

International Arbitration Alert

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New SIAC Rules: The Need For Refinement

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Last month, the Singapore International Arbitration Centre (SIAC) started a review and revision of its 2016 Rules (the “2020 Review”). The 2016 Rules introduced a number of novel provisions to address “early dismissal of claims and defences”; “delocalisation of the seat of arbitration” and “practical enhancements to the popular Expedited Procedure and Emergency Arbitration provisions”. It is likely that the 2020 Review will:

- Focus on procedural efficiency and nuance the existing expedited procedures, summary dismissal and emergency procedures.
- Seek to refine the 2016 Rules commensurate with the conclusions and statistics from the 2019 SIAC Annual Report and similar publications from other Institutions, the Report of the ICC Commission on Arbitration and alternative dispute resolution (ADR) on Construction Industry Arbitration.
- Seek to correlate with trends and aspirations on diversity, the Equal Representation in Arbitration Pledge (“ERA Pledge”) and developments relating to artificial intelligence (AI). The new SIAC Arbitration Rules are expected to be released in Q3 2021.

SIAC states that the purpose of the 2020 Review is to “take into account recent developments in international arbitration practice and procedure, and is aimed at better serving the needs of businesses, financial institutions and governments that use SIAC.”¹ SIAC has formed an Executive Committee overseeing six sub-committees which will look at:

- i. Multiple Contracts, Consolidation and Joinder
- ii. Expedited Procedure and Emergency Arbitration
- iii. Appointment and Challenges
- iv. Arbitral Procedure and Powers of the Tribunal (including Early Dismissal)
- v. New Technology and New Procedures
- vi. Drafting.

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Institutional Arbitration Rules: The Direction Of Travel

The 2020 Review comes at a time when Institutions have embarked on updates to the various Institutional rules. The Institutional drive for procedural efficiency has elevated expedited procedures, summary dismissal and emergency procedures. The London Court of International Arbitration (LCIA) will release its new Arbitration Rules last updated in 2014. The LCIA has not shared information about its new Rules although one could expect revisions in line with other leading arbitral rules including the 2016 SIAC Rules.

The last major institutions to update rules are the International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce (SCC). In 2017, the ICC introduced new Expedited Procedure Rules applicable to cases where the amount in dispute is less than US\$2 million; a shortened time limit for establishing the ICC Terms of Reference; enhanced transparency through the ICC Court's communication of reasoned decisions; and changes to the ICC's fee scale, including for expedited proceedings. Overall, the 2017 ICC Rules made incremental improvements. The SCC Rules made similar incremental advancements. Institutions that delay revisions risk losing relevancy. One example is the Dubai International Arbitration Centre (DIAC), which last revised its Rules in 2007. An update to reflect regimes for electronic filing of requests for arbitration; swift procedures for tribunal constitution; emergency arbitration; expedited arbitration and early dismissal are needed. Many of these features became "standard" several years ago (as evidenced by the Swiss Rules 2012 issued by the Swiss Chambers' Arbitration Institution (SCAI)).

The 2020 Review: Thought Points

Institutional rules need to give arbitrators a full set of tools needed to handle complexities in arbitral procedure yet render a fully enforceable award. The 2016 SIAC Rules are one of (if not the most) innovative and efficient set of rules and so one would expect the 2020 Review to only refine or nuance the framework. Areas for specific attention are:

- **Expedited Arbitration.** A familiar update in recent years is expedited arbitration such that many institutional rules now provide for fast(er)-track arbitration procedures (which include strict deadlines for the rendering of awards). However, one aspect lacking in many of these procedures is flexibility in the method in which the procedure is applied.² The increased complexity and value of disputes suggests movement away from a one-size fits all approach (usually applied solely by virtue of the amount in dispute) and toward a stepped or tiered approach commensurate with the amount in dispute and/or complexity of the dispute.³ For further analysis and proposals on this topic, one should consult the Journal of International Arbitration Article published in March 2020: "*Ten Years Later: Why the 'Renaissance of Expedited Arbitration' Should be the 'Emergency Arbitration' of 2020*".⁴
- **Sanctions.** An area which has not received attention (although expressly mentioned in the draft revised DIAC Arbitration Rules) relates to express powers of the arbitral tribunal to sanction bad conduct. Document production is an area that may be ripe for sanctions as it appears that parties can be tempted to "factor in" the potential of a tribunal drawing adverse inferences for nondisclosure into decisions whether or not to comply with disclosure orders. Put differently, may be a trend of parties being more willing to breach document production orders in the hope/calculation that no meaningful sanction will ultimately be forthcoming given

arbitral tribunals' general reluctance to draw adverse inferences. It would be worth considering what sanctions arbitral rules could provide to increase compliance with production orders. While a stay or strike out of proceedings are draconian remedies, tribunals should be prepared to use them in order to protect the integrity of their processes and procedures. Breaches of confidentiality provisions are another area that would benefit from express or discretionary sanctions. Often an innocent party needing a breach of a confidentiality order will find itself and the tribunal relatively toothless. The breach has already occurred and damages stemming from a breach of confidentiality are difficult to quantify.

- **Early Dismissal**. 2016 SIAC Rule 29 is an excellent tool for managing efficiency of proceedings because it allows the removal of claims that are manifestly without merit from the proceedings. Rule 29 is commendable in leaving the flexibility for such an application to be brought at any time rather than within a limited period following the commencement of the arbitration or the constitution of the arbitral tribunal. Although this flexibility is implied in the current drafting of the Rule, SIAC should consider express language which makes clear that Rule 29 applies throughout the proceedings (thus avoiding argument about whether an application under Rule 29 needs to be brought earlier in the proceedings—for example, 30 or 60 days after the Request for Arbitration or Statement of Claim).
- **Arbitrators, Conflicts and Duty of Disclosure**. Institutions, through Rules or protocols, should be incorporating the latest thinking and research on increased diversity in the composition of arbitral tribunals. There are also issues related to the arbitrators' duties of disclosure in respect of potential conflicts of interest, which has featured as the subject of many rule updates, soft law and academic papers.⁵ Some institutional rules include provisions which require arbitrators to disclose facts which could give rise to "justifiable doubts" as to their independence or impartiality. The ICC addressed arbitrator disclosure in Practice Note in 2019 which accompanied the revised Arbitration Rules. The Practice Note includes a list of nine factors⁶ that arbitrators should consider when making disclosure in addition to the circumstances set out in the IBA Guidelines on Conflicts of Interest. The 2019 Practice Note received early criticism in that it could be read to be making requirements broader and less clear than those already set out in the IBA Guidelines. It is thus unlikely that SIAC will follow the ICC approach.
- **Follow-on Disputes**. After the issue of a final award, satellite disputes can arise about the contractual effect or implementation of the declarations in the final award. Some institutional rules and some national laws provide for the ability for the arbitral tribunal to issue interpretations of the award which would extend to interpreting/clarifying findings made in the award (as opposed to making new findings or dealing claims which were not made as part of the arbitration). The 2016 SIAC Rules already contain a robust regime in Rule 33 for correction, interpretation and additional awards. These provisions avoid the possibility for a recalcitrant party to refuse interpretation forcing a fresh arbitration to commence. Related to issues of interpretation, one option in institutional rules would be to provide tribunals with the express power to hear satellite disputes related to the final award without the need to fully re-constitute the arbitral tribunal under the same terms as the first constitution. For example, where the parties have agreed that the same arbitral tribunal ought to hear the follow-on dispute arising out of the final award, the parties should not be forced to endure the constitution process.

- **Data Privacy and Cyber Security.** An area which needs increased attention as business and international arbitration has evolved to an almost exclusively digital platform is the requirement for, and implications of breaches of, data privacy and/or cyber security. Most institutional rules are silent on such topics, leaving persons affected by breaches without a remedy. At the very least, a provision requiring the parties, institutions and arbitrators to secure the electronic data they are sending/receiving and to uphold applicable data privacy regulations would provide an initial guidepost that a party or arbitrator failing to do so would be in breach of the Rules. Naturally, data privacy and cyber security become more important given the growth in AI mechanisms.

¹ SIAC Announces Commencement of Revisions for SIAC Arbitration Rules dated July 7, 2020, available at <https://siac.org.sg/index.php>.

² For example, the Arbitration Foundation for Southern Africa (AFSA) draft Rules which are an excellent example incorporating many of the current best practices in international arbitration have added expedited procedures to their new draft Rules, but have not provided for a sliding scale of time/complexities commensurate with the value in dispute.

³ Note that this issue was also explicitly addressed in the context of International Construction Arbitration in the ICC Commission Report on Arbitration and ADR on Construction Industry Arbitration.

⁴ H. Lal and B. Casey, *Ten Years Later: Why the 'Renaissance of Expedited Arbitration' Should be the 'Emergency Arbitration' of 2020*, Journal of International Arbitration Vol. 37(3) (Kluwer 2020).

⁵ See, e.g., H. Lal, B. Casey and L. Defranchi, *Re-Thinking Issue Conflicts in International Commercial Arbitration*, IBA Dispute Resolution International Vol. 14(1) (IBA 2020).

⁶ ICC Practice Note 2019, at para. 23. The ICC recommends taking into consideration if the arbitrator or prospective arbitrator or his/her law firm: "advises, or has represented or advised, one of the parties or one of its affiliates; acts or has acted against one of the parties or one of its affiliates; firm has a business relationship with one of the parties or one of its affiliates, or a personal interest of any nature in the outcome of the dispute; acts or has acted on behalf of one of the parties or one of its affiliates as director, board member, officer, or otherwise; is or has been involved in the dispute, or has expressed a view on the dispute in a manner that might affect his or her impartiality; has a professional or close personal relationship with counsel to one of the parties or the counsel's law firm; acts or has acted as arbitrator in a case involving one of the parties or one of its affiliates; acts or has acted as arbitrator in a related case; has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel's law firm."

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