International Arbitration

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New SIAC Arbitration Rules enter into force

Since its establishment in 1991, the Singapore International Arbitration Centre (SIAC) has grown in popularity and gained international recognition. This is reflected both in the increase in the number of new cases it is receiving (its 2012 Annual Report reported a record 235 new cases) and in the size and complexity of disputes: in 2011, the total sum in dispute figure was S$1.32 billion and the highest individual claim amount was S$304 million. In 2012, these figures had risen to S$3.61 billion and S$1.50 billion respectively. In line with this growth, the SIAC plans to open offices in Seoul, Mumbai and the Gulf in the near future.

SIAC recently published a fifth edition of the SIAC Rules of Arbitration (the Rules). The Rules entered into force on 1 April 2013 and will apply to all arbitration proceedings commenced on or after 1 April 2013, unless agreed otherwise by the parties.

This article offers an overview of some of the key changes introduced by the Rules and some commentary on their likely impact.

New governance structure

Arguably the most significant change is the creation of a new Court of Arbitration (the Court). The Court will oversee the case administration and arbitral appointment functions of the SIAC. The Board of Directors, which was responsible for the SIAC's legal and technical functions under the previous rules, will now be responsible for the SIAC's corporate and business functions only. This is a significant change to the SIAC's structure and aligns it to a greater extent with the ICC, with its ICC Court and Secretariat.

The Court is comprised of 16 leading arbitration practitioners from various countries across the world, including Bahrain, Belgium, China, France, India, Japan, Singapore, the UK and the USA. The former Chairman of the SIAC Board of Directors, Professor Michael Pryles, has been appointed the first President of the Court, and Mr Lucien Wong will chair the Board of Directors.

Increased powers for Registrar

Under the Rules, the Registrar of the SIAC Court may:

1. Scrutinise awards (Rule 28).
2. Extend or shorten any time limits prescribed under the rules at any time during the arbitration process (Rule 2.5).
3. Deem a Notice of Arbitration complete if, in the Registrar's opinion, there has been "substantial compliance" with the requirements listed at rule 3.1 (Rule 3.3).
4. Where there are multiple parties to the arbitration proceedings, impose time limits within which the parties may jointly nominate an arbitrator, in the absence of which the arbitrators may be appointed by the President (Rules 9.1 and 9.2).

These new powers afford the Registrar greater freedom and flexibility in conducting the arbitral process.

Decisions of President, Court and Registrar now binding

The positions of the President, the Court and the Registrar are strengthened under the new governance structure by new Rule 36, which makes their decisions "conclusive and binding" upon the parties and the arbitral tribunal. Rule 36 further states that the parties are taken to have waived any right of appeal or review in respect of any decisions of the President, the Court and the Registrar to any state court or other judicial authority.

Extension of the tribunal's powers

Under new Rule 24(n), the arbitral tribunal is empowered to decide any issue not expressly or impliedly raised in the parties' Rule 17 submissions, provided that such issues have been clearly brought to the notice of the other party and the other party has been given an adequate opportunity to respond. This is consistent with the recent Singapore Court of Appeal decision in *PT Prima International Developments v Kempinski Hotels SA* (9 July 2012).

Review of jurisdiction

Under the previous 2010 rules, where a party objected to the "existence, validity or scope of the arbitration agreement or to the jurisdiction of the Centre over a claim", it was mandatory for the Committee of the Board to make a determination. Under the new Rules, the word "scope" has been removed from Rule 25.1 and reference to the Court (rather than to the Committee of the Board) to make a determination is now at the Registrar's discretion. This amendment is intended to add clarity as well as to restrict applications to the obvious or very rare cases. It should streamline and improve the efficiency of the arbitral process by allowing the Registrar to take a more active role in filtering objections.

Publication of redacted awards

Under Rule 28.10, the SIAC may publish any arbitration award with the names of the parties and other "identifying information" redacted. This new provision represents a departure from the practice of other arbitration institutions, which usually only publish awards with the agreement of the parties. The LCIA Arbitration Rules, for instance, contain an express provision that the LCIA Court does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal. It will be interesting to see whether this changes in the new LCIA rules, expected to enter into force in 2013.

Advance on costs

Rule 30.2 has been amended to allow the Registrar to fix separate advances on costs for the claimant and the respondent where a counterclaim is made.

Post-award interest

Consistent with the recent amendments to the Singapore International Arbitration Act allowing tribunals to grant post-award interest, Rule 28.7 allows a tribunal to award interest in respect of any period which it deems appropriate, including post-award interest.

Extension of jurisdiction

The SIAC may now hear disputes arising under any investment treaty or other instrument conferring jurisdiction upon the SIAC.

Retrospective amendments to the 2007 and 2010 Rules

The Rules make some retrospective amendments to the 2007 and 2010 SIAC Rules. These relate mainly to changes to the titles of certain individuals and bodies performing arbitral functions under the 2007 and 2010 Rules. Notably, the term "Chairman" is redefined to mean "President" and the term "Committee of the Board" is redefined to mean "Court". These changes should not fundamentally alter the arbitration procedure under the previous sets of rules.

Conclusion

The new governance structure and the fine-tuning of certain of its rules reflect the SIAC's commitment to providing its users with a highly efficient and modern dispute resolution service. The changes also seek to further align the SIAC with other major dispute resolution service providers, such as

the ICC and the LCIA. Overall, they can be seen as having a positive impact on arbitration in Singapore and it will be interesting to see whether this leads to a further increase in filings in 2013.

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Emergency arbitration under the SIAC Rules

An emergency arbitration procedure was introduced by the Singapore International Arbitration Centre (SIAC) on 1 July 2010. Since then, it has attracted more than 21 applications, a number of which have involved HFW. The procedure is for parties who require urgent interim measures and cannot wait for the conclusion of the main arbitral proceedings. The pleadings and hearing stages take around three weeks instead of the usual 18 months in normal arbitral proceedings.

Procedure

Rule 26.2 and Schedule 1 of the SIAC Rules 2013 (the Rules) allow a party to apply for emergency arbitration relief prior to the constitution of the arbitral tribunal, so long as the application is made with or following the filing of a Notice of Arbitration.

In order to have an application accepted, it is essential to be able to demonstrate the 'criticality' of the situation and why it cannot await the formation of a full tribunal. Obvious examples are where:

(i) There is a real risk that the property or evidence will be destroyed or tampered with and a preservation order is required.

(ii) Property will suffer damage without interim relief.

(iii) Critical documents required to trigger a letter of credit are not forthcoming due to one party's litigation in breach of the arbitration clause in another jurisdiction, and an order is required to release such documents before the letter of credit expires.

The following hallmarks of the SIAC emergency arbitration procedure make it shorter than normal arbitral proceedings:

a. The Emergency Arbitrator (EA) can be appointed within one business day of the President's acceptance of the application and the applicant's payment of the deposit fees.

b. The EA establishes a hearing schedule within two business days of his appointment.

c. There is no requirement for a formal hearing and proceedings can be conducted via telephone or by way of written submissions.

d. The EA can rule on his own jurisdiction.

e. The EA has jurisdiction until the tribunal is constituted or until the expiration of 90 days from the grant of the order or award.

f. An order or award granted by the EA expires after 90 days, unless the tribunal has been constituted before the expiration of the 90 days.

g. Once the tribunal has been constituted, it is not bound by any determination made by the EA and it can reconsider, modify or vacate an interim award or order.

It is not uncommon for a respondent in emergency arbitral proceedings to challenge the EA's jurisdiction. A challenge can be a means to prolong the emergency proceedings. The Rules allow the EA to rule on his own jurisdiction. Once he has done so, either party can apply to the Singapore High Court to decide the matter within 30 days of the notice of the ruling of the EA. So as to preserve the urgent nature of the emergency proceedings, an application to the High Court does not operate as a stay of the proceedings or the execution of an award or order.

Emergency Award or Order

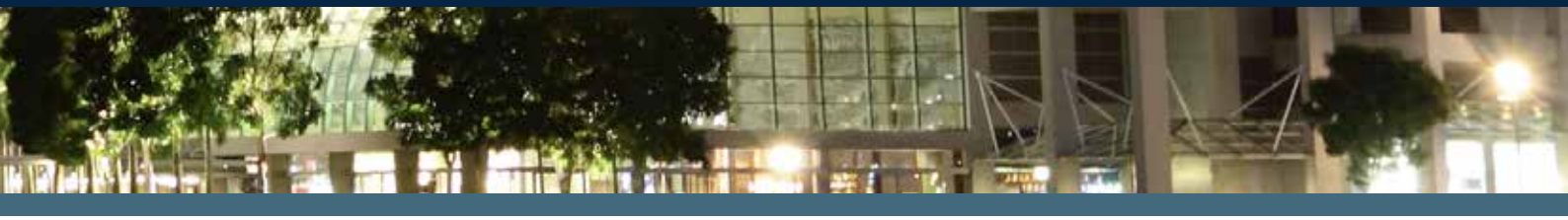
On 9 April 2012, the Singapore Parliament introduced amendments to the International Arbitration Act (the Act), clarifying a grey area on the enforceability of emergency arbitration awards and orders. These amendments gave EAs the same legal status as regularly constituted tribunals and rendered emergency awards enforceable in the same manner as ordinary arbitral awards.

Section 2 of the Act defines an "award" as "a decision of the arbitral tribunal [including the EA] on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any order or directions made under section 12".

Like conventional arbitrators, EAs are empowered under section 12 of the Act to make interim orders or give directions. Under the Rules, the EA can render either an award or an order for any interim relief that he deems necessary. However, neither the Rules nor the Act provide any guidance on when it is appropriate to render an award and when an order. The decision is left up to the EA.

Enforcement

The decision whether to apply for an award or an order and the decision of an EA whether to render an award or an order can be very significant. Whilst emergency orders are enforceable in the Singapore High Court as if they were orders made by the Court itself, they are limited to enforcement



within the jurisdiction only. They are not arbitral awards and are therefore not enforceable in other jurisdictions under the New York Convention.

Parties should also bear in mind that for an emergency award to be enforceable, it must be accompanied by reasons. This is provided for in Article 31(2) of the UNCITRAL Model Law, which has the force of law through the Act. There is no such requirement for emergency orders and the question is still open as to whether an EA should provide reasons for his order.

These considerations can be challenging for a party where speed is a key consideration. An emergency order (without reasons) can be rendered much faster than an emergency award (with reasons). One solution would be for a party to request the delivery of the emergency award first, with reasons to follow. Since there is nothing in the Rules or the Act on this approach, it would be entirely within the EA's discretion whether to agree to such a request. From HFW's experience, in complex cases, the EA may be reluctant to separate the award from the reasons.

Conclusion

The SIAC emergency arbitration procedure is appealing for those seeking interim relief on an urgent basis. However, there are potential limitations and pitfalls to be taken into account by a party applying for emergency arbitration.

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Corporate choices in international arbitration: industry perspective

The School of International Arbitration, Centre for Commercial Law studies, Queen Mary University of London and PwC have published the results of their 2013 International Arbitration survey: Corporate choices in International Arbitration – Industry perspective.

The survey was conducted over a ten month period and included online questionnaires completed by over 100 in-house counsel followed by a series of interviews. It targeted three specific industry sectors: Energy, Construction and Financial Services. Rather than examining the internal process of arbitration as a means of dispute resolution, it sought to examine arbitration from the outside, and as an industry.

A link to the survey is below:

http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf
In this article, HFW Partner Chris Lockwood considers some key results and what they reveal.

Choice of dispute resolution mechanism

Participating corporations were asked to rank by preference various dispute resolution mechanisms: litigation, arbitration, expert determination/adjudication and mediation. The results confirmed that arbitration continues to be more popular than any of the other options available, with 62% preferring arbitration as claimants and 60% when a respondent with no counterclaim.

In the Energy sector, arbitration was preferred followed by litigation, adjudication and mediation. In Construction, arbitration led by an overwhelming margin. For both sectors, the perceived benefits of arbitration were neutrality, the expertise of the decision makers, the flexibility of the procedure, cost, speed, enforceability and confidentiality. However, costs and delays did feature as areas of concern along with increased formality of proceedings.

Given the more complex and technical nature of the disputes in those sectors, it is perhaps not surprising that the Construction and Energy industries preferred arbitration because, for example, it allowed them to select an arbitrator with specialist knowledge to decide the claim. In contrast, the Financial Services sector tended towards litigation rather than arbitration because of the often legal nature of its disputes.

Choice of outside counsel

Two factors appeared to be particularly influential in the selection of outside counsel. The first was previous contentious experience of the firm or lawyer retained and the second was personal knowledge of the lawyer selected. Ranking of law firms in directories was not regarded as particularly influential. Notably, 67% of the participating corporations indicated that they used a panel of preferred firms with only some 30% of these occasionally retaining firms from outside their panel.

A noteworthy trend emerging from the survey was the increased involvement of in-house counsel in case management, in particular in the sharing of case preparation including drafting submissions and in the disclosure process. In fact, a number of respondents reported that they were specifically employing dispute resolution lawyers to enhance their in-house capabilities for arbitration cases so as to reduce their external spend.

When it comes to expertise, the majority of respondents preferred counsel with expertise in arbitration over specialist industry knowledge, although technical industry knowledge was more important to the respondents from the Construction sector. A number of respondents ranked a good understanding of the *"commercial reality"* of the matter (as distinct from technical expertise) as indispensible.

Interestingly, when asked if the respondents had re-hired a particular outside counsel who had previously represented them in an unsuccessful arbitration, a majority had done so.

Funding

The survey revealed that once a decision had been made to pursue a claim in arbitration, only a few corporations had subsequently withdrawn due to funding issues. However, increased budget pressures had made corporations more cautious about initiating proceedings, with a significant number having introduced some form of alternative fee structure for their external lawyers (other than hourly rates). Most had used capped fees or a combination of discounted rates with a success fee. Contingency fees continue to be rare.

The survey also revealed that the use of third-party funding remains rare, with 94% of respondents saying that they had not used it. If they had, it was due to a lack of liquidity or because it was more convenient to sell on the claim or share the risk. Others had only used third party funders to assist in enforcement where the funder team was considered to be better equipped to pursue assets and secure a recovery.

Choice of arbitrator

Although anecdotal evidence has suggested that the lack of availability of an arbitrator has been a cause of concern over delay, apparently this was not a factor considered by respondents when making an appointment: the choice of arbitrator was more about finding the person best suited to the case than whether or not the individual had a congested diary.

In fact, a commercial understanding of the industry ranked highest as a determining factor in the choice of arbitrator. This was followed by knowledge of the law applicable to the dispute; experience; technical knowledge and qualification; and, only then, availability. Of lesser importance were the individual's track record with the organisation; outside recommendation; and ranking in any league table.

Cost and delays

The concerns of in-house counsel over the issues of cost and delay experienced in international arbitration are not new. Indeed, steps have been taken by a number of arbitration institutions in response to those concerns to improve efficiencies and, for example, to give parties the opportunity to fast track the process or limit the recovery of costs.

In the survey, although cost was not ranked as the most important factor when deciding whether to pursue a claim in arbitration, it was still an area of concern.

Conclusion

Whilst the survey demonstrates that arbitration continues as a beneficial dispute resolution method for transnational disputes, it is apparent that there is an increasing focus by in-house counsel upon securing greater value from the process.
A recurring theme over successive surveys has been the view of interviewees that as arbitration has become more sophisticated, users have lost control of the process. With increased "judicialisation" has come greater formality of proceedings leading to perceived delay and associated cost. This trend was seen as potentially damaging to the attractiveness of arbitration, particularly if arbitration eventually loses the factors which differentiate it from litigation.

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