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SIAC Rule 29 On Early Dismissal: How Early Is Early?

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Introduction

Rule 29 of the 2016 SIAC Rules ("**SIAC Rules**") introduced a procedure for enabling an 'early' dismissal of claims and defences. Rule 29 is akin to summary judgment and striking out in common law courts. It is aimed at allowing a tribunal to dismiss patently unmeritorious claims and defences without having to conduct full-fledged proceedings. In this article, the authors discuss the interpretation of two legal standards contained in Rule 29, and conclude by proposing certain changes to the standard of exceptional circumstances under Rule 29.

Standard of manifestly without legal merit

Rule 29 permits an application for early dismissal on the basis that a claim or defence is "manifestly without legal merit." While "manifestly without legal merit" is not defined in the SIAC Rules, guidance may be drawn from cases which have considered the term "manifestly without legal merit" under Rule 41(5) of the ICSID Rules, from which Rule 29 was adopted.[1)]

Relying on the well-known work tracks of Professor Schreuer in the origin of the word 'manifest', ICSID jurisprudence on the interpretation of 'manifest' has generally been taken to mean something which is '*easily understood or recognized by the mind*'. The word relates not to the seriousness of the excess or the fundamental nature of the rule that has been violated but rather to the cognitive process that makes it apparent.[2)]

For instance, in the first ever decision made under Rule 41(5) of the ICSID Rules, the tribunal in *Trans-Global Petroleum, Inc.* v. *Hashemite Kingdom of Jordan*[3)] found that an applicant would have to *"establish its objection clearly and obviously, with relative ease and despatch"* in order to prove that the claim in question is manifestly without merit. Similarly, in *Brandes Investment Partners, LP* v. *Bolivarian Republic of Venezuela*,[4)] the tribunal considered that the scope of the term 'manifestly without legal merit' under Rule 41(5) of the ICSID Rules would include *"all objections to the effect that the proceedings should be discontinued at an early stage because, for whatever reason, the claim can manifestly not be granted by the Tribunal."* The tribunal concluded that the objection concerning a legal impediment to a claim could be examined on an expedited basis.

Standard of exceptional circumstances

Another legal standard introduced under Rule 29 is that of "exceptional circumstances." If a tribunal allows an application for early dismissal to proceed under Rule 29.3, the tribunal is required to make an order or award on the application (for which reasons may be in summary form) within 60 days from the date of filing the application. However, the SIAC Rules do not define what "exceptional circumstances" would justify an extension of the time for a tribunal to render an order or award in an early dismissal application.

By way of comparison, Rule 9.8 permits the LCIA Court to extend the 14-day deadline for an emergency arbitrator to decide an emergency relief, in "exceptional circumstances". Whilst LCIA has set out through certain case studies, what circumstances could constitute an "exceptional urgency" in the LCIA Notes on Emergency Procedures, no comparable exercise has been undertaken to enlist potential scenarios on the interpretation of "exceptional circumstances" in terms of Rule 9.8. Looking at another example, Article 37(c) of WIPO Rules permits the tribunal to extend deadlines set in the arbitral procedure, in "exceptional cases", and in "urgent cases". The Commentary on WIPO Arbitration Rules sets out that what constitutes an "exceptional circumstance" for the purposes of Article 37(2), is a matter which is decided by the tribunal in consultation with the parties. The Commentary goes on to note that "*…it is difficult to express in the abstract what qualifies as 'exceptional circumstances'. Some element of unpredictable circumstances will need to be present…*"

In addition to the above, the expression "exceptional circumstances" has been considered by the courts of England. In *Haven Insurance Company Ltd. v. EUI Limited (T/A Elephant Insurance),*[5] the English Court of Appeal departed from the usual position that parties should comply with contractual time bars in bringing arbitration proceedings. This was because the facts of the case involved 'quite exceptional circumstances' in which the established custom of the Technical Committee (that heard the dispute between the parties) allowed a period of 30 days to file an appeal from the date of the minutes passed by the Technical Committee.

Similarly, in *P v. Q*,[6] The High Court of England and Wales granted an extension of time in terms of Section 12(3) of the Arbitration Act, 1996 in circumstances that were "relatively exceptional". In both these cases, the English courts also took the view that in order to ascertain what qualifies as "exceptional circumstances", there has to be an element of unpredictability.

From the broad review of the interpretations of 'exceptional circumstances' the authors' view is that an "exceptional circumstance" must be one that is unpredictable, i.e. something that the parties / the tribunal could not have foreseen.

Proposed changes relating to the standard of exceptional circumstances

The authors, having been involved in separate early dismissal proceedings under Rule 29, were faced with a situation where several simpliciter extensions were granted under Rule 29.4. The respective proceedings lasted for a period of almost five months. Interestingly, six months is the time period prescribed for completion of expedited proceedings under the SIAC Rules. Accordingly, the authors propose certain changes in an attempt to address this.

In order to give practitioners and parties some insight into what "exceptional circumstances" would warrant an extension under Rule 29, SIAC could consider drawing from the LCIA Notes on Emergency Procedures and provide 'Case Studies' to supplement Rule 29. The SIAC Annual Reports for 2017, 2018 and 2019 suggest that as on December 2019, SIAC received a total of 30

applications under Rule 29. Of these, 9 were allowed to proceed. As on date, 2 out of the 9 applications are yet to be decided. It is unknown whether the other 7 applications were decided within the prescribed 60-day timeline. If not, SIAC could analyse the circumstances which caused the grant of extensions in passing the order / award and set them out as 'Case Studies'.

Further when extending the time for passing an order/ award on applications under Rule 29, SIAC could set out, at the least, reasons in brief regarding what unusual circumstances beyond the control of the tribunal made it impossible to render the award within 60 days. The authors have independently identified some circumstances which may warrant the extension of timelines under Rule 29:

- A party challenges the appointment of an arbitrator;
- The Registrar receives an application for joinder/ consolidation under the SIAC Rules; and
- Certain new evidence which was not available to the parties for justifiable reasons (e.g. documents which were earlier not or could not have been in the possession or control of the party) at the time of completion of pleadings/ arguments, under Rule 29.

More importantly, hectic schedules and/or excessive workload of arbitrators should not qualify as an "exceptional circumstance" for the purpose of extending the 60-day time limit for making an order or award.

Alternatively, SIAC could consider re-wording the language used in Rule 29.4. The rule can account for the grant of a simpliciter extension of the 60-day time limit, by subjecting such an extension to the discretion of the Registrar. The SIAC Rules confer discretionary powers upon SIAC's President,[7)] SIAC's Registrar,[8)] as well as tribunals[9)] constituted under the Rules. Rule 29.4 could simply be brought in line with such rules of discretion.

Either way, any departure from the specified timeline in Rule 29 should be justified with transparency, which would contribute towards the development and clear understanding of this summary procedure in the context of commercial arbitration.

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References

?1 See also A PRACTICAL GUIDE TO THE SIAC RULES, Nish Shetty, Harpreet Singh Nehal SC, Kabir Singh; and *The 2016 SIAC Rules: New Features*, Elodie Dulac (Indian Journal of Arbitration Law, Indian Journal of Arbitration Law, Vol. 5, No. 2, January 2017)

?2 See Christoph H. Schreuer, The ICSID Convention: A Commentary (2001); Referred to at paragraph 85 of the decision of the Tribunal in *Trans-Global Petroleum, Inc.* v. *Hashemite Kingdom of Jordan.*

?3 ICSID Case No. ARB/07/25.

?4 ICSID Case No. ARB/08/3, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules (Feb. 2, 2009)

?5 [2018] EWCA Civ. 2494

?6 [2018] EWHC 1399 (Comm.)

?7 Rules 9 and 17 of the 2016 Rules

?8 Rule 34.7 of the 2016 Rules

?9 Rules 18, 19.4 and 29.3.

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