch 1, paras 2, 6, 8. Cf SIAC IA Rules, Sch 1, paras 3, 7, 9).

Neither the ICSID nor PCA Rules contain emergency arbitration provisions. Under these rules, interim relief is not available to parties before the constitution of the tribunal, other than through national courts. On a different end of the spectrum, the SCC Rules make emergency arbitration provisions applicable in all cases under the SCC Rules, rather than only where the parties have expressly opted in (SCC Rules, App II).

Early dismissal of claims and defences

Under Rule 26, parties may seek the early dismissal of a claim or defence on grounds that such claim or defence is:

- manifestly without legal merit
- manifestly outside the jurisdiction of the tribunal, or
- manifestly inadmissible (SIAC IA Rules, Rule 26.1)

The tribunal has to make an order or award, with reasons, which may be in summary form, within 90 days of the date of filing of the application, unless in exceptional circumstances the Registrar extends the time limit (SIAC IA Rules, Rule 26.4). This is similar to the procedure under the SIAC's 2016 commercial rules, save that the SIAC IA Rules:

> include an additional ground for early dismissal where a claim or defence is manifestly inadmissible, and
> allow the tribunal an additional 30 days to make their order or award (cf 2016 SIAC Rules, Rule 29)

The early dismissal mechanism is intended to allow Tribunals to dispose of claims or defences at an early stage and in an expedited fashion, without needing to go through all the procedural steps in a typical arbitration, saving substantial time and costs.

Notably, as a result of the public consultation process, SIAC introduced three features in the SIAC IA Rules that are not found in the draft version:

> first, an application for early dismissal can be made at any time after the constitution of the tribunal, and is not subject to the 30-day time limit that was originally in the draft SIAC IA Rules (SIAC IA Rules, Rule 26.1. Cf draft SIAC IA Rules, Rule 25.1). This gives parties and Tribunals additional flexibility in utilising the early dismissal mechanism, including in dealing with claims or defences that are introduced at a later stage
> second, the mechanism applies to the early dismissal of both claims and defences, and not just the early dismissal of claims (SIAC IA Rules, Rule 26. Cf draft SIAC IA Rules, Rule 25). This allows both Claimants and Respondents to have equal access to the early dismissal mechanism, which should in principle be available to dispose of both claims and defences that are manifestly lacking in legal merit, jurisdiction or admissibility
> third, Rule 26.3 provides that the tribunal has discretion to decide whether or not an application for early dismissal should proceed, which empowers the tribunal to preliminarily dismiss applications that are purely tactical and designed to disrupt the arbitral process (SIAC IA Rules, Rule 26.3). This provision addresses concerns raised during the public consultation process that Rule 26 may be abused parties seeking to delay and obstruct proceedings

The ICSID Rules contain a similar early dismissal mechanism that forms the basis for the early dismissal mechanism in the SIAC IA Rules. Under ICSID Rule 41(5), parties may, no later than 30 days after the constitution of the tribunal, file an objection that a claim is manifestly without legal merit (ICSID Rules, Rule 41(5)), and the tribunal may render an award to that effect (ICSID Rules, Rule 41(6)). Unlike the SIAC IA Rules however, there are no time limits within which the tribunal is required to make any order or award; ICSID Rule 41(5) merely states that the tribunal shall notify the parties of its decision on the objection 'at its first session, or promptly thereafter' (ICSID Rules, Rule 41(5)). Furthermore, in contrast to the SIAC IA Rules, ICSID Rule 41(5) only applies to claims, not defences (ICSID Rules, Rule 41(5)). The PCA Rules do not have provisions that allow the early dismissal of claims or defences.

Like SIAC, the SCC Rules also recently introduced a summary procedure that allows parties to request that the tribunal decide one or more factual or legal issues 'by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration' (SCC Rules, Art 39). The SCC Rules are less prescriptive in setting out the threshold that the tribunal must adopt for summary procedures to apply, and the procedure for the application to be heard. These issues must be addressed by the tribunal, having regard to all relevant circumstances (SCC Rules, Art 39(5)).

Third-party funding

The SIAC IA Rules are the first set of institutional rules to expressly address the issue of third-party funding. They do so in two provisions:

> first, under Rule 24.1, the tribunal may order disclosure of the existence of third-party funding arrangements, the identity of the funder and, where appropriate, the funder's interest in the outcome of the proceedings and whether the funder has committed to undertake adverse costs liability
> second, under Rule 33.1, the tribunal has the discretion to take into account any third-party funding arrangements in apportioning the costs of the arbitration (SIAC IA Rules, Rule 24.1)

There are no similar provisions in the ICSID, PCA or SCC Rules.

These provisions on third-party funding provide clarity to parties and Tribunals. Some investment Tribunals, in the absence of express guidance from the applicable arbitral rules, have relied on their inherent powers to (i) make disclosure orders (particularly where there is a potential conflict of interest arising from the funder's involvement in the proceeding) (see, eg, *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti. v Turkmenistan* (ICSID Case No ARB/12/6) and *South American Silver v Bolivia* (PCA case No 2013–15)), and (ii) factor in third-party funding arrangements in costs orders (*Quasar de Valores SICAV SA v Russian* (SCC Arbitration No 24/2007, Award of 20 July 2012, para [223]) (not reported by LexisNexis®UK)). However, jurisprudence on third-party funding is limited, still developing and far from settled. The SIAC IA Rules clarify that the tribunal has the power to deal with such issues, although it leaves the question of whether to exercise such powers as a matter for each tribunal's discretion.

References:

Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti. v Turkmenistan, ICSID Case No ARB/12/6, Procedural Order No 3, 12 June 2015

South American Silver Limited v The Plurinational State of Bolivia,

PCA case No 2013–15, Procedural Order No 10, 11 January 2016

Notably, the SIAC IA Rules do not contain the provision originally in the draft SIAC IA Rules which empowered Tribunals to make adverse costs orders directly against third-party funders 'where appropriate' (draft SIAC IA Rules, Rule 34). Whether a tribunal would have jurisdiction over a third-party funder to make such an order against funders is a difficult and fact-sensitive question, which depends ultimately on whether the funder can be bound to the arbitration agreement in each individual case. This is developing area of law on which SIAC received a divergent range of views. As a result, the provision has been removed, leaving open the possibility for it to be addressed in future editions of the SIAC IA Rules.

Fore more information on third party funding and arbitration, see Practice Note: Third-party funding and arbitration.

Transparency

Publication of information on the dispute

The SIAC IA Rules promote greater transparency in investment arbitration through the inclusion of two provisions on confidentiality and the publication of information relating to the dispute. Under Rule 37.3, the fact and existence of proceedings are not confidential, unless the parties otherwise agree. This is in contrast to both the draft SIAC IA Rules and SIAC's 2016 commercial rules. SIAC amended the confidently provision following the public consultation process where participants reflected a desire for greater public participation and transparency in investment arbitration.

Further, Rule 38 of the SIAC IA Rules identifies two categories of information that SIAC may publish:

- first, under Rule 38.2, SIAC may, without parties' consent, publish information relating to: the nationality of the parties; the identity and nationality of the 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 (SIAC IA Rules, Rule 38.2)
- second, under Rule 38.3, SIAC may also publish, if parties so agree, 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 (SIAC IA Rules, Rule 38.3)

In contrast, the ICSID Convention and Rules do not contain any default provisions on confidentiality (M Kinnear and M Gagain, *The ICSID Approach to Publication of Information in Investor-State Arbitration, in Malatesta and Sali, The Rise of Transparency in International Arbitration* (Juris, 2013) at p 108). Therefore, neither the fact, existence nor details of proceedings are presumptively confidential in ICSID arbitrations. However, several ICSID Tribunals have ordered parties not to release information relating to the dispute in particular case, on the basis that the release of information would jeopardise the integrity of the arbitral process (M Kinnear and M Gagain, *The ICSID Approach to Publication of Information in Investor-State Arbitration, in Malatesta and Sali, The Rise of Transparency in International Arbitration* (Juris, 2013) at p 109). ICSID practice has been to publish basic information relating to the dispute such as the subject matter and date of proceedings, the names of the parties, the sector of the dispute and the instrument giving rise to the arbitration (ICSID Administrative and Financial Regulation, reg 23). See also M Kinnear and M Gagain, *The ICSID Approach to Publication of Information in Investor-State Arbitration, in Malatesta and Sali, The Rise of Transparency in International Arbitration* (Juris, 2013) at pp. 112–113. However, like the SIAC IA Rules, the ICSID Rules provide that awards or orders may only be published with the consent of the parties (ICSID Arbitration Rules, Rule 48(4)).

The PCA Rules do not include any provisions on confidentiality or the publication of information. Unlike the United Nations Commission on International Trade Law (UNCITRAL) Rules, they do not provide for the automatic application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the UNCITRAL Transparency Rules) in investor-state arbitrations (cf UNCITRAL Rules, Art 1(4)). However, the provisions on publication of information and documents in Articles 2 and 3 of the UNCITRAL Transparency Rules will apply where parties agree or where those rules are applicable on their terms (UNCITRAL Transparency Rules, Arts 2, 3)

Submissions by non-disputing parties and non-disputing contracting parties

Consistent with the trend towards greater third-party participation in investment disputes, and the desire of users as reflected in the public consultation process, the SIAC IA Rules include two mechanisms through which third parties who are not parties to the arbitration may make submissions to the tribunal.

First, under Rule 29.1, a non-disputing contracting party—defined as a party to a treaty pursuant to which the dispute has been referred to arbitration that is not a party to the arbitration (SIAC IA Rules, Rule 1.5)—may make submissions on questions of treaty interpretation that are directly relevant to the dispute (SIAC IA Rules, Rule 29.1). Submissions may be made within the scope of Rule 29.1, without the leave of the tribunal or the consent of the parties (SIAC IA Rules, Rule 29.1). This is in line with recent treaty and arbitral practice, including the UNCITRAL Transparency Rules, as well as a number of bilateral investment treaties and free trade agreements (see, eg, UNCITRAL Transparency Rules, Art 5(1), 5(4); Trans-Pacific Partnership, art 9.22(2); Canada-EU Comprehensive Economic Trade Agreement, Annex I, *Amicus Curiae* Submissions; Columbia-U.S. Free Trade Agreement, Art 10:20(2); Peru-US Free Trade Agreement, Art 10:20(2); Australia-Chile Free Trade Agreement, Art 10:21(2); Canada-South Korea Free Trade Agreement, Art 8:31(1); Canada-Romania Bilateral

Investment Treaty, Annex C; Canada-China Bilateral Investment Treaty, Art 27(2)). The provision recognises the interests of a non-disputing contracting party to a treaty, particularly on treaty interpretation issues that may affect other treaties entered into by that party. This interest is sufficiently distinct from that of other third parties (like amicus curiae) and warrants submission to the tribunal as of right, so long as the submission is on a question of treaty interpretation that is directly relevant. As compared to the original version in the draft SIAC IA Rules, the finalised Rule 29.1 provides additional clarification that the tribunal may both accept and invite non-disputing contracting party submissions, which are to be in a written form (SIAC IA Rules, Rule 29.1).

Rule 29.2 provides for parties who are not party to the arbitration (whether or not they are contracting parties to the underlying treaty) to apply to make submissions more generally on matters within the scope of the dispute, which are not limited to matters of treaty interpretation (SIAC IA Rules, Rule 29.2). Under Rule 29.2, applicants may only make submissions with the leave of the tribunal, although the tribunal must consider the views of the parties as well as the circumstances of the case (SIAC IA Rules, Rule 29.2). Rule 29.3 sets out a non-exhaustive list of factors that the tribunal is to consider, including: whether the non-disputing party's submissions would assist the 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; whether the non-disputing party's submissions would only address a matter within the scope of the dispute; whether the non-disputing party has a 'sufficient interest' in the arbitral proceedings and/or related proceedings; and whether allowing the written submissions would violate the parties' right to confidentiality (SIAC IA Rules, Rule 29.3). This provision is largely unchanged in substance from the draft SIAC IA Rules.

The SIAC IA Rules also provide that the tribunal may determine the form and content of Rule 29 submissions, and the parties shall have the right to respond (SIAC IA Rules, Rule 29.5). The tribunal may fix time periods for communicating such submissions, and decide what further written submissions may be required (SIAC IA Rules, Rule 29.6). Rule 29.8 also provides that the tribunal may order that the non-disputing party be provided with access to documents related to the proceedings, such as submissions, subject to the tribunal's power to take steps to safeguard the confidentiality of information related to the proceedings. The confidentiality obligations under Rule 37 expressly bind any third parties making submissions under Rule 29 (SIAC IA Rules, Rules 37.1, 37.2). If parties so request or the tribunal so decides, the tribunal may also hold a hearing for the non-disputing party to elaborate on or be examined on its submissions (SIAC IA Rules, Rule 29.7). The draft SIAC IA Rules did not contain these provisions on further submissions by non-disputing parties, the right to respond by parties, access to documents and the availability of a hearing.

Under the ICSID Rules, a non-disputing party may file a written submission with the leave of the tribunal under Rule 37(2) (ICSID Rules, Rule 37(2)), which provides for the tribunal to consider similar factors as those under Rule 29.3 of the SIAC IA Rules, with two significant differences. The ICSID Rules do not provide that confidentiality is a relevant factor in deciding whether to allow Rule 37(2) submissions, and also set out a higher threshold of a 'significant interest' in the proceeding, as compared to a 'sufficient interest' under the SIAC IA Rules. The ICSID Rules do not provide for a separate track for submissions as of right by non-disputing parties that are contracting parties to the underlying treaty. They also do not contain provisions on further submissions by non-disputing parties, access to documents and the availability of a hearing.

The PCA Rules do not include any provisions on non-disputing party submissions. However, where parties agree to apply the UNCITRAL Transparency Rules or if they apply by virtue of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, then the provisions on such submissions by a third person and submissions by a non-disputing party to a treaty in Articles 4 and 5 of the Transparency Rules will apply (UNCITRAL Transparency Rules, Arts 2, 3).

For more information on the UNCITRAL Transparency Rules, see Practice Note: UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

Conclusion

With the release of the SIAC IA Rules, SIAC became the first private arbitral institution with rules that separately cater to commercial and investment arbitration disputes. Although other private arbitral institutions, such as the ICC and the SCC, have previously administered investment arbitration proceedings, the practice of these institutions has been to use the same set of rules to administer both commercial and investment arbitrations. The SIAC IA Rules are also unique as a standalone set of investment arbitration rules published by a private arbitral institution for investment arbitrations, and combines features commonly found in commercial arbitration rules with those in rules specially promulgated for investment arbitration by the ICSID or the PCA. They present a unique and attractive dispute settlement option for states, state-controlled entities and intergovernmental organisations, although it remains to be seen whether such parties will adopt the SIAC IA Rules in their contracts, treaties, statutes or other instruments.

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