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Launch of the Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules 2017

On 1 January 2017, the Singapore International Arbitration Centre ("SIAC") launched its Investment Arbitration Rules 2017 (the "IA Rules")[1], potentially marking a new chapter in the institutional administration of investor-State arbitration proceedings. The IA Rules were developed, following public consultation, to address some of the more compelling criticisms of existing investor-State arbitration mechanisms. In particular, they attempt to deal with spiraling costs, frivolous claims, impartiality and public interest interventions, by drawing on best practice from bodies such as the Permanent Court of Arbitration ("PCA"), the International Centre for Settlement of Investment Disputes ("ICSID") and the United Nations Commission on International Trade Law ("UNCITRAL").

Appointment and Dismissal of Arbitrators

The IA Rules include a requirement that arbitrators are independent and impartial, as well as a provision under which sole or presiding arbitrators should not have the same nationality as either of the parties, unless otherwise agreed between the parties.[2] They also anticipate the problem of non-participation by the respondent and include default provisions where one party fails to appoint its arbitrator and the institution has to step-in. The default provisions under the Rules apply if a party fails to make a nomination within 35 days.[3] This is in line with the 30-day window provided for under the equivalent UNCITRAL and PCA Rules,[4] but is a substantially shorter timeframe than provided for in the ISCID Rules, which allow 90 days.[5]

The grounds for challenging an arbitrator are where there are justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess any requisite qualification on which the parties have agreed.[6]Unlike the ICSID Rules, any challenge is determined by the institution rather than the tribunal itself, which allows the proceedings to continue while a challenge is being considered, thus reducing the risk of challenges being brought as a delay tactic.[7] This is further supplemented by a strict limit on the timing of any such challenges. In contrast to ICSID's requirement that a challenge must be brought "*promptly and, in any event, before the proceedings are declared closed*", the IA Rules provide a 28-day window from the time of appointment (or the ground for a challenge becoming known).[8] Given that many ICSID proceedings have been beset by late (and often repeated) challenges, this is undoubtedly a positive development.

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[1] Available at http://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf
[2] IA Rules, Rules 10.1 and 5.7
[3] IA Rules, Rule 7.2
[4] UNCITRAL Arbitration Rules 2013, Article 9.2; PCA Arbitration Rules 2012, Article 9.2
[5] ICSID Rules 2006, Rule 4
[6] IA Rules, Rule 11.1
[7] ICSID Rules 2006, Rules 9(4) and 9(6); IA Rules, Rules 12.4 and 13.1
[8] ICSID Rules 2006, Rule 9(1); IA Rules, Rule 12.1

Summary Procedure and Emergency Arbitrators

Drawing on recent developments in multilateral trade and investment agreements such as the Comprehensive Economic and Trade Agreement ("CETA") between the European Union and Canada. The IA Rules provide for early dismissal of claims where they are deemed to be frivolous or unmeritorious. They allow for a claim to be struck out where it is (i) manifestly without merit, (ii) manifestly outside the jurisdiction of the tribunal, or (iii) manifestly inadmissible.[9] This clearly draws upon the ICSID Rules and corresponding case law.[10]

The IA Rules also provide for an emergency arbitrator to be appointed prior to the constitution of the tribunal.[11] This is in stark contrast to the approach taken by the International Chamber of Commerce ("ICC") in its latest arbitration rules, which specifically exclude the ability of the parties to apply for an emergency arbitrator in cases involving treaties.[12] Allowing for the appointment of an emergency arbitrator might arguably cut across the mandatory cooling-off period common among investment treaties. In practice, it therefore seems likely that States will seek to exclude these provisions in any agreements referring to the IA Rules.[13]

Third Party Interventions

In response to the widespread criticism that investment tribunals are clandestine, unaccountable and pay little heed to important public policy issues, SIAC has adopted provisions permitting *amicus curiae* interventions in certain limited circumstances. These largely adopt the drafting used in the most recent versions of the ICSID and UNCITRAL Rules,[14] as well as several recent trade and investment agreements.

The IA Rules provide a *prima facie* right for non-disputing parties to a treaty to provide written submissions on the correct interpretation of that treaty, provided that these are relevant to the dispute.[15] In addition, they permit third parties (whether a party to the treaty or not) to apply to the tribunal for permission to make written submissions, provided that they have a "sufficient interest" in the outcome of the proceedings and assist the tribunal in the determination of a relevant factual or legal issue by bringing a perspective, particular knowledge or insight that is different from that of the parties.[16] Interestingly, unlike the ICSID and UNCITRAL Rules, the IA Rules also expressly enable the tribunal to seek input from third parties *ex proprio motu*, provided that the parties have been consulted.[17]

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[9] IA Rules, Rule 26.1
[10] ICSID Rules 2006, Rule 41(6); e.g. *Trans-Global Petroleum Inc. v. Jordan*, ICSID ARB/07/25
[11] IA Rules, Rule 27.4 and Schedule 1
[12] ICC Rules 2012, Article 29(5); ICC Arbitration Commission Report on Arbitration Involving States and State Entities under the ICC Rules of Arbitration (01 Oct 2015), Paragraphs 51 and 52
[13] The IA Rules require specific consent to the emergency arbitrator provisions
[14] ICSID Rules 2006, Rule 37(3); UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014, Articles 4 and 5.1
[15] IA Rules, Rule 29.1
[16] IA Rules, Rules 29.2 and 29.3
[17] IA Rules, Rule 29.2

Third Party Funding

One issue that has not expressly been dealt with in any of the rules typically applied to investment arbitrations is the treatment of third party funding. The IA Rules therefore break the mould in this respect, by providing for the tribunal (i) to order disclosure of third party funding arrangements, including the identity of the funder, its interest in the outcome of proceedings and/or whether the funder has committed to undertake adverse costs liability, and (ii) to take into account any third party funding arrangements when apportioning the costs of the arbitration. It is noteworthy that the original draft of the rules that was circulated for public consultation in February 2016 also included a provision under which the tribunal could make a costs award against a third party funder, if appropriate.[18] Given that this proposal was not adopted in the final draft, it seems that parties to proceedings under the IA Rules will instead have to rely on the cumulative effect of provisions for funding arrangements to be disclosed and for security for costs to be ordered.

Transparency and Confidentiality

One significant criticism of investment arbitration that is not addressed in the IA Rules is the issue of transparency. This is perhaps understandable, given the institution's primarily commercial focus and the stakeholders that it generally represents. In stark contrast to the recently adopted UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration 2014, which provide for transparency save in exceptional circumstances (i.e. commercially sensitive information or national security interests), the IA Rules treat confidentiality as the default option.

This raises some interesting practical questions, especially in relation to third party interventions. First, it is unclear how interested parties would become aware of the proceedings in the first place if all details are kept confidential. Second, it seems unrealistic to expect non-governmental organisations or other civil society groups to participate in proceedings without consultation with their members and/or the public in general. This would be very difficult unless confidentiality was waived in relation to the key factual and legal issues in dispute between the parties. Clearly this tension between transparency and confidentiality was considered during the consultation phase, since the original proposal from SIAC anticipated the publication of the identity of the parties and their legal counsel.[19] Instead, the final rules permit disclosure only of the nationalities of the parties, as well as the identities of the tribunal members and the treaty or other legal instrument under which the arbitration has been commenced.[20]

[18] Public Consultation on Draft SIAC Investment Arbitration Rules (01 Feb 2016), Draft Rule 34
[19] Public Consultation on Draft SIAC Investment Arbitration Rules (01 Feb 2016), Draft Rule 37.2
[20] SIAC IA Rules, Rule 38.2

A New Chapter in Investment Arbitration?

Singapore is quickly emerging as a dominant force in international commercial arbitration and the recent case of *Sanum v. Laos*[21] demonstrates the Singapore courts' willingness and ability to deal with complex issues of public international law when acting as a supervisory court in international investment arbitration proceedings. Singapore is therefore well-situated for the new wave of investments from China and other Asia-Pacific economic heavyweights into Africa and the Indian subcontinent.

It remains to be seen whether the alternative approach taken by SIAC, when compared to ICSID and UNCITRAL, will be sufficient to encourage the widespread adoption of the new rules by States in future investment treaties and contracts. There is also the more esoteric question of whether the proliferation of different rules is a positive development, providing greater choice and competition among institutions, or a negative development, exacerbating the fragmentation of international law. But in the absence of a consensus among States as to the merits or characteristics of a global investment court, it is reassuring to see that some steps are being taken to allay the more credible and pertinent public concerns surrounding investment arbitration.

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[21] *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] SGCA 57