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Diminishing Procedural Boundaries in International Arbitration*

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Key Words : SIAC Rules, Civil Law, Common Law, Emergency Arbitration, Expedited Procedure, Urgent Interim Reliefs.

* The views expressed in this article are those of the author and do not necessarily represent the views of, and should not be attributed to, the Singapore International Arbitration Centre

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Part I: Harmonizing Commom & Civil Law Practices

1. Introduction

Parties involved in cross border transactions, often find it a common ground to agree to resolve their disputes by arbitration. This is due, in part, to parties being wary of having to contest their disputes in courts of unfamiliar jurisdictions and even more so in jurisdictions with a different legal system.

The two most prevalent legal systems are the civil law and common law systems.[1] The civil and common law practices diverge on procedural aspects such as details of pleadings/submissions, disclosure of documents, taking of evidence, appointment of experts and examination of witnesses[2]; which may act as a hurdle for the lawyers, of the respective systems, to completely adapt to the procedural approach of the other's legal system.

It appears that international arbitration is emerging as a melting pot for parties, arbitrators and lawyers from different jurisdictions. It is seen that, in arbitration, parties are akin to agree on convergence of practices of the two legal systems[3]. Such convergence of practice is possible in arbitration because the Tribunal is not bound to follow the domestic evidence rules and/or the civil procedure rules of the seat of the arbitration[4].

As an example, we will use the SIAC Rules to show how they bridge the gap between parties coming from the civil and common law jurisdictions. At the outset, we would like to mention that Rule 16.1 read with Rule 16.3 of the SIAC Rules provides the parties and the Tribunal with the liberty to agree on the procedural conduct of the arbitration. However, the Tribunal is obligated to ensure that the procedures adopted result in a fair, expeditious, economical and final determination of the dispute.

1) Siegfried H. Elsing and John M Townsend, International Arbitration and Mediation: From the Professional's Perspective, 2007, p.45.
2) Michael Mc Ilwrath and John Savage, International Arbitration and Mediation: A Practical Guide, 2010, p. 257.
3) Supra note 1.
4) Gary B. Born, International Arbitration: Law and Practice, (Kluwer Law International 2012), p. 110.

Rule 16.1 and 16.3 of the SIAC Rules, 2013 state as follows:

Rule 16.1

"The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final determination of the dispute."

Rule 16.3

"As soon as practicable after the appointment of all arbitrators, the Tribunal shall conduct a preliminary meeting with the parties, in person or by any other means, to discuss the procedures that will be most appropriate and efficient for the case."

2. Notice of Arbitration

The common law practice is of filing a succinct notice of arbitration; briefly stating the material facts and the alleged wrong committed by the Respondent. The civil law practice is of initiating arbitration by pleading in detail the law and facts and disclosing the relevant documents relied upon[5].

Rule 3.1 of the SIAC Rules sets out the essential information that a party is to include in its notice of arbitration in order to commence the arbitration proceedings. Further, Rule 3.2 of the SIAC Rules provides the party an option of submitting its statement of claim along with the notice of arbitration. Thus, the SIAC Rules allow parties the discretion to decide the extent of details parties wish to include, apart from the essential information as stated in Rule 3.1, in their notice of arbitration at the time of the commencement of the arbitration.

3. Disclosure of Documents

The practice of disclosure of documents is significantly different in the civil law and common law jurisdictions. The common law lawyers and judges are accustomed to a practice wherein it is usual for parties to make requests for disclosure of documents relevant to the proceedings[6]. The disclosure process is party driven; however, the courts

5) Supra note 1, p.46.
6) Supra Note 4, p.182.

too would not hesitate to order parties to produce documents relevant to the case[7].

In the civil law jurisdictions, disclosure requests from the opponent are highly unusual. In addition, the courts exercise a hands-off approach when it comes to ordering parties to disclose or produce further documents. The respective party would voluntarily disclose the documents which they think are relevant to the proceedings. The case is adjudicated on the basis of the documents disclosed by the respective parties[8].

The SIAC Rules strike a balance between the practices of both systems. Rule 17.1 read with Rule 17.7 of the SIAC Rules provides that unless the Tribunal determines otherwise, all submissions filed by the parties should be accompanied by copies of all supporting documents which have not previously been submitted by any party. The parties, at the pleading stage itself, are expected to disclose documents that are relevant to the arbitration proceedings. Should there be a need for further disclosure of documents, Rule 24.1(g) of the SIAC Rules confers power on the Tribunal to order parties to disclose documents that are relevant to the case and material to its outcome. The SIAC Rules do not, however, give parties' an express right to request a disclosure of documents from the other side.

Rules 17.1, 17.4 and 24.1(g) of the SIAC Rules, 2013 state as follows:

Rule 17.1

"*Unless the Tribunal determines otherwise, the submission of written statements shall proceed as set out in this Rule.*"

Rule 17.7

"*All submissions referred to in this Rule shall be accompanied by copies of all supporting documents which have not previously been submitted by any party*"

Rule 24.1(g)

"*In addition to the powers specified in these Rules and not in derogation of the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to order any party to produce to the Tribunal and to the other parties for inspection, and to supply copies of, any document in their possession or control which the Tribunal considers relevant to the case and material to its outcome*"

7) *Id.*
8) *Id.*

4. Taking of Evidence

In the civil law system, greater emphasis is attached to pleadings and written submissions rather than to oral examination of witnesses and experts[9]. As a result, the civil law tradition has been to have relatively short hearings[10]. Further, the appointment of experts and examination of witnesses are controlled by the courts. The courts would appoint the experts, summon witnesses and question the witness at the first instance[11].

The common law system is to fully develop one's case at the oral hearing. Oral hearings, in a common law system, are longer and more intense. Further, the appointment of experts, presentation and examination of witnesses are driven by the parties at the first instance[12]. The court will step in only when it needs to ask further questions[13].

The SIAC Rules dealing with taking of evidence principally provide that in the absence of the parties' agreement, the Tribunal shall have the power to direct the manner in which evidence is to be taken. The SIAC Rules gives the Tribunal the flexibility to either adopt the practices of the civil law system, common law system or converge the practices of the two legal systems in taking evidence.

By way of illustration, we set out a few of the SIAC Rules dealing with taking of evidence in an arbitration proceeding conducted under the SIAC Rules.

a) Oral Hearing

Rule 21.1[14] of the SIAC Rules provides that unless the parties agree to a 'Documents Only' hearing, the Tribunal shall, hold a hearing for the presentation of evidence and/or oral submissions on the merits of the dispute, if (i) even one of the party's requests for it; or (ii) the Tribunal itself decides that such a hearing is necessary. The occurrence of an oral hearing depends on the request of the party/parties, and in the absence of such request, the discretion of the Tribunal.

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9) Julian D. M. Lew; Loukas A. Mistelis; Stefan Michael Kröll, Comparative International Commercial Arbitration, (Kluwer Law International 2003), p. 553 – 583.
10) Supra Note 2.
11) Supra Note 9.
12) *Id.*
13) *Id.*
14) Rule 21.1 of the SIAC Rules 2013.
Unless the parties have agreed on documents-only arbitration, the Tribunal shall, if either party so requests or the Tribunal so decides, hold a hearing for the presentation of evidence and/or for oral submissions on the merits of the dispute, including without limitation any issue as to jurisdiction."

b) Witness Examination

Under Rule 22.4[15] of the SIAC Rules, the Tribunal may direct that the witness(s) testify in writing; this may be in the form of a signed statement, affidavit or any other form of written recording. A party may also request that a witness who has testified in writing be called for oral cross examination, subject to Tribunal's discretion. Rule 22.2[16] of the SIAC Rules confers the discretion on the Tribunal to allow, refuse or limit the appearances of the witnesses for cross examination. The Tribunal also has the power, on its own accord, under Rule 24.1(i)[17] to direct any party to give evidence by affidavit or in any other form.

Further, Rule 22.3[18] of the SIAC Rules provides that the witnesses giving oral evidence may be questioned by the parties, their representatives and the Tribunal in such manner as the Tribunal shall determine.

c) Appointment of Experts

The SIAC Rules provide for both appointment of experts by the parties and/or by the Tribunal. The relevant Rules dealing with expert witnesses are as follows:

Rules 22.1, 23 and 31.2 of the SIAC Rules 2013 state as follows:

Rule 22.1

"*Before any hearing, the Tribunal may require any party to give notice of the identity of witnesses, including expert witnesses, whom it intends to produce, the subject matter of their testimony and its relevance to the issues.*"

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15) Rule 22.4 of the SIAC Rules 2013.
"The Tribunal may direct the testimony of witnesses to be presented in written form, either as signed statements or sworn affidavits or any other form of recording. Subject to Rule 22.2, any party may request that such a witness should attend for oral examination. If the witness fails to attend, the Tribunal may place such weight on the written testimony as it thinks fit, disregard it or exclude it altogether."

16) Rule 22.2 of the SIAC Rules 2013.
"The Tribunal has discretion to allow, refuse or limit the appearance of witnesses."

17) Rule 24.1(i) of the SIAC Rules 2013.
"In addition to the powers specified in these Rules and not in derogation of the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to:.. order any party to provide security for all or part of any amount in dispute in the arbitration."

18) Rule 22.3 of the SIAC Rules 2013.
"Any witness who gives oral evidence may be questioned by each of the parties, their representatives and the Tribunal in such manner as the Tribunal shall determine."

Rule 23.1

"*Unless the parties have agreed otherwise, the Tribunal:*

a. may following consultation with the parties, appoint an expert to report on specific issues; and

b. may require a party to give such expert any relevant information, or to produce or provide access to any relevant documents, goods or property for inspection.

Rule 23.2

"Any expert so appointed shall submit a report in writing to the Tribunal. Upon receipt of such a written report, the Tribunal shall deliver a copy of the report to the parties and invite the parties to submit written comments on the report.

Rule 23.3

"Unless the parties have agreed otherwise, if the Tribunal considers it necessary, any such expert shall, after delivery of his written report, participate in a hearing. At the hearing, the parties shall have the opportunity to question him."

Rule 31.2

"*The term "costs of the arbitration" includes:*

.....

c. the costs of expert advice and of other assistance required by the Tribunal."

5. Conclusion

As discussed earlier, as the civil and common law legal systems are distinct in their procedural approach. In view of the hybrid nature of international arbitration practices, parties involved in cross border transactions may find international arbitration to be an acceptable forum to resolve their disputes. As has been illustrated above, the SIAC Rules provides parties and the tribunal, coming from different legal systems, the option to tailor with the conduct of the arbitration proceedings in a way that is closest to their legal system.

Part Ⅱ : SIAC Special Procedures

A. Emergency Arbitration

1. Introduction

The Singapore International Arbitration Centre ('SIAC') introduced provisions providing for emergency arbitration ('EA') in its 2010 Rules[19]. The EA provisions are set out under Schedule 1 of the 2010 Rules and details the procedure for initiating an EA. The EA provisions enable a party to obtain order(s)/award for urgent interim relief(s) upon commencement of arbitral proceedings but pending the constitution of the main Tribunal. For this purpose an emergency arbitrator is appointed, prior to constitution of the main Tribunal. In other words, it is the emergency arbitrator who deals with the party's emergency interim relief application pending the constitution of the main arbitral Tribunal. Prior to the introduction of the EA provisions in the 2010 Rules, parties had to approach the national courts for seeking emergency reliefs, in aid of arbitration, as parties were unable to wait for the Tribunal to be constituted. In certain cases, this defeated the very purpose for which parties opted to resolve their dispute by arbitration in the first place. It is pertinent to mention that a request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal is not incompatible with these Rules[20].

SIAC's EA provisions have proved extremely popular.

2. The EA Rules

A party in need of emergency relief, prior to the constitution of the Tribunal, may apply for such relief pursuant to Rule 26.2 and Schedule 1 of the 2013 Rules. Under these provisions:

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19) The EA provisions have been retained in Schedule 1 to the SIAC Rules, 2013.

20) Rule 26.3 of the SIAC Rules 2013.

"A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter is not incompatible with these Rules."

(i) the President of Court of SIAC Court of Arbitration will seek to appoint an Emergency Arbitrator within one business day of deciding to accept an application for emergency relief under these provisions;
(ii) any challenge to the appointment of the Emergency Arbitrator must be made within one business day of the communication of his of his appointment;
(iii) the Emergency Arbitrator must establish a schedule for considering the application for emergency relief within two business days of his appointment;
(iv) the Emergency Arbitrator shall have no further power to act after the Tribunal is constituted; and
(v) the order or award rendered by the Emergency Arbitrator shall cease to be binding if the Tribunal is not constituted within 90 days of such order or award or when the Tribunal makes a final award or if the claim is withdrawn.

3. Types of Cases

SIAC has seen EA applications being filed in corporate, construction, commercial and trade related disputes.

4. Scope of Interim Reliefs

An emergency arbitrator derives its power to grant urgent interim reliefs from the EA provisions contained in the SIAC Rules. The SIAC Rules provide that "*The Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary*" [21]and that *"Any interim award or order of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security."*[22]

The SIAC Rules do not limit the Tribunal's power by providing an exhaustive list of the type of urgent interim reliefs that may be sought or granted in an EA proceeding. The discretion to order/award suitable urgent interim reliefs is vested with the Tribunal. Interestingly, it has been noted that some emergency arbitrators have referred to Section 12 of the [Singapore's] International Arbitration Act (Cap 143A) ('**IAA**')[23] for guidance on the type of interim reliefs that an emergency arbitrator may order. Section 12 of the

21) Rule 6 of Schedule 1 of the 2013 Rules.
22) Rule 8 of Schedule 1 of the 2013 Rules.
23) Powers of arbitral tribunal.

IAA enumerates the type of orders or directions that are within the power of an arbitral tribunal to grant.

Set out below are broadly the types of urgent interim reliefs that have been granted in past EA Proceedings at SIAC:

1. injunction restraining a call on bank guarantees;
2. restraining a company from breaching a confidentiality provision in a contract by ordering the party to abide by the contractual dispute resolution mechanism of arbitration at the SIAC;
3. an order for sale of disputed cargo to prevent deterioration of the cargo;
4. an order for preservation of documents, records etc.;
5. an order for delivery-up of documents;
6. an order allowing access to a property for inspection of property;
7. Mareva injunction against a Respondent from: (i) disposing of the shares which formed the substance of the dispute (ii) dissipation of assets up to the value of the claim; and (iii) removal of assets from Singapore up to the value of the claim;
8. order requiring disclosure of assets ; and
9. order directing a shipyard to deliver of a vessel to the claimant.

5. Factors Considered While Granting Urgent Interim Relief

There is abundance of jurisprudence available on the threshold test to be considered by the main Tribunal in granting interim relief; such as case laws[24], commentaries or guidelines[25]. Some of the factors (non-exhaustive) usually considered by a tribunal while deciding on whether an applicant should be granted the interim relief are as follows:

- whether the arbitral tribunal *prima facie* has the jurisdiction to grant the interim relief requested by the applicant[26];
- whether there is an urgent requirement of the relief sought by the applicant;
- whether the applicant would suffer irreparable harm for which damages would not be an adequate remedy;

24) one of the most cited cases being American Cyanamid Co. v. Ethicon, [1975] AC 396.
25) CIArb Guidelines.
26) especially where the applicant is seeing a Mareva injunction/freezing order.

- whether the irreparable harm caused to the applicant would outweigh the harm that would be caused to the Respondent if interim relief is granted;
- whether there is a 'good arguable case' i.e. if there exists a real reasonable possibility of the applicant succeeding on the merits of the case. At the interim stage, the tribunal is unable to make a decision by going into the merits of the case; and
- the balance of convenience.

There is little commentary on the factors that an emergency arbitrator should be guided by in granting interim reliefs. It has been noticed that even in EA cases the emergency arbitrator considers and applies the same standard principles, as the main tribunal, when considering an interim relief application.

6. Time Lines & Costs

It goes without saying that in an EA proceeding, time is of the essence. One of the main factors contributing to the success of an EA procedure is the time within which a party is able to obtain the first interim order and subsequently the interim award. At SIAC, the average number of days taken in granting the first interim order after receipt of an emergency relief application has been 2.36 days. The average number of days between the first interim order and award on interim relief has been 9.40 days. The average number of days between the first interim order and award on interim relief, when there was a challenge to the Emergency Arbitrator has been 20 days.

The 'costs of arbitration' incurred towards an emergency arbitration include (a) the Emergency Arbitrator's fees and expenses and (b) the SIAC's administrative fee. SIAC does not charge a separate filing fee for EA proceedings. The filing fee is only collected in the main arbitration proceedings. SIAC's administrative fees for EA proceedings have been fixed at SGD 5,350.00 for Singapore parties and SGD 5,000.00 for overseas parties.

The emergency arbitrator's fee is capped at 20% of a sole arbitrator's maximum fees calculated in accordance with the Schedule of Fees in force at the time of commencement of the arbitration, but shall be not less than S$20,000, unless the Registrar otherwise determines. A further 20% of the Emergency Arbitrator's fee cap is collected to cover the emergency arbitrator's expenses.

B. Expedited Procedure

Apart from the EA provisions, the SIAC introduced another set of popular rules, in its 2010 Rules, called the 'Expedited Procedure' ('**EP**'). The EP provisions give parties the option of having their disputes determined in six (6) months from the date of the constitution of the tribunal. The EP provisions are set out in Rule 5 of the SIAC Rules.[27)]

The EP rules provides that a party may apply to SIAC, prior to the constitution of the tribunal, to have the arbitration proceedings conducted in accordance with the "Expedited Procedure". However, the party applying for the application of the EP needs to demonstrate that any one of the following criterions is satisfied i.e. either:

a. the amount in dispute does not exceed the equivalent amount of S$5,000,000, representing the aggregate of the claim, counterclaim and any setoff defence;
b. the parties so agree; or
c. it is a case of exceptional urgency.

Once a party files an application requesting the application of EP, the parties to the arbitration are asked to comment on the applicant's request. The President of the SIAC Court of Arbitration ('**President**') will then consider the views of the parties and determine whether the arbitration should be conducted on an expedited basis. Once the President determines that EP is to apply to the conduct of the arbitration proceedings the following procedures apply to the conduct of the arbitration:

a. the Registrar may shorten any time limits under these Rules;
b. the case shall be referred to a sole arbitrator, unless the President determines otherwise;
c. Unless the parties agree that the dispute shall be decided on the basis of documentary evidence only, the Tribunal shall hold a hearing for the examination of all witnesses and expert witnesses as well as for any argument;
d. the award shall be made within six months from the date when the Tribunal is constituted unless, in exceptional circumstances, the Registrar extends the time; and
e. the Tribunal shall state the reasons upon which the award is based in summary form, unless the parties have agreed that no reasons are to be given.

27) The EP provisions have been retained in the 2013 SIAC Rules.

• **Case Study**

Brief facts: The Claimants were nationals of Norway. The First Respondent was a company incorporated in BVI and the Second Respondent was a national of United Kingdom.

The dispute between the parties arose out of a Settlement Agreement whereby the Respondents agreed to redeem a number of the Claimants' shares issued by the First Respondent.

Arbitration Clause: The arbitration clause provided for the seat of arbitration to be Singapore and the governing law of the contract as the 'Laws of England'. Pursuant to the arbitration clause, the arbitration was administered under the SIAC Rules 2010.

Procedural history: The Claimants, on 11 March 2011, filed their Notice of Arbitration along with an application for these proceedings to be conducted in accordance with the Expedited Procedure under Rule 5 of the SIAC Rules 2010.

The Respondents were given an opportunity to comment on the Claimant's application for the arbitration to be conducted on expedited basis. The Respondents did not provide any comments even after several chasers. The Chairman of the SIAC determined on 29 March 2011 that the arbitral proceedings in the current reference shall be conducted in accordance with the Expedited Procedure provided under Rule 5 of the SIAC Rules; after considering the circumstances of this matter.

The Chairman of SIAC appointed the sole arbitrator on 7 April 2011. The sole arbitrator appointed was from Singapore.

The Arbitrator issued the award on 7 October 2011.

Timelines: The total time taken from the filing of the Notice of Arbitration up to rendering of the Award was 6 months, 26 days

The total time taken from the constitution of Tribunal and up to rendering of the Award was 6 months.

• **Conclusion**

It has been almost three years since the SIAC introduced provisions for the EA Proceedings and Expedited Procedures. SIAC has seen the growing use of these procedures from time of their introduction. From the introduction of these provisions, to October 2013, SIAC handled twenty seven (27) EA cases and 115 EP cases.

At the time of this article, SIAC is the arbitral institute with highest number of EA

cases in Asia. The growing importance of EA proceedings is also reflected in the fact that in the 2012 amendments to the IAA the definition of the "arbitral tribunal" was amended to include an Emergency Arbitrator[28], thereby recognising an Emergency Arbitrator to be a tribunal. This change allows the interim award/order passed by an Emergency Arbitrator to be enforceable in the similar manner as the main tribunal's awards/orders[29]. However, this position is yet to be tested as, in most of SIAC EA cases wherein an interim relief was granted, parties have abided by the Emergency Arbitrator's order/award on their own accord, in compliance with Rule 9[30] of the SIAC Rules, 2010[31].

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28) Article 2(1) of the International Arbitration Act (Cap 143A), Singapore.

29) Kindly note that the IAA is only applicable to arbitrations where the seat of arbitration is Singapore.

30) Schedule 1, Rule 9 of the SIAC Rules 2013.
"An order or award pursuant to this Schedule 1 shall be binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to comply with such an order or award without delay." [emphasis added].

31) Rule 9 of the SIAC Rules, 2010 remains unchanged in our new 2013 Rules.

<Guidelines & Institutional Rules>

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International Arbitration Act (Cap 143A), Singapore.

ABSTRACT

Diminishing Procedural Boundaries in International Arbitration*

Abha Pareek

The surge of cross border trade and transactions has seen international arbitration fast emerging as the preferred mode of dispute resolution. This phenomenon is especially remarkable in the Asian region. The Singapore International Arbitration Centre ("SIAC") aspires to contribute to this growth as one of the leading arbitral institutions. The objective of this article is to provide an insight into the key features of SIAC Rules.

This article has been divided into two parts; the first part discusses how the SIAC Rules are helpful in building bridges in international arbitration between the common law and civil law systems. We have attempted to throw light on how the SIAC Rules may be tailored by the parties to bring about a harmonization in the common law and civil law practices in the conduct of the arbitration proceedings.

In the second part of the article, we discuss the two most popular procedures introduced in the SIAC Rules in 2010 i.e. 'Emergency Arbitration' and 'Expedited procedures'. The emergency arbitration provisions enable a party to obtain order(s)/award for urgent interim relief(s) upon commencement of arbitral proceedings but pending the constitution of the main Tribunal. The expedited Procedure provisions give parties the option of having their disputes determined in six (6) months from the date of the constitution of the tribunal.

Key Words : SIAC Rules, Civil Law, Common Law, Emergency Arbitration, Expedited Procedure, Urgent Interim Reliefs.