

The expedited and emergency arbitrator procedures under the SIAC Rules – Six months on, how have they fared?



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The Singapore International Arbitration Centre (“SIAC”) has taken significant steps towards addressing concerns voiced by the international business community about delays in the arbitration process by making revisions to its Rules which, in particular, provide for (a) an “expedited procedure” (SIAC Rule 5) and (b) the appointment of an “emergency arbitrator” to grant interim relief before the tribunal has been constituted (SIAC Rule 26 and Schedule 1).

Those revisions took effect from 1 July 2010 and apply, absent contrary agreement by the parties, to any arbitration commenced under the SIAC Rules on or since that date. They were introduced by SIAC with the stated aim of achieving greater efficiency and effectiveness of the arbitral process. In this note we consider how they have been received by users of the SIAC Rules and also highlight some differences with equivalent rules adopted by other major arbitral institutions.

Outline of the “Expedited Procedure” (SIAC Rule 5.1)

Rule 5.1 of the revised SIAC Rules¹ provides that any party may apply to SIAC for the Expedited Procedure if any one or more of the following three circumstances apply:

- where the amount in dispute is less than S\$5 million (approximately US\$3.8 million at current exchange rates)²;

¹ SIAC Rule 5.1 draws from, amongst others, Section V (Expedited Procedure) of the Swiss Rules of International Arbitration (the “Swiss Rules”), the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce (the “SCC Rules”), and the World Intellectual Property Organization (“WIPO”) Expedited Arbitration Rules.

² SIAC Rule 5.1(a). By contrast, under the Hong Kong International Arbitration Centre Administered Arbitration Rules (the “HKIAC Rules”), there is an express presumption (Article 38) that an expedited procedure will apply to all cases where the aggregate amount of the claim and any counterclaim does not exceed US\$250,000, a substantially lower threshold than under SIAC Rule 5.1(a). Similarly, under Rule 59 of the Japan Commercial Arbitration Association Commercial Arbitration Rules (the “JCAA Rules”) an expedited procedure is presumed to apply where the

- upon agreement by the parties³; or
- in cases of exceptional urgency⁴.

Under Rule 5.2, it is for the Chairman of SIAC⁵ to decide whether the Expedited Procedure is appropriate, and he is obliged to consider the views of both parties in reaching his decision. If he considers it appropriate, the following procedures will in summary apply:

- the Registrar of SIAC may shorten any time limits under the Rules;
- unless otherwise determined by the Chairman, the case shall be referred to a sole arbitrator;
- unless the parties agree to a documents only arbitration, a hearing for the examination of all fact and expert witnesses and any oral argument will take place⁶;
- save for in exceptional circumstances, the award shall be made within six months of the date of the constitution of the tribunal⁷; and
- reasons of the tribunal will be in summary form unless the parties have agreed that no reasons are to be given.

The SIAC Expedited Procedure in practice

So, has the Expedited Procedure proved popular in practice since its introduction? Statistics recently released by SIAC speak for themselves. Of the new arbitrations filed with SIAC in 2010, 88 were filed after the introduction of the new Rules (i.e. after 1 July 2010)⁸. Of those 88 cases, SIAC received no less than 20 applications for the Expedited Procedure, of

aggregate value of the claims does not exceed JPY 20,000,000 (or approximately US\$237,000 at current exchange rates). However, in circumstances where the expedited procedures under the JCAA Rules and the HKIAC Rules are presumed to apply, parties are free to opt out by express agreement.

³ SIAC Rule 5.1(b).

⁴ SIAC Rule 5.1(c).

⁵ Or, in his place, the Deputy Chairman or CEO of SIAC.

⁶ The HKIAC Rules (Article 38.2) provide for a similar expedited process as SIAC Rule 5 (including an expectation that the award will be in summary form and issued within six months of the file having been transmitted to the tribunal). An important distinction to note is that the HKIAC Rules presume the tribunal will decide the dispute on the basis of only documentary evidence unless the tribunal determines that a hearing is necessary (Article 38.2 (c)).

⁷ This is likely to mean that the 45-day time limit under SIAC Rule 28.2 (by which the tribunal must in the normal course submit its draft award to the SIAC Registrar for his review following the close of proceedings) is shortened accordingly.

⁸ It is worth noting that the number of total disputes referred to SIAC in 2010 rose for the tenth consecutive year. The number handled in 2010 was 24% higher than in 2009, and the number handled in 2009 was 60% higher than in 2008.

which 12 applications⁹ were accepted under Rule 5.1(a) and one was accepted under Rule 5.1(b). (In other words, it appears that 12 applications were opposed and one agreed).

The equivalent provisions under other arbitral institutions' rules have also had a significant impact. Based on statistical information we have received for 2009, 27% of the cases administered under the SCC Rules involved a request for arbitration which had been filed pursuant to its expedited procedure, 30% of the cases administered under the Swiss Rules were conducted in accordance with its expedited procedure, and 16% of those administered by the JCAA were conducted pursuant to the equivalent JCAA Rules. Further, there has been a gradual rise over the last five years in the number of applications made under Article 9 of the LCIA Rules for the expedited formation of tribunals; 13 applications were made in 2009, rising to 20 in 2010.

Such popularity should not come as a surprise. Whilst expedited (or "fast-track") arbitration is not a new concept (in fact, it brings modern arbitration closer to its historical roots centuries ago when decisions on disputes between merchants would normally be rendered within very short time limits), in the modern era where cash-flow considerations are vital (particularly in large construction projects¹⁰) the desire to obtain a quick and effective award becomes even stronger. And, whilst one should not lose sight of the fact that it has always been possible (subject to tribunal members' diaries¹¹) for parties to agree to an expedited timetable¹², it remains rare in practice for parties to reach such an agreement – indeed, the defendant will often do all it can to seek to drag out the proceedings and delay issue of the award.

Against that background, the Expedited Procedure under the SIAC Rules offers a useful tool in a claimant's armoury to overcome a recalcitrant defendant. As outlined above, SIAC

Rule 5 provides that if the amount in dispute is less than S\$5 million or the applicant can show "exceptional urgency"¹³ the SIAC Chairman can, after having considered the views of both parties, determine that the Expedited Procedure should apply even if the respondent opposes the application¹⁴. Unless otherwise determined by the Chairman, that would mean the appointment of a sole arbitrator even if the parties had previously agreed in the arbitration clause within their contract to a tribunal of three members.

A potential defendant to arbitration proceedings under the SIAC Rules needs to therefore be alert, before its receipt of the claimant's Notice of Arbitration, to the possibility of a sole arbitrator (notwithstanding a prior agreement for three) and a fast-track timetable in a dispute which falls within the criteria in Rule 5.1, notwithstanding the defendant's objections.

Conversely, one assumes that the SIAC Chairman would in practice accept agreed applications under SIAC Rule 5.1(b) as a matter of course (though Rule 5.2 as drafted does not make that clear).

Outline of the "Emergency Arbitrator" procedure (SIAC Rule 26.2)

SIAC Rule 26.2 (and the related procedure at Schedule 1) allows a party to apply for the appointment by SIAC of an emergency arbitrator, prior to the appointment of the tribunal, solely for the purpose of granting emergency interim relief. Such application must be made concurrent with or following the filing of a Notice of Arbitration and such application is also to be decided by the SIAC Chairman¹⁵.

If the SIAC Chairman accepts the application, he (or his Deputy) must appoint an emergency arbitrator within one business day of his receipt of the application. The emergency arbitrator is then required to establish a schedule for consideration of the matters which are the subject of the application within two business days of appointment and is empowered to make orders in respect of any interim relief that an arbitrator would ordinarily be capable of granting. Such timeframes are impressively tight.

Unless otherwise agreed by the parties, the emergency arbitrator cannot sit on the tribunal subsequently appointed and shall have no further power to act after the tribunal's appointment¹⁶. Once appointed, the tribunal has the power to

⁹ Though we understand that eight of those applications were between the same parties in connected matters and were subsequently consolidated.

¹⁰ Construction related cases comprised 13% of the total cases filed with SIAC in 2010.

¹¹ Another revision (SIAC Rule 10.3) was introduced on 1 July 2010 in response to criticism by users concerning delays caused by the unavailability of some arbitrators, particularly in the context of scheduling hearings of three member tribunals. SIAC Rule 10.3 states "...The Chairman [of SIAC] shall also consider whether the arbitrator has sufficient availability to determine the case in a prompt and efficient manner appropriate to the nature of the arbitration...". In carrying out his obligation under Rule 10.3, the Chairman might make enquiries of potential arbitrators as to their current workload.

¹² It should be noted that, even before the introduction of the Expedited Procedure, SIAC recognised the need for efficiency through pro-active case management. Previous awards in SIAC administered arbitrations have been rendered within very short timeframes. We have been informed by SIAC that in one case involving a dispute relating to the sale of a vessel it took just two and a half months from the filing of the Notice of Arbitration to the final Award, and that in another, involving a mining dispute between two Indonesian parties, the same process took just 60 days. But in both cases the parties agreed to a fast-track timetable, a rare phenomenon.

¹³ SIAC has not issued any guidance on what would constitute "exceptional urgency". It is assumed that this question will be considered by the Chairman on a case by case basis.

¹⁴ By contrast, although the International Chamber of Commerce Rules of Arbitration ("the ICC Rules") enable parties to agree to shorten the various time limits stipulated in the ICC Rules (Article 32), there is no mechanism in the Rules to shorten the time limits without the parties' agreement.

¹⁵ Or, in his place, the Deputy Chairman or CEO of SIAC.

¹⁶ Schedule 1, Rules 4 and 7.

reconsider, modify or vacate any interim award or order which has been issued by the emergency arbitrator, and, in any event, any such interim award or order would cease to be binding on the parties i) if the tribunal is not constituted within 90 days, ii) when the tribunal makes a final award, or iii) if the claim is withdrawn.

Such provisions ensure that the tribunal's powers are not in any way usurped, but that is not to say that interim measures granted by the emergency arbitrator do not have bite. Any interim award or order he/she rendered would in the normal course be binding on the parties (subject to the above limitations) and, by agreeing to arbitration under the SIAC Rules, the parties expressly undertake to comply with such interim order or award without delay¹⁷. As a practical matter, the tribunal subsequently appointed is in any event unlikely to look favourably upon a party which has failed to comply with any prior order or award granted by the emergency arbitrator.

Although SIAC Rule 26.2 draws upon, amongst others, the SCC Rules, its provisions are unique when compared to the Rules of other leading arbitral institutions¹⁸.

The Emergency Arbitrator procedure in practice

By February 2011, three applications under SIAC Rule 26.2 had been received and accepted by the Chairman. As an illustration of how impressively tight the timings can be in practice, it is worth having regard to the facts of the first case as reported by SIAC.

Both the claimant and respondent were Indian parties (an interesting development of itself). The claimant had issued three bank guarantees for the respondent's benefit. The claimant applied for emergency interim relief under SIAC Rule 26.2 to restrain the respondent from calling on those guarantees. That application was received by SIAC at 21.30, Singapore time. The Chairman of SIAC determined that the application should be accepted and an emergency arbitrator was appointed the following day. Within one day of his appointment, the emergency arbitrator had established a schedule for consideration of the emergency relief application.

¹⁷ Schedule 1, Rule 9.

¹⁸ For example, the LCIA Rules only allow for the expedited formation of the tribunal that will hear the case on the merits (Article 9). Whilst such an application will often be made by a claimant for the purposes of then applying to that tribunal for urgent interim relief, it might also be made where an expedited decision on the merits is needed. Either way, the LCIA Court would need to be persuaded of "exceptional urgency". The "Pre-Arbitral Referee Procedure" introduced by the ICC can only be adopted where the parties have expressly agreed to it in writing, whether in the arbitration clause itself or by subsequent agreement. Where the parties have so agreed in advance, either may apply to the Chairman of the ICC for the appointment of a Referee who would be empowered to order certain specified interim relief. However, if not provided for in the arbitration clause, it will be rare for parties to agree to this procedure after a dispute has arisen. Perhaps as a consequence, it is understood that such applications are rare.

As per that schedule, the parties made written submissions on the application and a telephonic hearing was conducted within one week of the appointment of the emergency arbitrator, who then issued an interim order only one day later.

In that light, SIAC Rule 26 might offer a viable alternative to applying to a state court for interim relief before the tribunal has been constituted. Notwithstanding Rule 26, parties to SIAC arbitrations will inevitably need to continue applying to state courts for certain types of interim relief, such as orders against third parties (which an emergency arbitrator would not be empowered to grant), or where it is necessary for the application to be made without notice to the other party, for example to freeze funds in a bank account which may otherwise be dissipated¹⁹. However, we anticipate that this provision will increasingly be used by applicants in other cases, particularly if the state court where equivalent interim relief would otherwise need to be sought is in a less reputable jurisdiction or if its judges are not known to be supportive of the arbitration process.

In summary, it is submitted that the expedited and emergency arbitrator procedures in the revised SIAC Rules are welcome additions which should help claimants and applicants avoid delay in securing the remedies they require. Those revisions have already proved popular among parties and it seems likely that applications under both procedures will only increase.

¹⁹ Indeed, SIAC Rule 26.3 makes it clear that an application to a judicial authority is not incompatible with the SIAC Rules.