New Rules at the Singapore International Arbitration Centre

Kluwer Arbitration Blog
May 14, 2013

Gary Born (Wilmer Cutler Pickering Hale and Dorr LLP)

Please refer to this post as: Gary Born, 'New Rules at the Singapore International Arbitration Centre', Kluwer Arbitration Blog, May 14 2013, http://arbitrationblog.kluwerarbitration.com/2013/05/14/new-rules-at-the-singapore-international-arbitration-centre/

The Singapore International Arbitration Centre ("SIAC") has issued new rules that came into force on April 1, 2013. The rules changes are accompanied by new Practice Notes for cases administered by SIAC under its rules and the UNCITRAL rules that also came into force on the same date. While the changes do not reflect a significant overhaul of the prior version of the institution's rules, they do contain important changes of which practitioners should be aware.

The 2013 rules are the fifth set of rules issued by SIAC, which promulgated previous versions in 1991, 1997, 2007, and 2010. The SIAC rules are one of several sets of arbitral rules to be updated in the last few years; other recent updates include the CIETAC rules (2012), the ICC rules (2012), the Swiss rules (2012), and the UNCITRAL rules (2010).

SIAC's new rules are significant in part because of the institution's substantial and growing caseload involving parties from around the world. According to its website, SIAC registered 235 cases during 2012 (the largest number of cases ever registered in a single year at SIAC) involving parties from 39 jurisdictions and was handling a total of 525 active cases at year's end. The largest number of cases filed at SIAC in 2012 involved parties from Singapore, China, India, Indonesia, the United States, and Hong Kong. However, SIAC's caseload extends well beyond the Asia-Pacific region, also including parties from Bermuda, the British Isles, the British Virgin Islands, Cayman Islands, Cyprus, Denmark, France, Germany, Liberia, Mauritius, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Arab Emirates, and the United Kingdom.

The most salient changes to the new rules are detailed below.

Court of Arbitration

The new SIAC rules establish a Court of Arbitration ("Court") that takes over case administration functions from SIAC's Board of Directors ("Board"), which will now focus on corporate and business development matters. The Court is comprised of 16 members from jurisdictions around the world with Dr. Michael Pryles serving as the Founder President of the Court.

The responsibilities of the Court under the new rules include rendering decisions on challenges to arbitrators (Rule 13) and jurisdictional challenges (Rule 25). The President of the Court will have responsibility for determining applications for expedited procedures (Rule 5) and appointment of arbitrators (Rules 6-10) and emergency arbitrators (Schedule 1). While the SIAC rules now use terminology similar to that of the ICC International Court of Arbitration, the SIAC Court does not

exercise the more involved review function of its ICC counterpart.

Commencement of the Arbitration

The new rules give the SIAC Registrar the power to determine when an arbitration has commenced. Under Rule 3.3, the Registrar is now responsible for determining that a notice of arbitration is in "substantial compliance" with Rule 3.1, which sets out the requirements for notices of arbitration.

Time Limits

Changes in the new SIAC rules to time limits are minimal but important. A new Rule 2.5 has been added that permits the Registrar to "extend or shorten any time limits prescribed under" the rules. In addition, Rule 9 on multi-party appointment of arbitrators has been amended to give parties 28 days or a time period set by the Registrar to make a joint appointment (absent an agreement by the parties) calculated from the date on which the Registrar received the notice of arbitration rather than the date of the filing of the notice of arbitration as had been the standard in the previous version of the rules.

Investment Arbitration

In a nod to the growing number of investment arbitration cases being heard at arbitral institutions other than ICSID, Rule 3.1(d) of the new SIAC rules notes that the notice of arbitration must include a reference to the contract "or other instrument [e.g., investment treaty]" underlying the dispute.

Substitute Arbitrators

Rule 14.1 now allows a substitute arbitrator to be appointed in cases involving the "removal" of an arbitrator. Previously, the rules provided for the appointment of a substitute arbitrator only in the event of a "death" or "resignation" of an arbitrator.

Party Representatives

The new rules loosen the regulation of party representatives by SIAC and arbitral tribunals comprised under it. Whereas the former version of Rule 20 provided that "[a]ny party may be represented by legal practitioners or any other representatives, subject to such proof of authority as the Registrar or the Tribunal may require," the new version of Rule 20 dispenses with the proof requirement and simply provides that "[a]ny party may be represented by legal practitioners or any other representatives." This is an important change that reaffirms the fundamental principles of party autonomy and the freedom of a party to choose its own counsel in international arbitral proceedings.

Witness Interviews

In direct recognition of the various approaches taken by different jurisdictions to witness preparation, Rule 22.5 of the new SIAC rules expressly permits witness interviews. The former version of Rule 22.5 stated that "[s]ubject to the mandatory provisions of any applicable law, it shall be proper for any party or its representatives to interview any witness or potential witness prior to his appearance at any hearing." The new rule has discarded the mandatory law exception and now states that "[i]t shall be permissible for any party or its representatives to interview any witness or potential witness (that may be represented by that party) prior to his appearance at any hearing." While the new Rule 22.5 would not override applicable mandatory national law prohibiting witness interviews in an international arbitration (which, in any event, would arguably be inconsistent with the New York Convention), it nevertheless reflects the practice and expectations of parties and tribunals in international arbitration.

The change also brings the SIAC rules into line with other leading rules on arbitral procedure that expressly recognize the permissibility of interviewing witnesses prior to hearings, including Rule 25.2 of the Swiss Rules of International Arbitration, which provides that "[i]t is not improper for a party … to interview witnesses, potential witnesses, or expert witnesses," and Rule 4.3 of the IBA Rules on the Taking of Evidence in International Arbitration, which similarly provides that "[i]t shall not be improper for a Party … to interview its witnesses or potential witnesses and to discuss their prospective testimony with them."

Additional Powers of Tribunals

Rule 24 of the new SIAC rules broadens the powers of tribunals. The former version of Rule 24(e) provided that "the Tribunal shall have the power to … order the parties to make any property or item available, for inspection in the parties' presence, by the Tribunal or any expert." The presence requirement and the qualification that the tribunal or any expert must be able to perform the inspection have been eliminated. Rule 24(e) now broadly provides that "the Tribunal shall have the power to … order the parties to make any property or item available for inspection."

Rule 24(n) is a completely new provision made in response to the Singapore Court of Appeal's decision in PT Prima International Development v. Kempinski Hotels SA [2012] SGCA 35. Rule 24(n) provides that "the Tribunal shall have the power to … decide, where appropriate, any issue not expressly or impliedly raised in the submissions filed under Rule 17 [written submissions] provided such issue has been clearly brought to the notice of the other party and that other party has been given adequate opportunity to respond." This provision thus empowers a tribunal to act in a situation where a new issue has arisen, for example, during document disclosure or at a hearing, so long as there is notice and an opportunity to be heard on the new issue.

Jurisdiction Challenges

Rule 25.1 has been amended to create a two-step procedure for addressing a challenge made to the jurisdiction of SIAC prior to the constitution of a tribunal. Under the new version of the rule, the challenge will go first to the Registrar, who will determine if the objection should be referred to the Court. If the Registrar refers the matter to the Court and the Court determines that "it is prima facie satisfied" that there is a valid arbitration agreement, then the case goes forward without prejudice to the tribunal's competence to rule on its own jurisdiction. The previous rule had a one-step process, i.e., a Committee of the Board (the predecessor to today's Court in terms of case-administration matters) decided the matter without having a preliminary decision made by the Registrar.

Further, the term "scope" has been deleted from Rule 25.1. As a result, a party cannot raise an objection (prior to the appointment of the tribunal) that the scope of an arbitration agreement does not cover a claim or counterclaim. Parties were able to do so under the previous version of the rules.

Rule 36.1, which is an entirely new addition to the rules, provides that "the decisions of the President, Court and Registrar with respect to all matters relating to an arbitration shall be conclusive and binding upon the parties and the Tribunal" and that they "shall not be required to provide reasons for such decisions." Rule 36.2, which is also new, goes on to provide that "the parties shall be 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."

Publication of Awards

Rule 28.10 is another entirely new provision providing that "SIAC may publish any award with the names of the parties and other identifying information redacted." This provision will prove to be very

helpful to practitioners and academics but, at the same time, potentially unappealing for parties.

Post-Award Interest

Under Rule 28.7, tribunals established under the SIAC rules are now permitted to award post-award interest. The earlier version of this rule permitted interest to be awarded "ending not later than the date of the award." The change makes the SIAC rules consistent with amendments to §§ 12(5) and 20 of Singapore's International Arbitration Act made in 2012.

Costs

A new addition to Rule 30.2 permits the Registrar to fix separate advances on arbitration costs for claims and counterclaims. In addition, the term "apart from the costs of arbitration" has been deleted in Rule 33, which relates to legal and other costs. This change was made because Rule 31 already permits tribunals to apportion the costs of arbitration among parties, making the term in Rule 33 redundant and unnecessary.

Gary B. Born, Michelle Glassman Bock, and Thomas R. Snider