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A Brief Overview of the Draft SIAC Investment Arbitration Rules 2016

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The Singapore International Arbitration Centre ("SIAC") published a draft of new investment arbitration rules (the "draft SIAC IA Rules") for public comment on 1 Feb 2016. They will be finalized on 27 May 2016. The draft SIAC IA Rules are a unique hybrid of modern commercial arbitration rules and specialist investment arbitration rules (e.g. the ICSID Rules). As discussed below, they take head-on a number of the challenges facing investment arbitration today, including inefficiency and rising costs, the perceived lack of transparency, and the impact of third-party funding arrangements on proceedings.

Resolving Investment Disputes Efficiently

Responding to the criticism of increasing time and costs of investment disputes, the draft SIAC IA Rules introduce a number of provisions that streamline and speed up the investment arbitration process, while taking into consideration the constraints faced by State parties:

– Rule 1.1 provides that the draft SIAC IA Rules will be applicable by express reference in the contract, treaty or national legislation. This avoids the time and expense involved with litigating the definition of an "investment," as with arbitration under the ICSID Rules. Rule 1.2 of the draft SIAC IA Rules further provides that any dispute about their applicability shall be decided by the SIAC Court, whose decision shall be final.

– Rules 6.2, 7.2 and 7.3 provide that the SIAC Court shall appoint the sole, party-appointed or presiding arbitrator if the parties or party-appointed arbitrators fail to make an appointment within 28 days, which is shorter than the 90-days under the ICSID Rules. However, these timelines may be extended by the SIAC Registrar where appropriate. The draft SIAC IA Rules also provide for a default list-procedure as a method of appointing the sole or presiding arbitrator.

– Rule 12.1 provides for a strict timeline for challenges to arbitrators: a party is required to raise its challenge within 14 days of becoming aware of the circumstances that give rise to the challenge. This is in contrast to ICSID Rule 9(1), which provides no timeline but simply states that challenges are to be raised "promptly." Moreover, unlike ICSID Rule 9(6), which provides that a challenge automatically suspends on-going proceedings, under the draft SIAC IA Rules a challenge does not suspend proceedings unless the Registrar so orders.

– Rule 29.1 requires the tribunal to declare proceedings closed no later than 30 days after the last hearing, or the filing of the last post-hearing submissions, whichever is later. Beyond this, the tribunal can only reopen proceedings after seeking an extension of the timeline from SIAC where "necessary." The ICC, ICSID, SCC and UNCITRAL Rules, by contrast, do not provide a timeline for a tribunal to close proceedings, or to make its award.

Emergency Arbitrator

Rule 24.6 allows parties to obtain expedited interim relief prior to constitution of the tribunal through an emergency arbitrator. No institution besides the SCC currently allows for this possibility; the ICC Rules implicitly exclude their application to investment treaty disputes. Recognizing that there has been criticism of the suitability of emergency arbitrator procedures for investment arbitration,[1)] the draft SIAC IA Rules do not take a categorical approach like the SCC or ICC Rules to allow or disallow emergency arbitrator procedures. Instead, the draft SIAC IA Rules provide that emergency arbitral relief is only available where the parties "expressly agree."

Early Dismissal Mechanism

Rule 25.1 of the draft SIAC IA Rules allows parties to file an application for the early dismissal of a claim, no later than 30 days after the constitution of the tribunal, on three grounds – where the claim is manifestly lacking in legal merit, jurisdiction or admissibility. Rule 25.1 is based on ICSID Rule 41(5) – but drawing from ICSID jurisprudence, Rule 25.1 is drafted more clearly and sets out with more specificity the grounds on which early dismissal may be raised.

An early dismissal mechanism filters out frivolous and unmeritorious claims, and can lead to significant savings in costs and time. At present, ICSID is the only arbitral institution besides SIAC to offer such a mechanism for investment disputes.

Third-Party Funding

The draft SIAC IA Rules also address third-party funding, an issue not yet regulated by other institutional rules.

– First, Rule 23.l expressly empowers the tribunal to "order the disclosure of the existence and details of a party's third party funding arrangement, including details of the identity of the funder, the funder's interest in the outcome of the proceedings, and whether or not the funder has committed to undertake adverse costs liability." None of the ICC, ICSID, SCC or UNCITRAL Rules have a similar provision. Although ICSID tribunals have relied on their inherent power to order disclosure in cases involving a potential conflict of interest (see *Muhammet Çap & Sehil In?aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, Procedural Order No. 3, ICSID Case No. ARB/12/6), this is not a settled issue of law. Rule 23.1 overcomes this uncertainty by according tribunals the express power and flexibility to require disclosure to the extent appropriate in an individual case.

– Second, Rule 32.1 allows the tribunal to take into account any third-party funding arrangements in apportioning the costs of the arbitration and Rule 34 empowers the tribunal to make adverse costs orders against third party funders "where appropriate." Although most major funders (i) will procure after-the-event insurance, and (ii) are required by the Association of Litigation Funders to address responsibility for adverse costs liability in their funding agreements, such self-regulatory

practices are neither uniformly observed nor mandatory. Rules 32.1 and 34 reduce the risk of exposing successful respondent States to a costs bill that they cannot recover. The adverse cost consequences may also deter the funding of frivolous claims.

Submissions by Non-Disputing Parties

Recognizing that investment disputes often implicate matters of public interest, and consistent with the emerging trend towards transparency, the draft SIAC IA Rules also address submissions by non-disputing parties:

– Rule 28.2 confers on tribunals the discretion to permit non-disputing party submissions. Rule 28.3 further provides that the tribunal shall consider, in exercising such discretion: (i) the extent to which the non-disputing party submissions will bring a different perspective to the legal or factual matters that are relevant to dispute, and (ii) whether the non-disputing party has a "sufficient interest" in the proceedings. The latter sets a lower threshold than under the ICSID or UNCITRAL Transparency Rules, which require a "significant interest." Rule 28.2 will therefore enable tribunals to more broadly benefit from *amicus curiae* without a strong link to the parties' dispute *per se*, but who nonetheless have important expertise to bring to bear on the understanding or resolution of certain issues.

– Rule 28.1 deals with submissions by "a party to the contract, treaty or other instrument that is not a party to the dispute" (i.e. a non-disputing ***contracting*** party), who may make written submissions on written notice to the parties. Under Rule 28.1, such written submissions may be made without the need for consent from either the tribunal or the disputing parties, so long as they are limited to a "question of treaty or contractual interpretation that is directly relevant to the dispute." The tribunal has the discretion to invite or accept oral submissions. Rule 28.1 thereby protects the interests of contracting State parties in ensuring an accurate interpretation of the relevant legal instrument. Although similar provisions exist in the recent UNCITRAL Transparency Rules, and in certain treaties,[2)] they are absent in most other institutional rules such as the ICC, ICSID, SCC or UNCITRAL Rules.

Conclusion

With the draft SIAC IA Rules, SIAC will be the first arbitral institution with rules to cater separately to investment and commercial arbitrations. If successful in its attempt to combine the best features of commercial arbitration rules and specialist investment arbitration rules, the draft SIAC IA Rules – when finalized – will provide a unique and attractive option for adoption by States and investors in investment contracts, treaties or legislation.

Mr Jonathan Lim, one of the authors of this article, is a member of the YSIAC Committee. He assisted the SIAC Rule-Revision Subcommittee on Investment Arbitration in its work on the draft SIAC IA Rules. This blog post is modified from a longer article previously published here.

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References

?1 For instance, emergency arbitrators may be required to make decisions on complex jurisdictional questions, which can be challenging given the limited timeframes within which emergency arbitrators operate. Emergency arbitrator provisions may also undermine mandatory cooling-off periods in investment treaties, and prejudice States that might lack the resources and infrastructure to respond in an expedited process.

?2 See e.g. TPP, Article 9.22(2); CETA, Annex I, Amicus Curiae Submissions; CAFTA, Article 10:20(2); Colombia-US FTA, Article 10:20(2); Peru-US FTA, Article 10:20(2); Australia-Chile FTA, Article 10:21(2); Canada-South Korea FTA, Article 8:31(1); Canada-Romania BIT, Annex C; Canada-China BIT, Article 27(2).

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