

# Singapore Arbitration Guide



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# Singapore Arbitration Guide

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## Executive Summary

- Singapore is a recognised international arbitration centre, and along with Hong Kong, is one of the two forums of choice in Asia.
- The Singapore government has actively promoted Singapore as a venue for international arbitration, introducing measures such as liberalisation of legal services, and establishment in 2010 of a dedicated disputes resolution centre, Maxwell Chambers.
- Singapore has a dual arbitration regime, with international arbitrations governed by the *International Arbitration Act* (Cap 143A) (“IAA”), incorporating the UNCITRAL Model Law, with amendments to facilitate further the conduct of arbitrations, and domestic arbitrations governed by the *Arbitration Act* (Cap 10) (“AA”). All arbitrations with Singapore as the seat are governed by one of these two Acts.
- The IAA applies where there exists an international element, most usually where one of the parties is not a Singapore entity. However, parties have the choice of falling within the scope of the IAA or the AA.
- The main difference between the two Acts is the degree of possible Singapore Court intervention in the arbitral process, with Court intervention being more readily available under the AA than the IAA, including a limited right of appeal on a question of law.
- Both Acts set out a framework procedure for the conduct of arbitrations where the parties have not agreed a set of arbitral rules, subject to the principle of party autonomy, and otherwise arbitral tribunals have the power to determine the procedure.
- Singapore ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1986 (“New York Convention”), and the New York Convention has been incorporated into the IAA. New York Convention awards can therefore be readily enforced in Singapore, and Singapore awards enforced in the 156 Convention signatory countries.
- The Singapore judiciary is supportive of arbitration, and has a policy of facilitating and promoting arbitration. The Singapore Courts do not intervene in arbitration proceedings unless there are clear grounds under the IAA or the AA respectively.
- The Singapore International Arbitration Centre (“SIAC”) is an experienced national arbitration centre, with an annual new case load of over 270 arbitrations. The SIAC has developed a set of arbitral rules to provide the parties and tribunals with the tools to conduct arbitrations in a prompt and efficient manner.
- The SIAC published its sixth edition of its Rules on 1 July 2016, which are effective from 1 August 2016, and amendments from the fifth edition include provisions for consolidation and joinder of arbitration proceedings, early dismissal of claims and defences, and amendments to the Emergency Arbitrator and Expedited Procedures, with the aim of further improving efficiency and reducing costs.

## 1. Introduction

Singapore is a recognised international arbitration centre, and along with Hong Kong, is one of the two forums of choice in Asia.<sup>1</sup> The Singapore government has actively promoted Singapore as a venue for international arbitration over the past 20 years, introducing measures such as:

- enactment of arbitration legislation based on the UNCITRAL Model Law (“Model Law”),<sup>2</sup> and regular amendments to update the legislation;<sup>3</sup>
- provisions to allow foreign law firms to represent parties;
- liberalisation of legal services;
- exemption of the need to obtain a work visa for those conducting arbitrations in Singapore;
- abolishment of withholding tax on foreign arbitrators’ fees; and
- establishment in 2010 of a dedicated disputes resolution centre, Maxwell Chambers.

In addition to the Singapore government’s support for arbitration, and the support of the Singapore judiciary (discussed in Section 10 below), there are also a number of practical advantages for Singapore as a favourable forum for international arbitration, including its location in the heart of Asia, a hub for international trade and finance, strong economic performance, a pool of experienced international arbitrators and legal counsel, and well developed infrastructure.

Singapore is now the fourth most popular global arbitral seat after London, Paris, and Hong Kong,<sup>4</sup> The International Court of Arbitration of the International Chamber of Commerce (“ICC”), in its 2015 report, has confirmed Singapore’s place as the fourth most chosen seat globally for arbitration, and retained its position in the top five most chosen seats for the tenth consecutive year.<sup>5</sup>

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<sup>1</sup> Queen Mary University of London, “*2015 International Arbitration Survey*”, in which Hong Kong and Singapore are referred to as the third and fourth most popular global arbitral seats respectively.

<sup>2</sup> The Model Law has been enacted in 72 states, and 102 jurisdictions, as at 2015 ([http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)).

<sup>3</sup> The *International Arbitration Act* (Cap 143A) and the *Arbitration Act* (Cap 10) were both most recently amended on 1 June 2012.

<sup>4</sup> Queen Mary University of London, “*2015 International Arbitration Survey*”.

<sup>5</sup> “*ICC Statistical Report for 2015*”.

## 2. Which Arbitration Legislation Applies?

Singapore has a dual arbitration regime, with international arbitrations governed by the *International Arbitration Act* (Cap 143A) (“IAA”), and domestic arbitrations governed by the *Arbitration Act* (Cap 10) (“AA”). All arbitrations with Singapore as the seat are governed by one of these two Acts. The IAA came into force on 27 January 1995, incorporating the Model Law.<sup>6</sup> The AA came into force on 1 March 2002, repealing the former *Arbitration Act* in its entirety, and adopting many of the features of the Model Law. The main difference between the two Acts is the degree of possible Singapore Court intervention in the arbitral process, with Court intervention being more readily available under the AA than the IAA.

Singapore is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (from 1965), and enacted in 1968 the *Arbitration (International Disputes Investment) Act* (Cap 11) to, amongst other things, provide for the enforcement of an award under the Convention. The International Centre for Settlement of Investment Disputes also established a venue office in Singapore at Maxwell Chambers in 2010.

The SIAC published its sixth edition of its Rules on 1 July 2016, which are effective from 1 August 2016 (“SIAC Rules”), and one of the most significant amendments from the fifth edition of the rules is the amendment to Rule 21.1 (previously rule 18.1) to remove Singapore as the default seat (unless the arbitral tribunal determines that another seat is more appropriate in the circumstances) where the parties have not agreed the seat, and replaced this with the arbitral tribunal determining the seat, having regard to all the circumstances of the case.

Rule 21.1 is consistent with Article 18 of the ICC Rules, to “*delocalise*” the SIAC Rules from Singapore as the seat. Parties can no longer rely on selecting Singapore as the seat by specifying the SIAC Rules, and must now expressly agree Singapore as the seat in their arbitration agreement.

## 3. Has Singapore Acceded to the New York Convention?

Singapore ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) in 1986, and the New York Convention has been incorporated into the IAA.<sup>7</sup> New York Convention awards can therefore be readily enforced in Singapore, subject only to the reciprocity reservation and the exceptions in Article 5 of the

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<sup>6</sup> The Model Law is contained in the First Schedule of the IAA, and by the terms of Section 3(1) of the IAA, has the force of law in Singapore, subject to the terms of the IAA.

<sup>7</sup> Contained in the Second Schedule to the IAA.

Convention (being, in essence, the same grounds for setting aside an award under the Model Law), and Singapore awards can be enforced in the 156 Convention signatory countries.<sup>8</sup>

#### 4. Does Arbitration Bar Litigation Proceedings?

Under both the IAA and AA, arbitration agreements can be enforced by an application to the Singapore Courts to stay any litigation proceedings commenced by a party in breach of the agreement. Under the IAA, the Court is obliged to grant a stay, unless the arbitration agreement is null and void, inoperative, or incapable of being performed.<sup>9</sup>

One of the significant differences between the IAA and the AA is that a stay of proceedings is discretionary under the AA, and is only granted if the Court is satisfied that:<sup>10</sup>

- there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and
- the applicant is ready and willing to do all things necessary for the proper conduct of the arbitration.

In practice, there are only limited grounds which have been held to justify refusal of a stay under the AA.<sup>11</sup>

#### 5. Which Legislation – the Arbitration Act or the International Arbitration Act?

The IAA applies only to an “*international arbitration*”, and otherwise, the arbitration is governed by the AA. Section 5 of the IAA extends the scope of application of the IAA and the Model Law in two respects.

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<sup>8</sup> As at June 2015, with the most recent signatory being Andorra, on 19 June 2015. For a full list of the signatories, refer to <http://www.uncitral.org>

<sup>9</sup> Section 6(2) of the IAA.

<sup>10</sup> Section 6(2) of the AA.

<sup>11</sup> For example, where some of the issues do not fall within the scope of the arbitration agreement and hence the matter should be heard in a single judicial forum (*Yee Hong Pte Ltd v Tan Chye Hee Andrew* ([2005] 4 SLR 398)). The author submits that in light of the subsequent decision of the House of Lords in *Premium Nafta Products Ltd v Fili Shipping Co Ltd* (Reported as *Fiona Trust and Holding Corporation v Privalov* (“*Fiona Trust*”)) ([2007] 1 Lloyd Rep 254), followed by the Singapore High Court in *Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd* ([2008] SGHC 229), and *Doshion Ltd v Sembawang Engineers and Constructors Pte Ltd* ([2011] 3 SLR 229), and by the Singapore Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* ([2011] SGA 21), it seems unlikely that the decision in *Yee Hong Pty Ltd* would be followed by the Singapore Courts on similar facts.

First, parties can agree in writing for the IAA and Model Law to apply to what would otherwise be an arbitration falling within the scope of the AA.<sup>12</sup> Parties may do so, for example, where they do not wish for the parties to have the ability to appeal a question of law to the Singapore Courts, a right under Section 49 of the AA. Similarly, parties can agree for an arbitration to be governed by the AA for arbitrations that would otherwise fall within the scope of the IAA.<sup>13</sup>

A reference to institutional rules in the arbitration agreement is not of itself sufficient to exclude the application of the Model Law or Part II of the IAA. Any intention must be clearly expressed.

Secondly, the arbitration must be “*international*”, but need not be “*commercial*”, an express requirement under Article 1(1) of the Model Law.<sup>14</sup>

An “*international arbitration*” is defined in the IAA<sup>15</sup> by reference to whether it has an international element, for example:

- at least one of the parties to arbitration has its place of business in any state other than Singapore;
- the place of arbitration is situated outside the state in which the parties have their places of business;<sup>16</sup> or
- the place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected is situated outside the state in which the parties have their places of business.

The circumstances in the second point above have limited effect, since if the place of arbitration is outside Singapore, the Singapore Courts cannot exercise overall jurisdiction over the arbitration in any event.

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<sup>12</sup> Sections 5(1) and 15(1) of the IAA. Parties may do so expressly in their arbitration agreement, or by reference to selected institutional rules. Rule 32 of the third edition of the SIAC rules provided that if the parties agreed for the SIAC rules to apply, the law of the arbitration under the rules shall be the IAA. The SIAC removed rule 32 in its fourth edition of its rules, and hence, if parties to a domestic arbitration wish for the IAA to apply, parties can no longer rely simply on selection of the SIAC Rules, and must expressly provide for this in their arbitration agreement itself.

<sup>13</sup> Section 15(1) of the IAA.

<sup>14</sup> The UNCITRAL interprets the word “*commercial*” widely, and this is reflected in the limited judicial decisions on the interpretation of Article 1(1) of the Model Law. However, the UNCITRAL acknowledges that not all relations related to business would be “*commercial*”, and the Singapore government removed this potential restriction on the scope of “*international arbitrations*” in the IAA.

<sup>15</sup> Section 5(2) of the IAA.

<sup>16</sup> From Article 1(3)(b)(i) of the Model Law, IAA.

The circumstances in the third point above would apply, for example, in a dispute involving two Singaporean parties relating to a foreign matter.

## 6. What are the Key Features of the Arbitration Act?

The AA allows a greater degree of judicial intervention than the IAA, reflecting restrictions on party autonomy. Key differences between the two Acts include:

- a stay of judicial proceedings is mandatory in an international arbitration,<sup>17</sup> but discretionary in a domestic arbitration;<sup>18</sup>
- the Singapore Court can extend contract time limits for commencement of arbitration proceedings,<sup>19</sup> but there is no equivalent power for international arbitrations;
- arbitral tribunals in domestic arbitrations have the power to strike out claims for want of prosecution,<sup>20</sup> but there is no equivalent power for tribunals in international arbitrations;
- a party can refer a point of law to the Singapore Court for a preliminary ruling,<sup>21</sup> but there is no equivalent power for international arbitrations;
- a party can appeal against a domestic award for an error of law,<sup>22</sup> but there is no equivalent power for an international award;
- parties can agree to consolidation of two or more domestic arbitrations,<sup>23</sup> but there is no equivalent power for international arbitrations;
- the Singapore Court can extend agreed time limits for the making of an award for domestic arbitrations,<sup>24</sup> but there is no equivalent power for international arbitrations; and
- there is an express power for the arbitral tribunal in domestic arbitrations to withhold its award by way of security for fees,<sup>25</sup> but there is no equivalent power for international arbitrations.

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<sup>17</sup> Section 6(2) of the IAA.

<sup>18</sup> Section 6(2) of the AA.

<sup>19</sup> Section 10 of the AA, and confined to contractual time limits only.

<sup>20</sup> Section 29(3) of the AA.

<sup>21</sup> Section 45 of the AA.

<sup>22</sup> Section 49 of the AA.

<sup>23</sup> Section 26 of the AA.

<sup>24</sup> Section 36 of the AA, and confined to contractual time limits only.



## 7. What are the Key Features of the International Arbitration Act?

As noted in Section 2 above, the IAA came into force on 27 January 1995, incorporating the Model Law (as the First Schedule to the Act), but with amendments to facilitate further the conduct of arbitrations. The Singapore government has amended the IAA when necessary to assist with Singapore being a forum of choice for international arbitration.<sup>26</sup>

The major amendments to the Model Law in the IAA are:<sup>27</sup>

- a wider definition of “*arbitration agreement*”,<sup>28</sup>
- recognition of the appointment of an emergency arbitrator to publish orders relating to interim relief;<sup>29</sup>
- immunity of arbitrators;<sup>30</sup>
- modifications to Article 1 on the scope of application of the IAA;<sup>31</sup>
- a default sole arbitrator, rather than a default three person arbitral tribunal;<sup>32</sup> and
- Singapore Court can grant interim protection measures.<sup>33</sup>

## 8. What is the Relationship between Singapore Arbitration Legislation and Arbitral Rules?

The AA and IAA contain both mandatory and non-mandatory provisions. As a general rule, parties can opt out of the non-mandatory provisions. For example, where parties have agreed the number of arbitrators and appointment procedure for an arbitral tribunal either in their arbitration agreement or by reference to agreed arbitral rules, these provisions take precedence over similar provisions in the AA and IAA. As such, the AA and IAA are read together with the arbitration

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<sup>25</sup> Section 41(1) of the AA.

<sup>26</sup> Amendments to the IAA were made in 2001, 2002, 2010, and 2012.

<sup>27</sup> The version of the Model Law adopted in the First Schedule of the IAA is the 1985 version, and Singapore has not adopted the most recent 2006 amendments to the Model Law.

<sup>28</sup> Section 2(1) of the IAA.

<sup>29</sup> Included in the definition of “*arbitral tribunal*” in Section 2(1) of the IAA, and also Section 2(1) of the AA.

<sup>30</sup> Section 25 of the IAA.

<sup>31</sup> As noted in Section 5.0 above, the removal of the term “*commercial*” in Article 1(1) of the Model Law.

<sup>32</sup> Section 9 of the IAA.

<sup>33</sup> Section 12A of the IAA.

agreement and any agreed arbitral rules, and the latter take precedence in the case of conflicting non-mandatory provisions of the AA and IAA.<sup>34</sup>

## 9. What are the Requirements for a Valid Arbitration Agreement?

The IAA adopts a wider definition of an “*arbitration agreement*” than contained in Article 7 of the Model Law,<sup>35</sup> and includes arbitration agreements concluded by any means, providing they are recorded then or subsequently in any form. This definition includes arbitration agreements concluded orally or by conduct, and subsequently recorded in writing, or by email or by audio recording.<sup>36</sup>

In the 2015 Singapore High Court decision in *AQZ v ARA*,<sup>37</sup> the parties had entered into an oral contract which imported an arbitration agreement from a separate written contract. The Court accepted that the arbitration agreement was valid, even though the contract itself was oral, because the arbitration agreement itself was recorded “*in writing*”.

The defining characteristics of arbitration are: (1) an impartial arbitral tribunal selected by the parties; (2) a procedure allowing each party to state its case; (3) a procedure to determine the substantive rights of the parties by a binding decision; and (4) the arbitral tribunal’s obligation to decide the dispute according to law.

## 10. Is the Judiciary Supportive of Arbitration?

The Singapore judiciary is supportive of arbitration, and does not intervene in arbitration proceedings unless there are clear grounds under the IAA or the AA respectively. The Singapore

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<sup>34</sup> This is clear from the terms of Section 15A of the IAA, added as a result of a 2002 amendment, following the decision of the Singapore High Court in *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd* ([2002] 1 SLR(R) 492), which followed a 2001 amendment to Section 15 of the IAA, following the decision of the Singapore High Court in *John Holland Pty Ltd v Toyo Engineering Corp* ([2001] 1 SLR(R) 443). Commentators generally consider that the Court in both cases incorrectly construed the selection of the arbitral rules to have excluded the Model Law. Refer to Gordon Smith and John Choong, “*The UNCITRAL Model Law and the Parties’ Chosen Arbitration Rules - Complementary or Mutually Exclusive? The Singapore case of Dermajaya Properties*”, *The Vindobona Journal of International Commercial Law and Arbitration*, Volume 6, Issue 2 (2002).

<sup>35</sup> Since the IAA was enacted, the UNCITRAL amended Article 7 of the Model Law in 2006 in a number of respects, and is now in wider terms than the definition of “*arbitration agreement*” in Section 2(1) of the IAA. Singapore has not adopted the 2006 amendments to the Model Law.

<sup>36</sup> Section 2A of the IAA.

<sup>37</sup> [2015] SGHC 49.

Court of Appeal's policy of facilitating and promoting arbitration was recently expressed by the Court in *Tjong Very Sumito v Antig Investments Pte Ltd*,<sup>38</sup> in the following terms:

"There was a time when arbitration was viewed disdainfully as an inferior process of justice. Those days are now well behind us. An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore. It is now openly acknowledged that arbitration, and other forms of alternative dispute resolution such as mediation, help to effectively unclog the arteries of judicial administration as well as offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with."

In matters of interpretation of arbitration agreements, the Singapore Courts have followed the decision of the House of Lords in *Premium Nafta Products Ltd v Fili Shipping Co Ltd* (Reported as *Fiona Trust and Holding Corporation v Privalov* ("Fiona Trust"))<sup>39</sup> in liberalising the Courts' approach to interpretation of arbitration agreements. The Singapore Courts' approach, consistent with *Fiona Trust*, is to commence from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal, unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.<sup>40</sup>

The Singapore Supreme Court, from 2003, also commenced appointing specialist judges who are knowledgeable and experienced in arbitration matters. In light of the number of arbitration related cases being decided by the Singapore Courts, the Singapore judiciary is now contributing to global jurisprudence on the law and practice of international arbitrations.

## 11. Is there a National Arbitration Centre?

The Singapore International Arbitration Centre ("SIAC") was established in 1990 by the Singapore Economic Development Board and the Trade Development Board, and commenced operation in 1991. Responsibility for the SIAC was subsequently transferred to the Singapore Business Federation, a non-government entity.

The three key functions of the SIAC are:

- to appoint arbitrators when the parties cannot agree on appointments;

<sup>38</sup> [2009] 4 SLR(R) 732, *per* V K Rajah JA, delivering the Court's judgment, at para 28.

<sup>39</sup> [2007] 1 Lloyd's Rep 254, followed by the Singapore High Court in *Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd* ([2008] SGHC 229), and *Doshion Ltd v Sembawang Engineers and Constructors Pte Ltd* ([2011] 3 SLR 229), and by the Singapore Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* ([2011] SGA 21).

<sup>40</sup> *Premium Nafta Products Ltd v Fili Shipping Co Ltd* (Reported as *Fiona Trust and Holding Corporation v Privalov* ("Fiona Trust")) ([2007] 1 Lloyd Rep 254), *per* Lord Hoffman, at para 13.

- to manage the financial and practical aspects of arbitration; and
- to facilitate effective and efficient arbitrations.

The SIAC is now the fourth most preferred global arbitral institution, after the ICC, LCIA, and the HKIAC.<sup>41</sup>

The SIAC published its first set of arbitration rules in September 1991 (1<sup>st</sup> edition), and has amended the rules on five subsequent occasions.<sup>42</sup> The SIAC published its current rules (6<sup>th</sup> edition) on 1 July 2016, the SIAC Rules, which are effective from 1 August 2016. The SIAC made significant amendments to the rules in the fourth edition, which came into force on 1 July 2010, with the intention to provide greater efficiency and effectiveness of the arbitration procedure, to provide greater flexibility in the conduct of arbitral proceedings, and to clarify aspects of the third edition of the rules. Key features of the amendments in the fourth edition included:<sup>43</sup>

- the Chairman of the SIAC (now the President) is obliged to consider whether arbitrators have sufficient availability to determine cases “*in a prompt and efficient matter*” prior to appointing arbitrators;<sup>44</sup>
- changes to procedure for constitution of a three member arbitral tribunal;
- a new Expedited Procedure for arbitration for amounts in dispute less than S\$5,000,000 (now S\$6,000,000) or in cases of “*exceptional urgency*”;<sup>45</sup>
- a compulsory preliminary meeting among the parties and the arbitral tribunal as soon as practicable after the arbitral tribunal has been appointed;<sup>46</sup>
- an Emergency Arbitrator Procedure with the power to issue an order or award for interim relief prior to constitution of the arbitral tribunal;<sup>47</sup>
- removal of the requirement for a Memorandum of Issues;

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<sup>41</sup> Queen Mary University of London, “2015 International Arbitration Survey”.

<sup>42</sup> September 2002 (2<sup>nd</sup> edition), July 2007 (3<sup>rd</sup> edition), July 2010 (4<sup>th</sup> edition), and April 2013 (5<sup>th</sup> edition).

<sup>43</sup> Refer to the discussion in Gordon Smith, “*Commentary on the New Singapore International Arbitration Centre Rules*”, CI Arb Journal, Arbitration, Vol. 76, November 2010, at p727.

<sup>44</sup> Rule 13.3 of the SIAC Rules.

<sup>45</sup> Rule 5 of the SIAC Rules.

<sup>46</sup> Rule 19.3 of the SIAC Rules.

<sup>47</sup> Rule 30.2, and Schedule 1 of the SIAC Rules.

- the arbitral tribunal’s express power to make interim awards for payment of advance on costs (now in terms of the power to issue an order or award for reimbursement of unpaid deposits towards the costs of the arbitration where a party to the arbitration has paid the other party’s share of the deposits on behalf of the non-paying party);<sup>48</sup> and
- removal of an express reference to the IAA as the law of the arbitration, replaced in part by a waiver of rights of appeal or recourse to an award.<sup>49</sup>

The SIAC published its fifth edition of the rules on 1 April 2013, and the principal changes from the fourth edition fell into two categories; those which relate to a new governance structure, including the formation of the new Court of Arbitration of SIAC (“Court”), and substantive changes relating to the arbitral procedure. The SIAC’s new governance structure is similar to the ICC International Court of Arbitration, and is intended to create a more effective case management structure. The Court, which exercises arbitral powers, is separate from the SIAC’s business and corporate structures, under its Board of Directors.

In relation to the former, the amendments in the fifth edition of the rules provided as follows:

- the President (defined as the President of the Court, and includes the Vice President and the Registrar) (previously the Chairman) has the power to appoint arbitrators;<sup>50</sup>
- the Court (previously the Committee of the Board) has the power to decide challenges to arbitrators;<sup>51</sup>
- the Court (previously the Committee of the Board) may determine *prima facie* the existence or validity of the arbitration agreement, or the competence of the SIAC to administer an arbitration before the arbitral tribunal is appointed;<sup>52</sup>
- the President determines whether the SIAC will accept applications for emergency interim relief and will appoint the Emergency Arbitrator;<sup>53</sup> and
- the decisions of the President, the Court and the Registrar are conclusive and binding on the parties and the arbitral tribunal, and that they shall not be required to provide reasons for their decisions (now except as provided under the Rules).<sup>54</sup>

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<sup>48</sup> Rule 27(g) of the SIAC Rules.

<sup>49</sup> Rule 40.2 of the SIAC Rules.

<sup>50</sup> Rule 9 of the SIAC Rules.

<sup>51</sup> Rule 16.1 of the SIAC Rules.

<sup>52</sup> Rule 28.1 of the SIAC Rules.

<sup>53</sup> Schedule 1, Rule 3 of the SIAC Rules.

With respect to the latter category, the following were the principal amendments:

- the powers of the Registrar were expanded, allowing the Registrar to extend or abbreviate any time limits under the rules,<sup>55</sup> determine whether there has been substantial compliance with the requirements for the content of the notice of arbitration;<sup>56</sup> make a determination upon objection by a party to the existence or validity of the arbitration agreement whether the objection is to be made to the Court;<sup>57</sup>
- the arbitral tribunal has the power to decide any issue not expressly or impliedly raised in the parties' submissions, as long as such issue was clearly brought to the notice of the other party and that other party had been given adequate opportunity to respond;<sup>58</sup>
- the limitation on the arbitral tribunal's power to award interest only up to the date of its award has been replaced by a power to award interest in respect of any period which it determines to be appropriate,<sup>59</sup> and
- the SIAC may publish any award with the names of the parties and other identifying information redacted.<sup>60</sup>

The SIAC published its sixth edition of its rules, the SIAC Rules, on 1 July 2016, effective from 1 August 2016, with amendments aimed at further improving efficiency and cost effectiveness of arbitration proceedings conducted under the rules. Pursuant to Rule 1.2 of the SIAC Rules, unless the parties have agreed otherwise, the SIAC Rules apply to any arbitration which is

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<sup>54</sup> Rule 40.1 of the SIAC Rules.

<sup>55</sup> Rule 2.6 of the SIAC Rules.

<sup>56</sup> Rule 3.3 of the SIAC Rules. This provision appears to be aimed at curtailing arguments from respondents that the notice of arbitration does not comply with the requirements of the SIAC Rules, and therefore, arbitration has not commenced.

<sup>57</sup> Rule 28.1 of the SIAC Rules.

<sup>58</sup> Rule 27(m) of the SIAC Rules. This amendment appears to stem from the Singapore High Court decision in *PT Prima International Development v Kempinski Hotels SA* ([2012] 4 SLR 98), in which it was argued that the arbitral tribunal did not have jurisdiction to determine matters which had not been raised in the parties' pleadings. The Court held that it was within the arbitral tribunal's jurisdiction to decide the points in contention, notwithstanding that the issues had not been specifically pleaded, in light of the parties having had notice of the issues, and the opportunity to respond to them.

<sup>59</sup> Rule 32.9 of the SIAC Rules. This amendment brought the SIAC rules into line with amendments to Sections 35 and 20 of the AA and IAA respectively, which came into effect on 1 June 2012. Where parties had agreed the fourth edition of the rules, rule 28.7 (as it then was) prevented the application of these wider provisions in the AA and IAA.

<sup>60</sup> Rule 32

.12 of the SIAC Rules, amended in the SIAC Rules to specify "*with the consent of the parties and the Tribunal*".

commenced after on or after 1 August 2016. The principal amendments from the fifth edition of the rules are as follows:

- removal in Rule 1.1 of the statement that if any of the rules is in conflict with a mandatory provision of the applicable law of the arbitration from which the parties cannot derogate, that provision shall prevail;<sup>61</sup>
- amendment to Rule 2.1 relating to deemed receipt of any notice, communication or proposal by delivery to “*the addressee personally*” to “*the addressee personally or to its authorised representative*”;
- amendment to Rule 4.1(a) to provide that the respondent’s response to a notice of arbitration shall include, where possible, any plea that the tribunal lacks jurisdiction;
- amendment to Rule 5.1(a) in respect of the limit of the amount in dispute which gives a party the right to apply to the President for arbitral proceedings to be conducted in accordance with the Expedited Procedure to increase the amount from S\$5,000,000 to S\$6,000,000;
- amendment to Rule 5.1(c) to provide that, where the arbitration is conducted in accordance with the Expedited Procedure, the tribunal may, in consultation with the parties, decide if the dispute is to be decided on the basis of documentary evidence only or if a hearing is required;
- amendment to Rule 5.2(e) to provide that the tribunal in an Expedited Procedure under Rule 5 “*may*” state its reasons in summary form, whereas previously the tribunal was obliged to do so;
- addition of Rule 5.3 that by agreeing to arbitration under the SIAC Rules, the parties agree that, where the arbitral proceedings are conducted in accordance with the Expedited Procedure under Rule 5, the rules and procedures in Rule 5.2 shall apply even in cases where the arbitration agreement contains contrary terms, which would include a sole arbitrator being appointed under the Expedited Procedure notwithstanding that the parties have agreed in their contract for disputes to be resolved by a panel of arbitrators;
- addition of Rule 5.4 to provide that upon application by a party, and after giving the parties the opportunity to be heard, the tribunal may, having regard to any further

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<sup>61</sup> The SIAC probably considered this provision to be redundant in light of the amendments to Section 15 and 15A of the IAA, and the Singapore Courts’ acceptance of this principle. Please refer to Section 8 above.

information as may subsequently become available, and in consultation with the Registrar, order that the arbitral proceedings shall no longer be conducted in accordance with the Expedited Procedure;

- addition of Rule 6, which provides for a claimant to commence a single arbitration concerning disputes arising out of or in connection with multiple contracts;
- addition of detailed joinder and consolidation procedures in Rules 7 and 8, which give the Court and the arbitral tribunal power to compel joinder and consolidation in the absence of agreement of the parties;
- removal of rule 10.6 of the fifth edition of the rules, which provided that if the parties have agreed on any qualification required of an arbitrator, the arbitrator shall be deemed to meet such qualifications unless a party states that the arbitrator is not so qualified within 14 days after receipt of the nomination of an arbitrator;
- amendment to Rule 15.1 relating to the time period in which a party can challenge an arbitrator to within 14 days after the circumstances became known “*or should have reasonably been known to that party*”;
- clarification on the procedure for challenge to arbitrators under Rule 15, and amendments to the decision on challenge under Rule 16;
- expansion of the grounds for replacing an arbitrator under Rule 17.2 to include where an arbitrator refuses or fails to act or perform his or her functions in accordance with the Rules or within the prescribed time limits, and expansion of the President’s discretion under Rule 17.3 to remove an arbitrator under the same criteria, and inclusion of an additional ground where the arbitrator does not conduct or participate in the arbitration with due diligence and/or in a manner that ensures the fair, expeditious, economical, and final determination of the dispute;
- addition of Rule 19.7 to give the President the power, at any stage of the proceedings, to request the parties and the tribunal to convene a meeting to discuss the procedures that will be most appropriate and efficient for the case;
- amendment to Rule 21.1 (previously rule 18.1) to remove Singapore as the default seat (unless the arbitral tribunal determines that another seat is more appropriate in the circumstances) where the parties have not agreed the seat, and replaced this with the arbitral tribunal determining the seat, having regard to all the circumstances of the case. Rule 21.1 is one of the more significant amendments to the SIAC Rules, and is consistent with Article 18 of the ICC Rules, to “*delocalise*” the SIAC Rules from Singapore as the



- seat. Parties can no longer rely on selecting Singapore as the seat by specifying the SIAC Rules, and must now expressly agree Singapore as the seat in their arbitration agreement;
- amendment to Rule 23.1 to provide that the Registrar and the tribunal may require proof of authority of any party representatives, and the addition of Rule 23.2 to provide that after constitution of the tribunal, any change or addition of a party to its representatives shall be promptly communicated in writing to the parties, the tribunal and the Registrar;
  - amendment to Rule 27(g) expressly to give the tribunal the power to issue an order or award for reimbursement of unpaid deposits towards the costs of the arbitration where a party to the arbitration has paid the other party's share of the deposits on behalf of the non-paying party;
  - amendment to Rule 28.3(b) to provide that any objection that the tribunal is exceeding the scope of its jurisdiction shall be raised within 14 days after the matter alleged to be beyond the scope of the tribunal's jurisdiction arises during the arbitral proceedings;
  - the addition of Rule 29.1 to allow a party to apply to the tribunal for the early dismissal of a claim or defence on the basis that the claim or defence is either manifestly without legal merit or is manifestly outside the jurisdiction of the tribunal. Pursuant to Rule 29.4, the tribunal is obliged to make an order or award on the application within 60 days of the date of filing of the application;
  - amendment to Rule 32.1 to provide that the tribunal shall, "*as promptly as possible*", after consulting with the parties, declare the proceedings closed;
  - the addition in Rule 32.6 relating to where one of the arbitrators fails to cooperate in the making of the award, the remaining arbitrators are obliged to provide written notice of such refusal or failure to the Registrar, the parties, and the absent arbitrator, and the remaining arbitrators are obliged to explain in any award made the reasons for proceeding without the absent arbitrator;
  - amendment to Rule 32.10 to provide that if the parties request, the tribunal may render a consent award recording the settlement of the parties, whereas previously "*any party*" could request the tribunal to render a consent award (previously rule 28.8);
  - amendment to Rule 32.12 to provide that the SIAC can publish an award with the names of the parties and other identifying information redacted only with the consent of the parties and the tribunal;

- the removal in Rules 33.1, 33.3, and 33.4, relating to correction, consideration of a claim, and interpretation of an award respectively, of the right of any other party to comment on such request within 15 days of its receipt;
- amendment to Rule 34.7 to provide that if the claim or counterclaim is not quantified, the Registrar shall determine the costs of the arbitration, as set out in Rule 34, in his or her discretion;
- the addition of Rule 34.9 to allow the Registrar to direct the parties to pay an additional fee for the SIAC's administrative services to be paid over that prescribed in the schedule of fees in exceptional circumstances;
- amendment to Rules 38.1 and 38.2 to extend the exclusion of liability and lack of any obligation to make any statement respectively to "*any person appointed by the Tribunal, including any administrative secretary and any expert*", and amendment to Rule 39.1 to provide that the obligation of confidentiality is extended to the same classes of person;
- amendment to Rule 39.3 to provide that the definition of "*matters relating to the proceedings*" in Rule 39.1 relating to confidentiality is an inclusive rather than exclusive definition;
- amendment to Rule 39.1 to provide that the deliberations of the tribunal shall be confidential, and Rule 40.1 that the discussions and deliberations of the Court are confidential;
- clarification in Rule 41.1 (previously rule 37.1) to provide that any party that proceeds with the arbitration without promptly raising any objection to a failure to comply with any provision of the Rules, or any other rules applicable to the proceedings etc, shall be deemed to have waived its right to object;
- amendment to Rule 2 of Schedule 1 (the Emergency Arbitrator Procedure) to give the Registrar the power to increase the amount of the Emergency Arbitrator's fees and expenses requested from the party making the application, and if not paid, the application is considered withdrawn;
- amendment to Rule 3 of Schedule 1 to provide that the President shall seek to appoint an Emergency Arbitrator within one day (previously one business day) of receipt by the Registrar of the application for emergency interim relief and payment of the administration fee and deposits;
- addition of Rule 4 of Schedule 1 to provide that if the parties have agreed on the seat of the arbitration, that seat shall be the seat of the proceedings for emergency interim relief,

otherwise the seat shall be Singapore, without prejudice to the tribunal's determination of the seat under Rule 21.1;

- amendment to Rule 5 of Schedule 1 to provide that any challenge to the appointment of the Emergency Arbitrator must be made within two days (previously one business day) of the communication by the Registrar to the parties of the appointment of the Emergency Arbitrator and the circumstances disclosed;
- amendment to Rule 7 of Schedule 1 to provide the establishment by the Emergency Arbitrator of a schedule for consideration of the application for emergency interim relief may provide for proceedings by video conference, in addition to telephone conference or on written submissions, and that such schedule shall be established as soon as possible, but in any event within two days (previously two business days);
- addition in Rule 8 of Schedule 1 to provide that the Emergency Arbitrator's power includes making preliminary orders pending any hearing, telephone or video conference, or written submissions by the parties, and amendment to Rule 8 to provide that the Emergency Arbitrator shall give "*summary*" (previously no reference to "*summary*") reasons for his or her decision in writing;
- addition of Rule 9 of Schedule 1 to provide for a time limit for the Emergency Arbitrator to make his or her order or award of 14 business days from the Emergency Arbitrator's appointment, and for the Registrar to approve the order or award as to form prior to issue;
- amendment to Rule 12 of Schedule 1 to provide that the parties agree irrevocably to waive their rights to any form of appeal, review or recourse to any State Court or other judicial authority with respect to such award insofar as such waiver may be validly made;
- amendment to Rule 13 of Schedule 1 to provide that the costs associated with the application "*may*" initially be apportioned by the Emergency Arbitrator, whereas the Emergency Arbitrator was previously obliged to do so;
- amendment to Rule 14 of Schedule 1 to provide that the Registrar may abbreviate any time limits under the Rules in applications for emergency interim relief;
- an increase in the amount of arbitrator's fees as a proportion of the amount claimed, by approximately 7% to 10% for sums in dispute up to S\$500m. For example, the arbitrator's fee for a S\$50m sum in dispute has increased from S\$263,000 to S\$281,900. The Emergency Arbitrator cap on fees has been set at S\$25,000, whereas previously there was a cap of 20% of the sole arbitrator's fee, and an overall cap on the Emergency Arbitrator's fees and expenses set at S\$30,000;

- the SIAC’s administration fees have increased by approximately 15% for a given sum in dispute, and the administration fee for Emergency Arbitrator appointments has increased by S\$2,140 to S\$5,350 for Singapore parties and S\$2,000 to S\$5,000 for overseas parties; and
- the SIAC has also introduced a fee for challenging an arbitrator under Rule 15.3 of amount S\$8,560 for Singapore parties and S\$8,000 for overseas parties.

The SIAC also maintains a panel of arbitrators, with specified minimum requirements for admission to the panel.

The SIAC’s case load has grown significantly over the last 10 years in particular, from 64 new cases in 2003 to 271 new cases in 2015,<sup>62</sup> and as a consequence, the SIAC is now an experienced and efficient international arbitration centre.

## 12. Is there a SIAC Model Arbitration Clause?

### *Model Arbitration Clause*

The SIAC recommends use of a model arbitration clause, as follows:

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (“SIAC”) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be [Singapore].\*

The Tribunal shall consist of \_\_\_\_\_\*\*arbitrator(s).

The language of the arbitration shall be \_\_\_\_\_.

*Parties should also include an applicable law clause. The following is recommended:*

This contract is governed by the laws of \_\_\_\_\_\*\*\*.

*\* Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace “[Singapore]” with the city or country of choice (e.g. “[City, Country]”).*

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<sup>62</sup> SIAC Annual Report, 2015.

*\*\* State an odd number. Either state one, or state three.  
 \*\*\*State the country or jurisdiction.”*

### ***Model Expedited Arbitration Clause***

The SIAC also recommends a model arbitration clause if the parties agree to adopt the Expedited Procedure set out in Rule 5.2 of the SIAC Rules (discussed in Section 23 below), as follows:

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (“SIAC”) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The parties agree that any arbitration commenced pursuant to this clause shall be conducted in accordance with the Expedited Procedure set out in Rule 5.2 of the SIAC Rules

The seat of the arbitration shall be [Singapore].\*

The Tribunal shall consist of one arbitrator.

The language of the arbitration shall be \_\_\_\_\_.

*Parties should also include an applicable law clause. The following is recommended:*

This contract is governed by the laws of\_\_\_\_\_.\*\*\*

*\* Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace “[Singapore]” with the city or country of choice (e.g. “[City, Country]”).*

*\*\* State an odd number. Either state one, or state three.*

*\*\*\*State the country or jurisdiction.”*

The President retains discretion as to whether the Expedited Procedure is appropriate. Please refer to the discussion of the Expedited Procedure in Section 23 below.

### ***Model Arb-Med-Arb Clause***

The SIAC also recommends an Arb-Med-Arb clause, in conjunction with the Singapore International Mediation Centre (“SIMC”), as follows:

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (“SIAC”) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be [Singapore].\*

The Tribunal shall consist of \_\_\_\_\_\*\* arbitrator(s).

The language of the arbitration shall be \_\_\_\_\_.

The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre (“SIMC”), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms.

\* Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace “[Singapore]” with the city and country of choice (e.g., “[City, Country]”).

\*\* State an odd number. Either state one, or state three.”

### 13. Can a Party obtain Pre-Arbitration Disclosure of Documents?

Pre-arbitration disclosure of documents *per se* is unavailable in the Singapore Courts. Singapore, like a number of common law jurisdictions, gives a party an express right to apply to the Court for pre-action disclosure of documents in litigation proceedings.<sup>63</sup> There have been unsuccessful attempts by parties in some jurisdictions to use this process for applications for pre-arbitration disclosure of documents. The Singapore High Court, in *Equinox Offshore Accommodation Ltd v Richshore Marine Supplies Pte Ltd*,<sup>64</sup> recently held that it has no power to grant an order for disclosure of documents prior to commencement of arbitration.

The situation in *Equinox Offshore* is to be distinguished from the case where a party may have a cause of action in the Singapore Courts outside the scope of the arbitration agreement, and the party brings an application for pre-action disclosure to determine whether it is viable to commence that cause of action in Court. The Singapore Court of Appeal has held that such applications fall within the scope of the relevant Singapore Rules of Court.<sup>65</sup>

For parties requiring early disclosure of specific classes of documents, an early application to the arbitral tribunal can be made, once the tribunal is constituted. If there is a risk of destruction of documents, a party could also apply for an Emergency Arbitrator Procedure to issue orders for protection of documents, discussed in Section 23 below.

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<sup>63</sup> Singapore Rules of Court, Order 24, Rule 6(1).

<sup>64</sup> [2010] SGHC 122.

<sup>65</sup> *Woh Hup (Pte) Ltd v Lian Teck Construction Pte Ltd* ([2005] SGCA 26).

## 14. How are Arbitration Proceedings Commenced?

Both the AA<sup>66</sup> and the IAA<sup>67</sup> provide that arbitration proceedings in respect of a particular dispute shall commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. The Singapore *Limitation Act (Cap 163)* applies to arbitration proceedings, and any reference to the commencement of proceedings shall be construed as a reference to the commencement of arbitral proceedings.<sup>68</sup>

Where the parties have agreed a set of arbitral rules, provisions dealing with commencement prevail over the provisions contained in the AA and IAA. Rule 3.1 of the SIAC Rules provides that a party wishing to commence arbitration shall file with the Registrar a notice of arbitration, and Rule 3.3 provides that the date of receipt of the complete notice of arbitration by the Registrar shall be deemed the date of commencement of the arbitration.

Rule 3.1 sets out the requirements for the content of the notice of arbitration, which includes a demand that the dispute be referred to arbitration, the names and contact details of the parties and their representatives, a reference to the arbitration clause and the contract, and a brief statement describing the nature and circumstances of the dispute. Rule 3.2 also provides that the notice of arbitration may include the statement of claim referred to in Rule 20.2.

Where the claimant has commenced a single arbitration proceedings under Rule 6.1(b), which deals with arbitration proceedings arising from multiple contracts (discussed in Section 21 below), pursuant to Rule 3.3 one of the criteria for the notice of arbitration being deemed to be complete is when the Registrar determines that there has been substantial compliance with the requirements of both Rule 3.1 and Rule 6.1(b), which requires a statement identifying each contract and arbitration agreement, and a description of how the applicable criteria under Rule 8.1 are satisfied. The claimant should therefore include in its notice of arbitration a statement to satisfy the requirements of Rule 6.1(b) and Rule 8.1, notwithstanding that there is no express requirement to do so contained in Rule 3.1.

Note however that the language used in Rule 3.1, in relation to the content of the notice of arbitration, is to specify that the notice “*shall include*” (previously “*shall comprise*”) the matters listed in Rule 3.1(a) to (k), in light of which Rule 3.1 does not preclude the claimant from including in the notice not only a statement of claim, as specified in Rule 3.2, but other evidence and submissions, such as witness statements, expert reports, and submissions on relevant legal principles.

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<sup>66</sup> Section 9 of the AA.

<sup>67</sup> Article 21 of the Model Law, IAA.

<sup>68</sup> Section 8A(1) of the IAA, and Section 11 of the AA.

Rule 4.1 sets out the requirements for the respondent's response to the notice of arbitration, in similar language to Rule 3.1, and which must be submitted to the claimant within 14 days of receipt of the notice of arbitration. Note that one of the amendments to Rule 4.1(a) is that the response shall include, where possible, any plea that the tribunal lacks jurisdiction. This provision is useful where the respondent has a jurisdictional objection, and requires the objection to be dealt with at an early stage of the proceedings under Rule 29, the early dismissal provisions (discussed in Section 20 below).

Rule 4.2 also provides that the response may include the statement of defence and statement of counterclaim, as referred to in Rule 20.3 and Rule 20.4.

## 15. How is the Arbitral Tribunal Formed?

Parties are free to agree on the number of arbitrators and method of appointment of arbitrators in their arbitration agreement, or by reference to an agreed set of arbitral rules. If the parties fail to agree on the number of arbitrators, a sole arbitrator is the default arbitral tribunal under both the AA<sup>69</sup> and the IAA.<sup>70</sup>

Where parties have agreed on a sole arbitrator, or a sole arbitrator applies under either the AA or the IAA, but have not agreed on a procedure for appointing the sole arbitrator, and are unable to agree on the appointment, the arbitrator shall be appointed by the "*appointing authority*", which is the President under both the AA<sup>71</sup> and IAA.<sup>72</sup>

Where the parties have agreed on a panel of three arbitrators, but have not agreed on an appointment procedure, under both the AA and the IAA, each party shall appoint an arbitrator and the third arbitrator shall be appointed by agreement of the parties.<sup>73</sup> In cases where parties either do not appoint an arbitrator, or cannot agree on the appointment of the third arbitrator, upon request of a party, the arbitrator shall be appointed by the "*appointing authority*", which is the President under both the AA<sup>74</sup> and IAA.<sup>75</sup>

The default arbitral tribunal under Rule 9.1 of the SIAC Rules is also a sole arbitrator, except that a three person tribunal may be appointed in circumstances where it appears to the Registrar, giving due regard to any proposals by the parties, that the complexity, the quantum involved or other relevant circumstances of the dispute, warrants the appointment of three arbitrators.

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<sup>69</sup> Section 12(2) of the AA

<sup>70</sup> Section 9 of the IAA.

<sup>71</sup> Section 13(3)(b) of the AA.

<sup>72</sup> Article 11(3)(b) of the Model Law, IAA.

<sup>73</sup> Sections 13(3)(a) of the AA, and 9A(1) of the IAA.

<sup>74</sup> Section 13(4) of the AA.

<sup>75</sup> Section 9A(2) of the IAA, and Article 11(3)(a) of the Model Law, IAA.



Pursuant to Rule 10.2 of the SIAC Rules, in the case of a sole arbitrator, if within 21 days after the date of commencement of the arbitration, or within the period otherwise agreed by the parties or set by the Registrar, the parties have not reached an agreement on the nomination of a sole arbitrator, or if at any time either party so requests, the President shall appoint the sole arbitrator.

Pursuant to Rule 11.1 of the SIAC Rules, the default procedure for appointment of a three person arbitral tribunal is for each party to nominate one arbitrator. Pursuant to Rule 11.2 of the SIAC Rules, in the case of three arbitrators, if a party fails to make a nomination of an arbitrator within 14 days after receipt of a party's nomination of an arbitrator, or within the period otherwise agreed by the parties or set by the Registrar, the President shall proceed to appoint an arbitrator on its behalf.

Similarly, pursuant to Rule 11.3, in the case of three arbitrators, unless the parties have agreed upon another procedure for appointing the third arbitrator, or if such agreed procedure does not result in a nomination within the period agreed by the parties or set by the Registrar, the President shall appoint the third arbitrator, who shall be the presiding arbitrator.

In all cases under the Rules, pursuant to Rule 9.3, the arbitrators nominated by the parties or by any third person including by the arbitrators already appointed, shall be subject to appointment by the President in his or her discretion.

Note that pursuant to Rule 5.2(b), for proceedings conducted in accordance with the Expedited Procedure, the case shall be referred to a sole arbitrator, unless the President determines otherwise, notwithstanding that the parties have agreed in their contract for disputes to be resolved by a panel of arbitrators (refer to the discussion in Section 24 below).<sup>76</sup>

## 16. Is there a Right to Challenge Arbitrators?

Arbitrators may be challenged under both the AA<sup>77</sup> and IAA<sup>78</sup> on the basis of:

- circumstances which give rise to justifiable doubts as to his or her impartiality or independence; or
- he or she does not possess the qualifications agreed to by the parties.

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<sup>76</sup> The effect of Rule 5.3 of the SIAC Rules.

<sup>77</sup> Section 14(3) of the AA.

<sup>78</sup> Article 12(2) of the Model Law, IAA.

Under both the AA<sup>79</sup> and the IAA,<sup>80</sup> the arbitral tribunal shall decide on any challenge in the first instance, and a party has the right to challenge this decision in the Singapore High Court,<sup>81</sup> which decision is not subject to further appeal.

The grounds for challenge under Rule 14.1 of the SIAC Rules are identical to those set out in the AA and IAA. However, pursuant to Rule 16.1 of the SIAC Rules, the Court determines the challenge, which pursuant to Rule 16.4, is final and not subject to appeal. The Court, by amendment to Rule 14.1 of the SIAC Rules, is now obliged to provide a reasoned decision on the challenge to be issued to the parties by the Registrar,<sup>82</sup> which formalises the Court's practice.

Pursuant to Rule 14.2, a party may challenge the arbitrator nominated by it only for reasons of which it becomes aware after the appointment is made.

The procedure for challenge under Rule 15.2 has been amended in the SIAC Rules to provide for the filing party to send the notice of challenge simultaneously to the other party, the arbitrator(s) being challenged, and other members of the tribunal. There is a significant amendment to Rule 15.1 as to the timing of a challenge to provide that a party that intends to challenge an arbitrator shall file a notice of challenge either (a) within 14 days after receipt of the notice of appointment of the arbitrator who is being challenged or (b) within 14 days after the circumstances specified in Rule 14.1 or Rule 14.2 became known or "*should have reasonably been known to that party*", which imposes an objective standard on the party's knowledge of the circumstances specified in Rule 14.1 or Rule 14.2.

Pursuant to Rule 16.1, the Registrar and/or the Court may now request comments on the challenge from the parties, the challenged arbitrator, and other members of the arbitral tribunal.

Pursuant to Section 14(4) of the AA, and Article 12(2) of the Model Law, a party is unable to challenge an arbitrator after appointment if the grounds for challenge were known to that party prior to appointment, or pursuant to Rule 15.1, should have reasonably been known to that party. Such a challenge would need to be made on new grounds.

The grounds for replacing an arbitrator under Rule 17.2 have been expanded to include where an arbitrator refuses or fails to act or perform his or her functions in accordance with the Rules or within the prescribed time limits, and the President's discretion under Rule 17.3 to remove an arbitrator has been expanded to include the same criteria, and inclusion of an additional ground where the arbitrator does not conduct or participate in the arbitration with due diligence and/or in

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<sup>79</sup> Section 15(3) of the IAA.

<sup>80</sup> Article 13(2) of the Model Law, IAA

<sup>81</sup> Section 15(4) of the AA, and Article 13(3) of the Model Law, IAA.

<sup>82</sup> Rule 16.4 of the SIAC Rules.

a manner that ensures the fair, expeditious, economical, and final determination of the dispute. This new ground gives the President wide discretion to remove an arbitrator in a range of circumstances related to the tribunal's conduct of the arbitration.

Pursuant to Rule 17.1, in the event of death, resignation, withdrawal, or removal of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator is appointed in accordance with the usual procedure under the Rules.

## **17. Are there any Requirements for Qualifications of Arbitrators?**

Apart from the usual requirements that all arbitrators must be independent and impartial, there are no specific requirements in either the legislation or the SIAC Rules for qualifications of arbitrators.

The parties themselves, reflecting party autonomy, are free to agree on any specific qualifications for an arbitrator. Pursuant to Rule 13.2 of the SIAC Rules, the President, in appointing an arbitrator under the Rules, is obliged to have due regard to any qualifications required of the arbitrator by the agreement of the parties, and a similar provision is contained in Article 11(5) of the Model Law.

Pursuant to Rule 14.1 of the SIAC Rules and Article 12(2) of the Model Law, an arbitrator may be challenged if the arbitrator does not possess any requisite qualifications on which the parties have agreed. There is one significant change in the SIAC Rules to remove the requirement of rule 10.6 of the fifth edition of the rules, which provided that if the parties have agreed on any qualification required of an arbitrator, the arbitrator shall be deemed to meet such qualifications unless a party states that the arbitrator is not so qualified within 14 days after receipt of the nomination of an arbitrator. Rule 10.6 of the fifth edition was probably considered by the SIAC to be unnecessary, in light of the 14 day time period for challenge of an arbitrator under Rule 15.1.

Arbitrators may be of any nationality,<sup>83</sup> and are not required to be legally trained. As noted in Section 12 above, the SIAC specifies minimum requirements for arbitrators to be included on its panel of arbitrators.

Both the Singapore Institute of Arbitrators and the Chartered Institute of Arbitrators regularly hold courses in Singapore for the training of arbitrators, and most arbitrators appointed on Singapore seated arbitrations will have had training in arbitration.

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<sup>83</sup> Article 11(1) of the Model Law, IAA, and Section 13(1) of the AA.

## 18. Are there Restrictions on the Parties' Representation?

There are no restrictions on a party's representation in both domestic and international arbitration proceedings. Parties can be represented by Singapore and foreign lawyers, and by non-lawyers, including in those instances where the underlying disputes are governed by Singapore substantive law.

Foreign lawyers resident in jurisdictions outside of Singapore can appear in arbitrations in Singapore arbitrations on social visit passes and do not require a work permit.

Pursuant to Rule 23.1 of the SIAC Rules, parties can be represented by legal practitioners, or by "any other authorised representatives", and the Registrar and/or the tribunal may require proof of the authority of any party representatives.

The SIAC has also added Rule 22.2 in the SIAC Rules, which provides that after the constitution of the tribunal, any change or addition by a party to its representatives shall be promptly communicated to the parties, the tribunal, and the Registrar. Rule 22.2 formalises the practice of most party representatives, and gives the other parties and the tribunal an opportunity to consider whether the change or addition by a party of its representatives gives rise to any further issues of conflict of interest.

## 19. Can an Arbitral Tribunal decide on its own Jurisdiction?

Arbitral tribunals under both Acts and the SIAC Rules have the power to decide on their own jurisdiction at any stage of the proceedings, reflecting the principle of *kompetenz kompetenz*.<sup>84</sup> The IAA was amended in 2012 to allow an arbitral tribunal's decision to refuse jurisdiction to be reviewed by the Singapore Courts, whereas previously the Singapore Courts were only entitled to review an arbitral tribunal's ruling on jurisdiction where that ruling was positive, consistent with Article 16(3) of the Model Law.<sup>85</sup> The rationale for drafting of Article 16(3) of the Model Law was that an arbitral tribunal should not be compelled to continue with an arbitration in circumstances where it considered that it did not have jurisdiction.

The 2012 amendments to the IAA also expressly give arbitral tribunals and the Singapore Courts the power to make costs orders against any party when ruling that the arbitral tribunal does not

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<sup>84</sup> Section 21(1) of the AA and Section 10(2) of the IAA, also reflected in Rule 28.2 and Rule 7, Schedule of the SIAC Rules in the case of an Emergency Arbitrator.

<sup>85</sup> Section 10(3) of the IAA, effective from 1 June 2012.

have jurisdiction.<sup>86</sup> This amendment is intended to overcome the potential problem that arbitral tribunals may not have the power to award costs if a tribunal rules that it has no jurisdiction.<sup>87</sup>

Equivalent amendments were also made to the AA.<sup>88</sup>

## 20. What is the Arbitration Procedure?

The parties are free to agree the procedure for the conduct of arbitration under the AA,<sup>89</sup> IAA,<sup>90</sup> and the SIAC Rules, and in the absence of agreement, the arbitral tribunal determines the procedure. One of the major advantages of arbitration is its flexibility. The parties can agree, or in the absence of agreement, the arbitral tribunal can order, a procedure which takes into account the background of the parties and their advisors, and the nature of the dispute.

There are no specific mandatory requirements for the conduct of arbitrations set out in either the AA or the IAA, subject to the usual principles of equality of treatment, fairness, and giving each party a reasonable opportunity of presenting their case,<sup>91</sup> reflecting the principle of party autonomy. However, both Acts set out a basic outline of procedure, which applies where the parties have not agreed a detailed procedure in their arbitration agreement, by reference to an agreed a set of arbitral rules, or otherwise.

Broadly, the procedure deals with the issues of formation of the tribunal, definition of the issues in dispute between the parties, evidential steps in the proceedings, conduct of the hearing, and publication of the award.

The framework procedural steps under the AA and IAA include:

- commencement of arbitration proceedings;
- formation of the tribunal;
- challenge to arbitrators;
- equality of treatment;

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<sup>86</sup> Section 10(7) of the IAA.

<sup>87</sup> *Report of the Law Reform Committee on Right to Judicial Review of Negative Jurisdictional Rulings*, Singapore Academy of Law, Law Reform Commission, January 2011.

<sup>88</sup> Sections 21(9) and 21A of the AA, effective from 1 June 2012.

<sup>89</sup> Section 23 of the AA.

<sup>90</sup> Article 19 of the Model Law, IAA.

<sup>91</sup> Section 22 of the AA, and Article 18 of the Model Law, IAA.

- in the absence of agreement of the parties, arbitral tribunals are empowered to conduct the arbitration in such manner as it considers appropriate;
- language to be used in the arbitration proceedings;
- statements of claim and defence;<sup>92</sup> and
- hearings and written proceedings.<sup>93</sup>

Similarly to the AA and IAA, under Rule 19.1 of the SIAC Rules, in the absence of agreement of the parties, and after consulting with the parties, the tribunal is obliged to conduct the arbitration in such matter as it considers appropriate to ensure the fair, expeditious, economical and final resolution of the dispute. As noted in Section 16 above, the President now has discretion under Rule 17.3 to remove an arbitrator in circumstances where, in effect, the arbitrator does not comply with the requirements of Rule 19.1 of the SIAC Rules.

The SIAC Rules also set out framework procedural steps requiring the claimant to file and serve a statement of claim (Rule 20.2), the respondent to file and serve a statement of defence (and counterclaim, if any) (Rule 20.3), and a statement of defence to counterclaim (Rule 20.4) all within periods of time to be determined by the arbitral tribunal.<sup>94</sup>

The arbitral tribunal is also obliged, pursuant to Rule 19.3, as soon as practicable after the constitution of the tribunal, to 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. Rule 19.7 has also been added in the SIAC Rules to give the President the power, at any stage of the proceedings, to request the parties and the tribunal to convene a meeting to discuss the procedures that will be most appropriate and efficient for the case;

The procedure by which the parties conduct the arbitration is therefore entirely within the hands of the parties, and absence agreement, to be decided by the tribunal in accordance with its obligation under Rule 19.1 of the SIAC Rules, thereby encouraging a procedure tailored to the particular circumstances of the dispute and the background of the parties, rather than involving any prescriptive elements to the procedure.

Rule 29.1 of the SIAC Rules has been added to provide for early dismissal of a claim or defence. Pursuant to Rule 29.1, a party may apply to the tribunal for the early dismissal of a claim or defence on the basis that the claim or defence is either manifestly without legal merit or

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<sup>92</sup> Article 23 of the Model Law, IAA.

<sup>93</sup> Article 24 of the Model Law, IAA.

<sup>94</sup> Rules 17.2 and 17.3 of the SIAC Rules.

manifestly outside the jurisdiction of the tribunal. Rule 29 is a unique measure in arbitral institutional rules, and is a useful provision, since it allows a party to seek dismissal of clearly unmeritorious claims or defences at an early stage of the proceedings, thereby saving time and costs.

In light of the respective timetables for the parties filing their notice of arbitration and response respectively, in most cases, parties will need to assess whether an application under Rule 29.1 is feasible on the basis only of these early documents. Rule 29.1 is also consistent with the requirement in Rule 4.1(a) that the response shall include, where possible, any plea that the tribunal lacks jurisdiction.

Pursuant to Rule 29.4 of the SIAC Rules, the tribunal is obliged to issue its order or award on the application, with reasons, which may be in summary form, within 60 days of the date of filing of the application. The author submits that if the tribunal issues an award under Rule 29.4, the tribunal is obliged to issue its award in draft form to the Registrar under the terms of Rule 32.3 of the SIAC Rules. However, if the tribunal issues an order, for example, a decision that it does not have jurisdiction, the author submits there is no requirement under the SIAC Rules for the tribunal to issue to the Registrar the draft order for review as to form.

It seems likely that arbitral tribunals will only dismiss a claim or defence under Rule 29.4 in circumstances where it is clearly unmeritorious, or where the tribunal clearly has no jurisdiction to consider the claim or defence. In particular, if any such claim or defence is dependent upon factual or expert evidence, it is unlikely that an arbitral tribunal will dismiss the claim or defence at this early stage of the proceedings.

Arbitral tribunals are not bound by rules of evidence applicable in litigation proceedings.<sup>95</sup> It is common practice for the parties to exchange written witness statements for primary evidence, followed by cross-examination of witnesses during a hearing. Arbitral tribunals have the power to order disclosure of documents which are within the possession or power of any of the parties or the persons claiming through them,<sup>96</sup> and, pursuant to Rule 27(f) of the SIAC Rules, order a party to produce to the tribunal and to the parties for inspection, and to supply copies of, any document in its possession or control which the tribunal consider relevant to the case and material to its outcome.

Arbitral tribunals will often restrict disclosure to specific classes of documents, and will usually refer to the provisions of the “*IBA Rules on the Taking of Evidence in International Arbitration*” as a guide, which, in Article 3(3)(a), reflects the relevance and materiality criteria for disclosure of documents stipulated in in Rule 27(f) of the SIAC Rules.

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<sup>95</sup> For example, Rule 19.2 of the SIAC Rules.

<sup>96</sup> Section 28(2)(b) of the AA, and Section 12(1)(b) of the IAA.

The arbitral tribunal, subject to agreement of the parties, has the power under the AA,<sup>97</sup> IAA<sup>98</sup> and the SIAC Rules,<sup>99</sup> to decide whether to hold oral hearings for oral argument and the presentation of evidence, or to proceed on the basis of documentary evidence only. However, if a party requests a hearing, the arbitral tribunal is obliged to hold a hearing. In practice, other than for agreed documents only arbitrations, a hearing is invariably held, usually followed by post-hearing written submissions.

In an amendment to the SIAC Rules from the fifth edition of the rules, pursuant to Rule 5.2(c), the sole arbitrator conducting an arbitration under the Expedited Procedure has the discretion, in consultation with the parties, whether to decide the dispute on the basis of documentary evidence only, or if a hearing is required for the examination of any witness and expert witness as well as for oral argument, which represents a departure from the usual principle in arbitration proceedings that a hearing is required if one party requests a hearing (refer to Section 25(2) of the AA, Article 24(1) of Model Law, and Rule 24.1 of the SIA Rules). Refer to the discussion in Section 24 below.

## 21. Can Arbitral Proceedings be Consolidated or Parties Joined?

Arbitration proceedings are a creature of contract between the parties, and as such, absence agreement of all parties, it is not possible to join third parties to arbitration proceedings or to consolidate more than one arbitration proceedings in the same way as in litigation proceedings in most jurisdictions. The difficulty usually arises in two situations, first, where there are several parties to a single contract, or secondly, where there are several parties to several contracts, all of which are related to the subject matter of the dispute.

The characteristics of modern international commerce are complex, often involving multiple parties, and multiple contracts relating to a single commercial transaction, consequently, solutions for joinder and consolidation of arbitration proceedings are desirable.<sup>100</sup> There are obvious advantages to joinder of parties to arbitration proceedings or consolidation of more than one arbitration proceedings where disputes involve similar subject matter, common facts, and common issues of law, such as preventing inconsistent or conflicting decisions, tribunals having a fuller view of a transaction, and usually savings of time and cost.

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<sup>97</sup> Section 25 of the AA.

<sup>98</sup> Article 24(1) of the Model Law, IAA.

<sup>99</sup> Rule 24.1 of the SIAC Rules.

<sup>100</sup> Thirty percent of the ICC arbitration workload now involves multi-party arbitrations. Refer to Mary Paralika and Alexander Fessas, “*Joinder, Multiple Parties, Multiple Contracts and Consolidation under the ICC Rules*”, a presentation made at the ICC Conference “*New Trends in ICC Arbitration and Mediation*”, Nicosia, Cyprus, 29 April 2014 (<http://www.ccci.org.cy/wp-content/uploads/2014/05/Multi-Joinder - Consolidation.pdf>).



As noted in Section 6 above, under Section 26 of the AA, parties are at liberty to agree to consolidation of two or more domestic arbitrations, but there is no equivalent provision under the IAA.<sup>101</sup> Consolidation of arbitration proceedings as contemplated under Section 26 of the AA is uncontroversial since it is a reflection of the principle of party autonomy.

The tribunal, pursuant to rule 24(b) of the fifth edition of the SIAC rules, has the power, upon “*application of a party*”, to allow one or more third parties to be joined in the arbitration, provided such person is a party to the arbitration agreement, with the written consent of the third party, and thereafter make a single award or separate awards in respect of all parties.<sup>102</sup> This provision applies only to the situation involving multiple parties to a single arbitration agreement, and requires agreement of the third party. Note however, that rule 24(b) does not require agreement of the opposing party in the arbitration proceedings.

The SIAC has significantly expanded the limited joinder mechanism in rule 24(b) of the fifth edition of the SIAC rules by Rule 6, “*Multiple Contracts*”, Rule 7, “*Joinder and Intervention*”, and Rule 8, “*Consolidation*”, of the SIAC Rules, which introduce a procedure for joinder of parties and consolidation of arbitrations involving multiple parties to a single contract, and multiple parties to multiple contracts. Rules 4, 7, and 8 extend joinder and consolidation significantly further than other institutional rules, which generally provide only limited joinder and consolidation mechanisms.<sup>103</sup>

Rule 6.1 allows a claimant, where there are disputes arising out of or in connection with more than one contract, to either file a notice of arbitration in respect of each arbitration agreement, and concurrently submit an application to consolidate the arbitrations pursuant to Rule 8.1 (discussed below) (Rule 6.1(a)), or, file a single notice of arbitration in respect of all arbitration agreements, which shall include a statement identifying each contract and arbitration agreement invoked and a description of how the applicable criteria under Rule 8.1 (discussed below) are satisfied (Rule 6.1(b)).

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<sup>101</sup> Section 26 of the AA.

<sup>102</sup> Rule 24(b), from the fourth edition of the SIAC rules, replaced the previous rule 24(b) in the third edition of the SIAC rules, which provided that the tribunal could allow “*other parties*” to be joined in the arbitration agreement with their express consent. The Singapore Court of Appeal in *PT First Media TBK v Astro Nusantara International BV* ([2013] SGCA 47) set aside an arbitral award where the tribunal relied on rule 24(b) to join a third party, with the third party’s consent, but where the third party was not a signatory to the relevant contract. The Court held that rule 24(b) could not have meant to extend the power to join non-parties to the arbitration without the consent of the parties to the arbitration agreement.

<sup>103</sup> Refer to Arts 8, 9 and 10 of the ICC Rules, Art 22 of the LCIA Rules, Arts 27 and 28 of the HKIAC Rules, Rule 8 of the KLRCA Rules, Art 19(5) of the UNCITRAL Rules, and Art 14 of the ACICA Rules.

In the latter case, the claimant shall be deemed to have commenced multiple arbitrations, one in respect of each arbitration agreement invoked, and the notice of arbitration shall be deemed to be an application to consolidate all such arbitrations pursuant to Rule 8.1. (Rule 6.1(b)).

In circumstances where a party files two or more notices of arbitration under Rule 6.1(a), pursuant to Rule 6.2, the Registrar shall accept payment of a single filing fee under the Rules for all arbitrations, but where the Court rejects the application, the claimant is obliged to make payment of a filing fee for each arbitration not consolidated. In circumstances where a claimant files a single notice of arbitration under Rule 6.1(b), and its application to consolidate is not granted, pursuant to Rule 6.3, the claimant is required to file a notice of arbitration for each arbitration not consolidated.

The terms of Rule 6.1(b) provide that the claimant is “*deemed to have commenced multiple arbitrations*” in respect of its single notice of arbitration. However, it is not clear whether such deemed commencement continues to operate in circumstances where the Court does not grant the claimant’s application for consolidation, in whole or in part, and the claimant is obliged, pursuant to Rule 6.3, to file a notice of arbitration in respect of each arbitration not consolidated.

As noted in Section 14 above, pursuant to Rule 3.2, the date of receipt of the complete notice of arbitration by the Registrar is deemed to be the date of commencement of the arbitration. It could be argued that the terms of Rule 6.1(b), read with Rule 6.3, operates as an exception to the usual principle under Rule 3.2, for all arbitrations the subject of a claimant’s application under Rule 6.1(b). The author submits that the better and more prudent view is that the terms of Rule 3.2 continue to apply where the Court does not grant the claimant’s application for consolidation, and any arbitration is not commenced until the claimant subsequently files new notices of arbitration under the terms of Rule 3.

There may be circumstances where a claimant is faced with a pending limitation period for a claim, in which case, it would be prudent for a claimant seeking consolidation of arbitrations to do so under Rule 6.1(a), rather than under Rule 6.2(b), in light of the fact that pursuant to Rule 3.2, the date of receipt of the complete notice of arbitration by the Registrar is deemed to be the date of commencement of the arbitration. Otherwise, a failed application under Rule 6.2(b) would result in a delay to commencement of the arbitrations under some of the contracts which may give rise to a failure to submit a claim within a requisite limitation period.

Turning to consider the consolidation provisions themselves, a party seeking consolidation of two or more arbitrations has two options. First, it may file an application with the Registrar under Rule 8.1 for the Court under Rule 8.4 to grant consolidation prior to constitution of any of the tribunals in the arbitrations sought to be consolidated, or secondly, await constitution of the tribunal and apply to the tribunal for consolidation under Rule 8.7. Note however, that a party’s failed application to the Court under Rule 8.1 does not preclude the party from applying again to the tribunal, once constituted, under Rule 8.7.

A party, pursuant to Rule 8.1, prior to the constitution of any of the tribunals in the arbitrations sought to be consolidated, may file an application with the Registrar to consolidate two or more arbitrations pending under the Rules into a single arbitration, provided one of the following three criteria is satisfied:

- all parties have agreed to the consolidation (Rule 8.1(a)); or
- all the claims in the arbitrations are made under the same arbitration agreement (Rule 8.1(b)); or
- the arbitration agreements are compatible, and (i) the disputes arise out of the same legal relationship(s); (ii) the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or (iii) the disputes arise out of the same transaction or series of transactions (Rule 8.1(c)).

Rule 8.2 sets out the requirements for the content an application under Rule 8.1, which includes the relevant case reference numbers (Rule 8.2(a)), the contact details, if known, of all parties and their representatives, and any arbitrators who have been nominated or appointed (Rule 8.2(b)), the information specified in Rule 3.1(c) and Rule 3.1(d) (relating to the arbitration agreement or relevant contract instrument) (Rule 8.2(c)), identification of the relevant agreement and, where possible, a copy of such agreement (Rule 8.2(d)), and a brief statement of the facts and legal basis supporting the application (Rule 8.2(e)).

Pursuant to Rule 8.3, the party applying for consolidation, at the same time as it files its application with the Registrar under Rule 8.1, is obliged to send a copy to all parties.

Pursuant to Rule 8.4, the Court shall, after considering the views of all parties, and having regard to the circumstances of the case, decide whether to grant, in whole or in part, any application for consolidation under Rule 8.1, without prejudice to either the tribunal's power to subsequently decide any question as to its jurisdiction arising from such decision, or any party's right to file an application with the tribunal to consolidate the arbitrations pursuant to Rule 8.7 (discussed below).

The author submits that the “*gate keeper*” test under Rule 28.1 of the SIAC Rules also applies to an application under Rule 8.1. Rule 28.1 provides that if any party objects to the existence or validity of the arbitration agreement or to the competence of the SIAC to administer an arbitration, the Court shall decide if it is *prima facie* satisfied that the arbitration shall proceed.

Clearly, all parties to the various pending arbitrations are entitled to submit their “*views*” to the Court under Rule 8.4 as to whether the party's application for consolidation should be granted, but it is not clear the extent of the Court's obligation under Rule 8.4. For example, if a party requests an oral hearing on the application, is the Court obliged to hold a hearing?

Pursuant to Rule 40.1 of the SIAC Rules, the decisions of the Court with respect to all matters relating to an arbitration shall be conclusive and binding upon the parties, and the Court shall not be required to provide reasons for such decisions. There is also a distinction between the language of Rule 8.4, which refers to the Court's obligation, in considering an application under Rule 8.1, in terms of "*after considering the views of all parties*", and the language of Rule 8.7 (discussed below), which refers to the tribunal's obligation, in considering an application under Rule 8.9, in terms of wider due process language as "*after giving all parties the opportunity to be heard*". In light of the terms of Rules 8.4, 8.9, and 40.1, it seems likely that the Court is obliged only to consider the parties' written submissions on the application for consolidation in its decision under Rule 8.4.

It is also implicit from the terms of Rule 8.1 that if a tribunal has already been constituted in any of the arbitrations sought to be consolidated, an application under Rule 8.1 is not permitted. Note that the reference to a constitution of a "*Tribunal*" does not apply to the appointment of an emergency arbitrator, who is not included within the definition of a "*Tribunal*" set out in Rule 1.3 of the SIAC Rules. A decision of an emergency arbitrator under Schedule 1 of the SIAC Rules prior to constitution of the arbitral tribunal in respect of an arbitration does not therefore preclude a party from subsequently applying to the Court for consolidation of one or more arbitration proceedings under Rule 8.1

Pursuant to Rule 8.5, where the Court decides to consolidate two or more arbitrations, the arbitrations shall be consolidated into the arbitration that is deemed by the Registrar to have commenced first, unless otherwise agreed by the parties, or the Court decides otherwise having regard to the circumstances of the case. Where a claimant has filed either multiple notices of arbitration under Rule 6.1(a) or a single notice of arbitration in respect of all arbitration agreements under Rule 6.1(b) as part of its application for consolidation of all such arbitrations pursuant to Rule 8.1, it is not clear how the Registrar will determine which of the arbitrations is deemed to have commenced first.

Pursuant to the final sentence of Rule 8.4, any arbitrations that are not consolidated shall continue as separate arbitrations under the Rules. Presumably, this provision does not apply to the situation where a claimant has filed a single notice of arbitration in respect of all arbitration agreements under Rule 6.1(b) as part of an application for consolidation of all such arbitrations pursuant to Rule 8.1, since by the terms of Rule 6.3, in circumstances where a claimant files a single notice of arbitration, and its application to consolidate is not granted, the claimant is required to file a notice of arbitration for each arbitration not consolidated.

Pursuant to Rule 8.6, where an application for consolidation is granted under Rule 8.4, the Court may revoke the appointment of any arbitrators appointed prior to the decision on consolidation, and unless otherwise agreed by the parties, Rules 9 to 12 apply as appropriate to appointment of the tribunal, with the timelines running from the date of receipt of the Court's decision under Rule 8.4. Since a party is not permitted to apply for consolidation under Rule 8.1 after constitution of

any tribunal, revocation of the appointment of an arbitrator under Rule 8.6 can only apply to a party nominated or appointed arbitrator in a three person tribunal.

Turning to consider the option of a party applying to the arbitral tribunal for consolidation of two or more arbitrations, pursuant to Rule 8.7, a party may apply to the tribunal to consolidate two or more arbitrations pending under the Rules into a single arbitration, provided one of the following three criteria is satisfied:

- all parties have agreed to consolidation (Rule 8.7(a));
- all claims in the arbitrations are made under the same arbitration agreement, and the same tribunal has been constituted in each of the arbitrations or no tribunal has been constituted in the other arbitrations(s) (Rule 8.7(b));
- the arbitration agreements are compatible, the same tribunal has been constituted in each of the arbitrations or no tribunal has been constituted in the other arbitrations(s), and (i) the disputes arise out of the same legal relationship(s); (ii) the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or (iii) the disputes arise out of the same transaction or series of transactions (Rule 8.7(c)).

Unlike an application to the Court under Rule 8.1, there is no requirement for a party applying to the arbitral tribunal for consolidation under Rule 8.7 to send a copy of the application to all parties to the arbitrations sought to be consolidated. There is no issue for the criteria in Rule 8.7(a) since all parties have agreed to the consolidation in any event, or for the criteria in Rule 8.7(b) where the arbitrations are between the same parties and the same tribunal has been appointed in each of the arbitrations. However, in all cases, it would be prudent for the party applying to the tribunal for consolidation to send a copy of its application under Rule 8.7 to all parties.

Pursuant to Rule 8.9, the arbitral tribunal shall, after giving all parties the opportunity to be heard, and having regard to the circumstances of the case, decide whether to grant, in whole or in part, any application for consolidation under Rule 8.7, without prejudice to the tribunal's power subsequently to decide any question as to its jurisdiction arising from such decision, and any arbitrations that are not consolidated shall continue as separate arbitrations under the Rules.

Pursuant to Rule 8.10, where an application for consolidation is granted under Rule 8.9, the Court may revoke the appointment of any arbitrators appointed prior to the decision on consolidation.

Pursuant to Rule 8.11 of the Rules, the Court's decision to revoke the appointment of any arbitrator under Rule 8.6 or Rule 8.10 is without prejudice to the validity of any act done or order or award made by the arbitrator before his appointment was revoked. The author submits that this provision applies only to revoking an appointment of an arbitrator under Rule 8.10, rather than Rule 8.6, since any application to the Court under Rule 8.1 can only be made prior to the

constitution of any tribunal in the arbitrations sought to be consolidated, and therefore, there is no opportunity for an arbitrator, either as a sole arbitrator or a member of a tribunal, to make any order or award.

The criteria in Rule 8.1(a) and Rule 8.7(a) are in identical terms, and reflect the principle of party autonomy, since two or more arbitrations can only be consolidated under these provisions if all parties to all arbitrations agree for the arbitrations to be consolidated. There are many situations where parties will agree to consolidate arbitrations for convenience, and cost and time savings, for disputes involving multiple parties, or multiple contracts relating to a single commercial transaction. For example, arbitration proceedings between an owner and main contractor, and one or more arbitrations between the main contractor and its subcontractors on the same construction project, all of which involve the same subject matter, and issues of law and fact.

The criteria in Rule 8.1(b) and Rule 8.7(b) apply where all claims in the arbitrations are made under the same arbitration agreement. This involves a situation where there are multiple parties to a single commercial transaction, such as a joint venture agreement, and say, party A commences arbitration proceedings against party B, and party C commences arbitration proceedings against party B, or where party A commences arbitration proceedings against party B, and party B commences separate arbitration proceedings against party A.

The criteria in Rules 8.1(b) and Rule 8.7(b) are a departure from the principle of party autonomy since it allows a party to apply for consolidation of two or more arbitrations without the consent of either the opposing party or parties to the arbitration, or the parties to the other arbitrations. In the first example given above, party A can apply for consolidation of its arbitration with party B without the consent of either party B or Party C.

Consolidation under Rules 8.7(b) and 8.7(c) only applies where either the same tribunal has been constituted in each of the arbitrations or no tribunal has been constituted in the other arbitrations. This overcomes the difficulty of consolidating two or more arbitrations where more than one tribunal has already been constituted. It will also overcome in most situations one of the usual difficulties with consolidation that one arbitration proceedings is significantly advanced prior to application for consolidation under a different arbitral tribunal.

The criteria in Rule 8.1(c) and Rule 8.7(c) require in all cases that the arbitration agreements are “*compatible*”. The expression “*compatible*” arbitration agreements is the same expression used in Article 10(c) of the ICC Rules, which allows the ICC Court, at the request of a party, to consolidate two or more arbitrations into a single arbitration without all parties’ agreement where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same

legal relationship, and the ICC Court finds the arbitration agreements to be “*compatible*”. The ICC Secretariat’s Guide to ICC Arbitration (2012) states that to comply with Article 10(c), the arbitration agreements must be “*substantially compatible*”.<sup>104</sup>

Arbitration agreements specifying matters such as different seats, language of the arbitration, mechanisms for appointing arbitrators, and the number of arbitrators, are unlikely to be compatible. More difficult questions arise in circumstances where one of the arbitration agreements is silent on some matters, for example, the seat or the language of the arbitration, and the tribunal is required to decide whether the agreements are sufficiently compatible to adopt the equivalent express requirements in an arbitration agreement in a related contract.<sup>105</sup> This highlights the importance of parties drafting arbitration agreements in multi-contract situations in identical terms as far as possible.

The consolidation provisions under Rule 8 of the SIAC Rules clearly apply only to arbitrations “*pending under these Rules*” (Rule 8.1 and 8.7), which may eliminate elements of potential incompatibility in some arbitration agreements.

The criteria in Rules 8.1(c)(i) to (iii) and 8.5(c)(i) to (iii) are in identical terms, and some disputes arising from multiple parties involved in a complex commercial transactions may fall within the scope of more than one of these criteria.

The criteria in Rules 8.1(c)(i) and 8.5(c)(i) apply where “*the disputes arise out of the same legal relationship(s)*”. These provisions will clearly apply where there are multiple parties to the same contract, but are also likely to apply to wider situations where there may be a series of contractual transactions implemented by the same parties under an umbrella commercial agreement, such as a series of distribution agreements under a head agreement.

The criteria in Rules 8.1(c)(ii) and 8.5(c)(ii) apply where “*the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s)*”. These provisions will clearly apply to the construction project situation where an owner enters into a contract with a head contractor and the head contractor enters into various sub-contract, services, and supplier

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<sup>104</sup> The expression “*compatible*” arbitration agreements is also used in Art 22.1(x) of the LCIA Rules, and Art 28.1 of the HKIAC Rules. Article 22.1(x) of the LCIA Rules allows the tribunal to order consolidation of one or more arbitrations “*subject to the LCIA Rules commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties.*” Article 28.1 of the HKIAC Rules allows the HKIAC to consolidate two or more arbitrations in one of three circumstances, including where the claims are made under more than one arbitration agreement, a common question of law or fact arises in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions, and HKIAC finds the “*arbitration agreements to be compatible*”.

<sup>105</sup> Refer to Thomas H Webster and Dr Michael Buhler, “*Handbook of ICC Arbitration: Commentary, Precedents, Materials*”, at paras 6-49 and 6-50.

contracts. These provisions are also likely to apply in commercial transactions where a parent company guarantee is given for the performance of a subsidiary in an underlying commercial contract.

The criteria in Rules 8.1(c)(iii) and 8.5(c)(iii) apply where “*the disputes arise out of the same transaction or series of transactions*”. These provisions are likely to apply, for example, to a string of sales contracts, or an insurance related dispute involving a broker, insurer, and reinsurer.

Pursuant to Rule 8.11, where an application for consolidation is granted under Rule 8.4 or Rule 8.9, any party who has not nominated an arbitrator or otherwise participated in the constitution of the tribunal shall be deemed to have waived its right to nominate an arbitrator or otherwise participate in the constitution of the tribunal, without prejudice to the right of such party to challenge an arbitrator pursuant to Rule 14.

Rule 8.11 is consistent with the equivalent provision in Rule 7.12 of the joinder provisions (discussed below), and overcomes one of the difficulties of consolidation of two or more arbitrations into a single arbitration where the parties involved in the arbitration consolidated do not have an opportunity to participate in selection of the tribunal, a potential ground for challenge of an award under Article 34(2)(iv) of the Model Law, and Article 31(2)(e) of the New York Convention.

Notwithstanding the terms of Rule 8.11, consolidation of arbitrations under Rule 8 gives rise to a significant practical effect upon a party’s choice of arbitrator in arbitration proceedings. A party may have selected an arbitrator in a panel of arbitrators appropriate for the circumstances of the dispute, only to have its arbitration consolidated by the Court or a tribunal under Rule 8.4 or Rule 8.9 respectively, and its dispute decided by a tribunal which the party was not involved in selecting.

It is not clear how confidentiality of information disclosed among parties to all the arbitrations during the application process is protected. The confidentiality provision in Rule 39.1 applies to “*a party*” that is, a party to an arbitration, rather than a party that may or may not become a party to consolidated arbitration proceedings, depending on the Court’s decision under Rule 8.2. It would be prudent for parties to seek a separate agreement on the confidentiality of the parties’ submissions to the Court during the application process contemplated under the terms of Rules 8.1 and 8.4 in order to protect confidential information.

A further issue which arises is the effect of Singapore’s dual arbitration regime, which gives rise to the possibility of consolidation of two or more arbitration proceedings, one of which involves an arbitration agreement governed by the AA, and another governed by the IAA. In light of the differences between the AA and IAA, there is an issue as to whether such arbitration agreements are compatible. The author submits that this situation does not, by itself, give rise to incompatible arbitration agreements. Although arbitration proceedings may be consolidated under Rule 8, they remain technically separate arbitration proceedings, and the tribunal may issue a single award



covering all arbitrations, or separate awards for each arbitration proceedings. Similarly, parties and the tribunal are free to apply provisions of the AA or IAA, as required, to the respective arbitrations.

Turning to consider the joinder provisions in Rule 7 of the SIAC Rules, as a general principle, joinder and intervention provisions should answer three questions (a) which party may propose joinder?, for example, an existing party, the party seeking to be joined, or the tribunal (b) what consents are required, and from whom?; and (c) what is the scope of parties that can be joined?

The joinder provisions set out in Rule 7 of the SIAC Rules are similar in some respects to the procedure for consolidation under Rule 8. Similarly to the consolidation provisions, a party seeking the joinder of a non-party to the arbitration proceedings, or a non-party to the arbitration proceedings seeking to be joined, has two options. First, it may file an application with the Registrar under Rule 7.1 for the Court under Rule 7.4 to grant the joinder prior to constitution of the tribunal, or secondly, await constitution of the tribunal and apply to the tribunal for joinder under Rule 7.8. Note however, that a party's failed application to the Court under Rule 7.1 does not preclude the party from applying again to the tribunal, once constituted, under Rule 7.8.

The criteria for joinder are identical under both Rule 7.1 and Rule 7.8, expressed in the following terms:

- the additional party to be joined is *prima facie* bound by the arbitration agreement (Rule 7.1(a) and Rule 7.8(a)) or
- all parties, including the additional party to be joined, have consented to the joinder (Rule 7.1(b) and 7.8(b)).

Rules 7.1 and 7.8 are useful provisions to join a third party to a pending arbitration where there are multiple parties to a commercial contract and the dispute involves all parties.

The requirements for the content of the joinder application under Rule 7.1 and Rule 7.8 are set out in Rules 7.2 and 7.9 respectively, and are in identical terms to the equivalent provisions in the consolidation provisions in Rule 8 discussed above.

The Court's and the tribunal's power and obligation to consider the application for joinder under Rules 7.4 and 7.10 respectively are in identical terms to Rules 8.4 and 8.9 of the consolidation provisions, and our comments above apply equally to the terms of Rules 7.4 and 7.10.

With respect to an application to the tribunal for joinder under Rule 7.8, one of the "*relevant circumstances of the case*" a tribunal will take into account is the status of the existing arbitration proceedings, and any delay or inefficiency which could arise relating to the conduct of the existing arbitration proceedings arising from the joinder of an additional party.

The criteria in Rules 7.1(b) and 7.8(b) reflect the principle of party autonomy, since a non-party can only be joined to a pending arbitration under these provisions if all parties, including the non-party itself, agree for the joinder. However, the criteria in Rules 7.1(a) and Rule 7.8(a) are a departure from the principle of party autonomy since it allows a non-party to be joined to an existing arbitration without the consent of either party to the existing arbitration in the case of an application for joinder by a non-party, or by the opposing party to the arbitration and the non-party in the case of an application for joinder of a non-party by a party to the arbitration.

Note that the criteria in Rules 7.1(a) and 7.8(a) is that “*the additional party to be joined is prima facie bound by the arbitration agreement*”, rather than a signatory to the arbitration agreement, which allows a party or non-party to the arbitration to apply for joinder in circumstances where the non-party to the arbitration is a non-signatory to the arbitration agreement.

The issue of whether a non-signatory to an arbitration agreement is “*bound by the arbitration agreement*” relates to questions of consent, and is dependent upon the application of legal principles such as agency, or piercing the corporate veil. In light of the increased scope for non-consenting third parties to be joined to existing arbitrations under Rule 7 of the SIAC Rules, the author submits there is an increased potential for an objecting party joined to the arbitration to challenge tribunals’ decisions on jurisdiction, and any consequential awards against an objecting party.

As noted above in the context of the consolidation provisions, Rule 7.12 provides that where an application for joinder is granted under Rule 7.4 or Rule 7.10, any party who has not nominated an arbitrator or otherwise participated in the constitution of the tribunal shall be deemed to have waived its right to nominate an arbitrator or otherwise participate in the constitution of the tribunal, without prejudice to the right of such party to challenge an arbitrator pursuant to Rule 14. This overcomes one of the difficulties of joinder of a party to an existing arbitration where the arbitral panel has already been constituted that the joined party did not have the opportunity to participate in selection of the tribunal, a potential ground for challenge of an award under Article 34(2)(iv) of the Model Law, and Article 31(2)(e) of the New York Convention.

In the case of a non-party’s desire to submit an application to be joined under Rules 7.1 or 7.8, in light of the confidential nature of arbitration proceedings, there is likely to be practical difficulties as to whether the non-party has any knowledge of the existence the proceedings, and the details of such proceedings, to decide whether to make an application, and if so, the content of its application.

The author’s comments above in the context of the consolidation provisions on the issues of confidentiality and the effect of Singapore’s dual arbitration regime apply equally to the joinder provisions in Rule 7 of the SIAC Rules.

Note that in the draft version of the rules issued by SIAC for public consultation, the consolidation provisions in Rule 8 of the SIAC Rules applied only to arbitration agreements

entered into after the SIAC Rules come into force. This provision has been removed in the final version of the SIAC Rules, and by the terms of Rule 1.2, the SIAC Rules are effective from 1 August 2016, and, unless the parties have agreed otherwise, the SIAC Rules apply to any arbitration which is commenced after on or after that date.

Parties should therefore review their existing arbitration agreements to assess the effect of Rules 6 to 8, particularly where parties have included in their agreements existing joinder, intervention, and consolidation arrangements, and assess whether these provisions are sufficient to exclude the operation of Rules 6 to 8.

Parties should also review any future arbitration agreements in light of Rules 6, 7 and 8. In particular, where parties wish for these provisions to apply, they should ensure that all arbitration agreements in a multi-contract commercial transaction are in identical terms as far as possible to assist compatibility under the terms of Rule 8.1(c) and Rules 8.7(c) of the SIAC Rules.

Parties should also consider whether they may wish to exclude the operation of Rules 6, 7 and 8. There will be circumstances where a party does not wish to be involved in potentially lengthy multi-party arbitration proceedings, for example, a party may have only a limited role in an overall transaction or project, may not wish to disclose a contract relationship, or may not wish to disclose to other parties in the transaction or project information of a confidential nature.

## 22. Can an Arbitral Tribunal Order Interim Measures?

Section 12(1) of the IAA gives the arbitral tribunal the power to order interim measures for the preservation, interim custody or sale of any property which is the subject-matter of the dispute,<sup>106</sup> the preservation and interim custody of any evidence for the purpose of the proceedings,<sup>107</sup> securing the amount in dispute,<sup>108</sup> ensuring that any award which may be made is not rendered ineffectual by the dissipation of assets,<sup>109</sup> and an interim injunction or any other interim measure (Section 12(1)(i)).<sup>110</sup>

Article 17 of the Model Law also provides that, unless otherwise agreed by the parties, the arbitral tribunal may order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.

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<sup>106</sup> Section 12(1)(g) IAA.

<sup>107</sup> Section 12(1)(f) IAA.

<sup>108</sup> Section 12(1)(g) IAA.

<sup>109</sup> Section 12(1)(h) IAA.

<sup>110</sup> Section 12(1)(i) IAA.

Section 28(2) of the AA also gives the arbitral tribunal in domestic arbitrations powers to order interim relief, although these are more restrictive than Section 12(1) of the IAA and Article 17 of the Model Law, being for the preservation and interim custody of any evidence for the purpose of the proceedings,<sup>111</sup> and for the preservation, interim custody or sale of any property which is the subject-matter of the dispute.<sup>112</sup>

The SIAC Rules also give the arbitral tribunal power to order a wide range of interim relief. The arbitral tribunal, pursuant to Rule 27(e) and (i) of the SIAC Rules respectively, has the power to order the preservation, storage, sale or disposal of any property or item which is or forms part of the subject matter of the dispute, and to direct any party to take or refrain from taking actions to ensure that any award which may be made in the arbitration is not rendered ineffectual by the dissipation of assets by a party or otherwise.

Rule 30.1 of the SIAC Rules also gives the tribunal the general power to issue an order or an award granting an injunction or any other interim relief it deems appropriate, and the tribunal may order a party requesting interim relief to provide appropriate security in connection with the relief sought.

The Singapore High Court, pursuant to Section 12A of the IAA, also has the power to grant interim relief in arbitration proceedings, but only where the arbitral tribunal, and “*any arbitral or other institution or person vested by the parties with power in that regard*” has no power or is unable for the time being to act effectively.<sup>113</sup> Parties are most likely to seek the assistance of the High Court for interim measures during the period between commencement of the arbitration and constitution of the arbitral tribunal, as an alternative to the Emergency Arbitrator Procedure under Rule 30.2 and Schedule 1 of the SIAC Rules (discussed in Section 23 below), or other agreed arbitral rules.

If the interim relief sought is not a matter of urgency, parties may apply to the Court only with the permission of the arbitral tribunal, or the agreement in writing of the other parties.<sup>114</sup> In addition, any Court-ordered provisional relief ceases to have effect when the arbitral tribunal makes an order expressly relating to all or part of the Court’s interim order.<sup>115</sup>

The Singapore High Court has similar powers under Section 33(1) of the AA to order interim measures as under the IAA. Although the Court is not subject to the same restrictions as under the IAA referred to above, pursuant to Section 33(3) of the AA, the Court, in exercising any

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<sup>111</sup> Section 28(2)(e) AA.

<sup>112</sup> Section 28(2)(g) AA.

<sup>113</sup> Section 12A(6) IAA.

<sup>114</sup> Section 12A(5) IAA.

<sup>115</sup> Section 12A(7) IAA.

power under Section 33, shall have regard to any application made before the arbitral tribunal, or any order made by the arbitral tribunal, in respect of the same issue. Section 33(2) of the AA is identical to Section 12A(7) of the IAA concerning the High Court’s order ceasing to have effect if the arbitral tribunal makes an order relating to the work or part of the High Court’s order.

### 23. Is there an Emergency Arbitrator Procedure?

The SIAC, in the fourth edition of the rules, which came into effect on 1 July 2010, introduced rule 26.2 to include new interim measures by vesting in Emergency Arbitrators the power to grant interim measures, thus affording parties emergency relief prior to constitution of the arbitral tribunal.<sup>116</sup> This provision is now contained in Rule 30.2 of the SIAC Rules, and the Emergency Arbitrator Procedure is set out in Schedule 1.

The Emergency Arbitrator Procedure has proved effective in assisting parties to obtain emergency relief prior to formation of the substantive tribunal without the need for parties to apply to the Singapore Courts for interim measures. The Emergency Arbitrator’s jurisdiction comes to an end upon appointment of the arbitral tribunal, which has the power to reconsider any interim award or order issued by the Emergency Arbitrator.<sup>117</sup>

As at 31 December 2015, there have been a total of 47 emergency arbitration applications under the SIAC Rules, all of which were accepted, and 28 of which were granted.<sup>118</sup> These applications were heard under expedited procedures. The writer has acted as Emergency Arbitrator on two applications, and in both cases the Emergency Arbitrator’s appointment, a directions hearing by conference call, issuance by the Emergency Arbitrator of directions for written submissions, the parties’ written submissions, a hearing on the merits conducted by conference call, drafting of reasoned draft orders on the applications, the Registrar’s review of the draft orders, and issuance of orders, were conducted over the course of 8 and 12 business days respectively.

There was some doubt as to the status of the Emergency Arbitrator’s interim awards or orders, due in part to Emergency Arbitrators not falling within the definition of “*arbitral tribunal*” in the AA and IAA. The definition of “*arbitral tribunal*” in both the AA<sup>119</sup> and IAA<sup>120</sup> was amended, effective from 1 June 2012, to include “*an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation*”. The amendments are intended to accord Emergency Arbitrators the

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<sup>116</sup> And the associated procedure set out in Schedule 1 of the SIAC Rules.

<sup>117</sup> Rule 10 of Schedule 1 of the SIAC Rules.

<sup>118</sup> SIAC Annual Report, 2015.

<sup>119</sup> Section 2(1) of the AA.

<sup>120</sup> Section 2(1) of IAA.

same standing as any other arbitral tribunal, and are not limited to Emergency Arbitrators appointed under the SIAC Rules.

Emergency Arbitrators' interim awards or orders of interim relief will invariably fall within the scope of orders or directions concerned with the operation of the arbitration, rather than an award, which requires an issue to be disposed finally between the parties.<sup>121</sup> Such "*interim award or order of emergency relief*", notwithstanding the nomenclature used in the SIAC Rules, therefore falls within the scope of orders made under Section 28 of the AA or Section 12 of the IAA. As such, an Emergency Arbitrator's interim award or order is not subject to the jurisdiction of the High Court to set aside "*awards*",<sup>122</sup> and there may be difficulties in enforcing awards or orders for interim measures, including Emergency Arbitrator's awards or orders, in some jurisdictions.<sup>123</sup>

The Emergency Arbitrator Procedure under the SIAC Rules is an alternative to a party's right under Section 12A of the IAA to apply to the Singapore High Court for interim measures prior to constitution of the arbitral tribunal. There are advantages and disadvantages to each option, including that a party can apply to the High Court for interim relief under Section 12A on an *ex parte* basis,<sup>124</sup> which is not appropriate in arbitration proceedings. However, there is an issue as to whether a party to a dispute subject to arbitration under the SIAC Rules is entitled to apply under Section 12A of the IAA in circumstances where an Emergency Arbitrator procedure is available, that is, in terms of Section 12A(6) of the IAA, the issue is whether the Emergency Arbitrator procedure can be considered "*any arbitral or other institution or person vested by the parties with power in that regard*".

There is anecdotal evidence that the Singapore Courts are reluctant to hear applications for interim relief under Section 12A of the IAA where an emergency arbitration procedure is available under agreed arbitral rules.<sup>125</sup>

Justice Ramsay, in the English Technology and Construction Court, briefly referred to this issue in his recent decision in *Seele Middle East Fze v Drake & Scull Int Sa Co*,<sup>126</sup> in which the applicant applied under a provision equivalent to Section 12A under the English *Arbitration Act*

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<sup>121</sup> Refer to the definition of "*award*" in Section 2(1), and Section 19B(1) of the IAA, and the definition of "*award*" in Section 2(1), and Section 44(1) of the AA. Note that orders under Sections 28 and 12 of the AA and the IAA respectively are excluded from the definition of "*award*" under the Acts.

<sup>122</sup> See the Singapore High Court's decision in *PT Pukaufu Indah v Newmont Indonesia Ltd* [2012] 4 SLR 1157

<sup>123</sup> Refer to the discussion in Gordon Smith, "*The Emergence of Emergency Arbitrations*", *Arbitrator & Mediator Journal*, December 2015.

<sup>124</sup> See the Singapore High Court's decision in *PT Pukaufu Indah v Newmont Indonesia Ltd* [2012] 4 SLR 1157.

<sup>125</sup> SIAC Congress, 27 May 2016, Singapore, referred to by a speaker during the session on emergency interim relief.

<sup>126</sup> [2013] EWHC 4350.

1996 for interim relief to restrain the defendant in relation to certain documents and intellectual property. Section 44(5) of the English *Arbitration Act* 1996 is in identical terms to Section 12A(6) of the IAA, and Ramsay J noted, in the context of Section 44(5), that under the relevant edition of the ICC arbitration rules there was no “*emergency arbitrator to deal with applications*”, as follows (emphasis added):<sup>127</sup>

“In these cases, the court under section 44(5) shall only act if and to the extent that the arbitral tribunal and any arbitral or other institution or person vested by the parties with power in that regard has no power or is unable for the time being to act effectively. Although this is a matter where there is an arbitration under the ICC Rules, it is not subject to the recent change in those rules in the form of the introduction of an emergency arbitrator to deal with applications. An ICC arbitration has been commenced but it is not said that the arbitral tribunal is yet in a position to act. Therefore, there is no power for the time being for an ICC arbitral tribunal to act effectively.”

Justice Ramsay’s dicta may suggest that if an emergency arbitrator procedure is available, by virtue of Section 44(5) of the English *Arbitration Act* 1996 (equivalent to Section 12A(6) of the IAA), the English Court (or Singapore High Court under Section 12A of the IAA) has no power to award interim relief. However, the author respectfully submits that the Emergency Arbitrator is not “*vested by the parties with power in that regard*” in terms of Section 12A(6) of the IAA until a party applies for emergency arbitration under Rule 1 of Schedule 1 of the SIAC Rules (or an equivalent provision of arbitral rules), and the President accepts the application and appoints an Emergency Arbitrator under Rule 2 of Schedule 1 of the SIAC Rules. The author submits that a party, prior to constitution of the arbitral tribunal, therefore has the choice to apply to the Singapore High Court under Section 12A of the IAA or implement the Emergency Arbitrator Procedure under Rule 30.2 of the SIAC Rules.

The SIAC has made a number of significant amendments in the SIAC Rules to the Emergency Arbitrator procedure in Schedule 1 of the SIAC Rules.

Rule 2 of Schedule 1 of the SIAC Rules has been amended to give the Registrar the power to increase the amount of the Emergency Arbitrator’s fees and expenses requested from the party making the application, and if not paid, the request is considered withdrawn.

The SIAC has amended Rule 3 of Schedule 1 to further expedite appointment of an Emergency Arbitrator by requiring that the President shall seek to appoint an Emergency Arbitrator within one day (previously one business day) of receipt by the Registrar of the application for emergency interim relief and payment of the administration fee and deposits.

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<sup>127</sup> Ibid, [33].

Rule 4 of Schedule 1 has been amended to provide that if the parties have agreed on the seat of the arbitration, that seat shall be the seat of the proceedings for emergency interim relief, otherwise the seat shall be Singapore, without prejudice to the arbitral tribunal's determination of the seat under Rule 21.1. This provision overcomes the difficulty of a party applying for the Emergency Arbitrator Procedure in circumstances where the parties have not expressly agreed the seat of the arbitration. Prior to this amendment, a party may have requested the Emergency Arbitrator to select a seat other than Singapore. In light of Rule 4 of Schedule 1, the Emergency Arbitrator now has no discretion regarding the choice of the seat.

The SIAC has also expedited the establishment of a procedure for consideration of the application for emergency interim relief by amending Rule 7 of Schedule 1 to provide for the Emergency Arbitrator to establish a schedule as soon as possible, but in any event within two days (previously two business days), and for the procedure to include proceedings by video conference, in addition to telephone conference or on written submissions. Rule 7 also expressly clarifies that the tribunal's power includes reconsidering the Emergency Arbitrator's ruling on his or her own jurisdiction.

Rule 8 of Schedule 1 (previously rule 6) has been amended to provide that the Emergency Arbitrator's power includes making preliminary orders pending any hearing, telephone or video conference, or written submissions by the parties. This provision is necessary to allow the Emergency Arbitrator to make interim orders pending a decision by the Emergency Arbitrator on the merits of the application for the parties to maintain the status quo. Anecdotal evidence is that Emergency Arbitrators regularly made such orders under the previous rule 6, but this amendment formalises the Emergency Arbitrator's power to do so.

Rule 8 of Schedule 1 has also been amended to provide that the Emergency Arbitrator shall give "*summary*" (previously no reference to "*summary*") reasons for his or her decision in writing, which is now consistent with Article 14 of Schedule 4 of the HKIAC Rules, and will allow Emergency Arbitrators expeditiously to issue a reasoned decision.

Rule 9 of Schedule 1 has been added, and the provision has two significant effects. First, Rule 9 specifies a time limit for the Emergency Arbitrator to make his or her order or award of 14 business days from the date of the Emergency Arbitrator's appointment, subject to the Registrar extending the time period in "*exceptional circumstances*". As a matter of practice, Emergency Arbitrators, on average, issue their orders or awards within 8 to 10 days of hearing the parties.<sup>128</sup> Rule 9 now formalises a time period for issuance of the order or award.

Secondly, Rule 9 of Schedule 1 also provides that no Emergency Arbitrator's order or award shall be made by the Emergency Arbitrator until it has been approved by the Registrar as to its form.

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<sup>128</sup> SIAC Annual Report, 2015.



Again, as a matter of practice, the Registrar reviewed all Emergency Arbitrators' orders or awards as to form prior to issuance, but this provision now formalises this practice.

The SIAC has also amended Rule 12 of Schedule 1 to provide that the parties agree to irrevocably waive their rights to any form of appeal, review or recourse to any State Court or other judicial authority with respect to such award insofar as such waiver may be validly made. Please refer to Section 32 below as to the effectiveness of such waiver provisions.

The SIAC has also clarified the position regarding the Emergency Arbitrator's power to award costs. Rule 13 of Schedule 1 has been amended to provide that the costs associated with the application "*may*" initially be apportioned by the Emergency Arbitrator, whereas the Emergency Arbitrator was previously obliged to do so. The terms of Rule 13 gives rise to a question as to whether the Emergency Arbitrator is obliged to order in his or her order or award that all or part of the legal or other costs of a party be paid by another party under Rule 37. The author submits that the terms of Rule 13 of Schedule 1 give the Emergency Arbitrator the power solely to apportion costs, that is, to initially allocate the division of responsibility for costs, rather than fixing or determining the total costs of the application, allocating responsibility for these costs, and directing payment of such costs. By the terms of Rule 13, the Emergency Arbitrator now has the option of leaving all costs issues, including apportionment, for the arbitral tribunal to decide.

The SIAC has also allowed for the possibility of further abbreviating the time periods for the Emergency Arbitrator Procedure by amendment to Rule 14 of Schedule 1 to provide that the Registrar may abbreviate any time limits under the Rules in applications for emergency interim relief under Rule 30.2.

## **24. Is there an Expedited Arbitration Procedure?**

The SIAC, in the fourth edition of the rules, which came into effect on 1 July 2010, introduced a new provision in rule 5 providing for an Expedited Procedure, in recognition that many arbitrations heard under the auspices of the SIAC involve relatively modest sums, and in the interests of dealing with appropriate disputes in a more efficient and cost-effective manner.

Rule 5 sets out the framework for the procedure, leaving the arbitral tribunal flexibility to determine the details, taking into account the circumstances of the case. Rule 5.1 provides that a party may apply to the Registrar for the arbitral proceedings to be conducted in accordance with the Expedited Procedure where one of the following three conditions is satisfied:

- the amount in dispute does not exceed S\$6,000,000 (representing the aggregate of claim, counterclaim and any defence of setoff) (increased from S\$5,000,000 in the fifth edition of the rules);<sup>129</sup>
- the parties so agree;<sup>130</sup> or
- in cases of exceptional urgency.<sup>131</sup>

Pursuant to Rule 5.2, where the President determines, after considering the views of the parties, and having regard to the circumstances of the case, the arbitral proceedings shall be conducted in accordance with the Expedited Procedure, the following procedure shall apply:

- the Registrar may abbreviate any time-limits under the SIAC Rules;<sup>132</sup>
- the case shall be referred to a sole arbitrator, unless the President determines otherwise;<sup>133</sup>
- the tribunal shall have the discretion to decide if the dispute shall be decided on the basis of documentary evidence only, or if a hearing is required for the examination of any witnesses and expert witnesses and/or for any oral argument;<sup>134</sup>
- the final award shall be made within six months from the date when the arbitral tribunal is constituted unless, in exceptional circumstances, the Registrar extends the time limit;<sup>135</sup> and
- the arbitral tribunal may state the reasons upon which the final award is based in summary form, unless the parties have agreed that no reasons are to be given.<sup>136</sup>

The SIAC has amended Rules 5.2(d) and (e) to refer to the “*final Award*” rather than the “*Award*” (previously in rules 5.2(d) and (e)). In light of the definition of “*Award*” in Rule 1.3 in terms of “*includes a partial, interim or final award and an award of an Emergency Arbitrator*”, this amendment is intended to make it clear that the six month time period in which the arbitral tribunal is obliged to make its award applies to the final award, and not a partial or interim award.

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<sup>129</sup> Rule 5.1(a) of the SIAC Rules.

<sup>130</sup> Rule 5.1(b) of the SIAC Rules.

<sup>131</sup> Rule 5.1(c) of the SIAC Rules.

<sup>132</sup> Rule 5.2(a) of the SIAC Rules.

<sup>133</sup> Rule 5.2(b) of the SIAC Rules.

<sup>134</sup> Rule 5.2(c) of the SIAC Rules.

<sup>135</sup> Rule 5.2(d) of the SIAC Rules.

<sup>136</sup> Rule 5.2(e) of the SIAC Rules.

The SIAC has amended the Expedited Procedure in the SIAC Rules in three significant respects.

The author, shortly after the SIAC introduced the Expedited Procedure in July 2010, raised the issue that it was not clear from the rules the effect of the parties having previously agreed in the arbitration agreement for disputes to be heard by a three member tribunal, rather than a sole arbitrator. The author suggested that by specifying use of the rules, parties have agreed for all disputes which fall within one of the three criteria set out in rule 5.1 (as it then was) to be heard by a sole arbitrator, rather than a three member tribunal.<sup>137</sup>

The SIAC has now clarified this issue by the addition of Rule 5.3, which provides that by agreeing to arbitration under the Rules, the parties agree that, where arbitral proceedings are conducted in accordance with the Expedited Procedure under Rule 5, the rules and procedures set forth in Rule 5.2 shall apply even in cases where the arbitration agreement contains contrary terms. The effect of Rules 5.2(b) and 5.3 therefore is that even in cases where the arbitration agreement provides for disputes to be determined by more than one arbitrator, an arbitration conducted under the Expedited Procedure shall be referred to a sole arbitrator, unless the President determines otherwise.

The SIAC's amendment of the Expedited Procedure also appears to be responsive to the recent decision of the Singapore High Court in *AQZ v ARA*,<sup>138</sup> in which the applicant contended that an award by a sole arbitrator should be set aside by reason of the sole arbitrator's lack of jurisdiction. The High Court in that case upheld an award issued by a sole arbitrator under the Expedited Procedure in the fourth edition of the SIAC rules, notwithstanding the parties had expressly provided for all disputes to be decided by a panel of three arbitrators.

The second significant amendment to the Expedited Procedure in the SIAC Rules is that, pursuant to Rule 5.2(c), the tribunal now has the discretion to decide if the dispute shall be decided on the basis of documentary evidence only, or if a hearing is required for the examination of any witnesses, expert witnesses and/or for any oral argument. This is a welcome provision in cases where the dispute can be decided by an arbitral tribunal solely on the documents, and otherwise the amount involved would not justify a hearing. However, the amendment represents a departure from the usual principle in arbitration proceedings that a hearing is required if one party requests a hearing (refer to Section 25(2) of the AA and Article 24(1) of Model Law), and may give rise to challenges to an award where one party requests a hearing and the tribunal exercises its discretion under Rule 5.2(c) to determine the dispute on documentary evidence only

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<sup>137</sup>Gordon Smith, "Commentary on the New Singapore International Arbitration Centre Rules", CIARB Journal, Arbitration, Vol 76, November 2010, at p727.

<sup>138</sup> [2015] SGHC 49.

The requirement in Rule 5.2(d) for the arbitral tribunal to make an award within six months from the date when the arbitral tribunal is constituted was a substantial change when introduced in the fourth edition of the rules.<sup>139</sup> To achieve this timetable, the arbitral tribunal must conduct the proceedings with expedited procedures such as the parties submitting all documentary and witness evidence they wish to rely upon along with their statement of claim and statement of defence respectively, followed by expedited requests for disclosure of any additional documents, and an expedited substantive hearing.

The reference to “*exceptional circumstances*” in Rule 5.2(d) is likely to be construed as meaning the Registrar will not grant an automatic extension of time. This of course would need to be balanced by the interests of the parties, since if time is not extended, the claimant may have to commence proceedings again, further delaying proceedings.

Although it is not expressly specified in the Expedited Procedure, the procedure for an arbitral tribunal to issue a draft award to the Registrar for the Registrar’s review set out in Rule 32.3 also applies to an award issued by an arbitral tribunal under the Expedited Procedure. The arbitral tribunal should take this requirement into account in complying with both the requirements of Rule 5.2(d) and Rule 32.3.

Rule 5.2(e) now permits the arbitral tribunal to provide reasons only in summary form which assists in shortening the time period for the arbitral tribunal to issue its draft award to the Registrar for review after close of proceedings.

The third significant amendment to the Expedited Procedure in the SIAC Rules is that, pursuant to Rule 5.4, upon application by a party, the tribunal may, having regard to any further information as may subsequently become available, and in consultation with the Registrar, order that the arbitral tribunal proceedings shall no longer be conducted in accordance with the Expedited Procedure.

Rule 5.4 is directed at those situations where, subsequent to commencement of the Expedited Procedure, it becomes apparent that, due to complexity of the dispute or other factors, the arbitration is not suitable to be conducted under the Expedited Procedure. The author submits that this is a useful amendment to the Expedited Procedure, in light of the President’s decision on a party’s application under Rule 5.1 for the arbitral proceedings to be conducted in accordance with the Expedited Procedure being made at an early stage of the proceedings, and prior to appointment of the sole arbitrator.

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<sup>139</sup> The usual time period for issuing an award is stipulated in Rule 32.3, which obliges the arbitral tribunal to submit its award in draft form to the Registrar within 45 days from the date on which the arbitral tribunal declares the proceedings closed, subject to any extension of time agreed by the parties or granted by the Registrar.

The SIAC's experience with the Expedited Procedure has been favourable. As at 31 December 2015, since the introduction of the Expedited Procedure on 1 July 2010, the SIAC had received a total of 231 requests for matters to be conducted under the Expedited Procedure, 140 of which were accepted.<sup>140</sup> Antidotal evidence is that for those arbitrations where an award has been issued, in the majority of cases the awards were issued within the six month time limit specified in Rule 5.2(d).

## 25. Is Confidentiality Protected?

There is no provision in either the AA or the IAA which deals with the issue of confidentiality of arbitration proceedings.

Pursuant to Rule 39 of the SIAC Rules, the parties and the arbitral tribunal are prohibited, with limited exceptions, from disclosing to third parties all “*matters relating to the proceedings*” and the award. The expression “*matters relating to the proceedings*” is widely defined in Rule 39.3 and includes the existence of the proceedings, the pleadings, evidence, other materials in the arbitral proceedings, and the award. The definition has also been amended in Rule 39.3 to an inclusive definition (by the expression “*includes*”), whereas previously it was an inclusive definition, thereby further widening the scope of materials within the confidentiality obligation.

The Singapore High Court in *Myanmar Yang Chi Oo Co Ltd v Win Win Nu*<sup>141</sup> stated that the English law on confidentiality set out in *Ali Shipping Corporation v Shipyard Trogir*<sup>142</sup> represents the law in Singapore. In *Ali Shipping*, the English Court of Appeal affirmed its view that arbitration proceedings carried an implied duty of confidentiality arising from an implied term of law. The Court formulated specific narrow categories of exceptions. However, the Privy Council in the subsequent decision in *AEGIS v European Reinsurance Company of Zurich*<sup>143</sup> was critical of the formulistic approach in *Ali Shipping*, and preferred an approach based on the actual facts and circumstance of the case. The Singapore High Court considered the decision in *AEGIS* in *International Cost Pte Ltd v Kristle Trading Ltd*,<sup>144</sup> and recognised that there was controversy in the exceptions approach in *Ali Shipping*, but did not expressly criticise the decision in *Win Win Nu*.<sup>145</sup>

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<sup>140</sup> SIAC Annual Report, 2015.

<sup>141</sup> [2003] 2 SLR 547.

<sup>142</sup> [1999] 1 WLR 314.

<sup>143</sup> [2003] 1 WLR 1041.

<sup>144</sup> [2008] SGHC 182.

<sup>145</sup> Refer to the discussion in Gordon Smith and Meef Moh, “*Confidentiality of Arbitrations - Singapore's Position Following the Recent Case of Myanma Yaung Chi Oo Co Ltd v Win Win Nu*”, The Vindobona Journal of International Commercial Law and Arbitration, Volume 8, Issue 1 (2004).

The position in Singapore for arbitrations under both the AA and IAA is therefore uncertain, and the clearest means of parties dealing with the issue of confidentiality is for the parties to expressly provide for confidentiality, either by selection of suitable arbitral rules, or by the terms of their dispute provisions.

## 26. What are the Requirements for an Arbitral Award?

Both the IAA and the AA contain requirements for the formal content of an arbitral award. Pursuant to Article 31 of the Model Law, the award must be in writing, and signed by the arbitrator or arbitrators. The arbitral tribunal must also state the reasons for its award, unless the parties have agreed that no reasons are to be given, and state the date and place of arbitration. Similar provisions are contained in Section 38 of the AA.

However, as noted in Section 24 above, under the Expedited Procedure in Rule 5 of the SIAC Rules, the tribunal is permitted to state the reasons upon which the award is based in summary form.<sup>146</sup> As also noted in Section 20 above, pursuant to Rule 29.4 of the SIAC Rules, the tribunal is obliged to issue its order or award on a party's application for early dismissal of a claim or defence under Rule 29.1, with reasons, which may be in summary form, within 60 days of the date of filing of the application.

As also noted in Section 23 above, Rule 8 of Schedule 1 of the SIAC Rules has been amended to provide that the Emergency Arbitrator shall give summary reasons for his or her decision in writing. The option previously in rule 8 of Schedule 1 for the parties to agree that no reasons are to be given by the Emergency Arbitrator has been deleted, which suggests that no such option is now permissible. This interpretation is also consistent with the Emergency Arbitrator's obligation under Rule 8 to give reasons in summary form, rather than simply the power to do so.

## 27. Is there Scrutiny of Arbitral Awards?

Rule 32.3 of the SIAC Rules requires the arbitral tribunal to issue its award in draft form to the Registrar. The Registrar scrutinises the award as to proper form, and may suggest modifications as to form, without affecting the tribunal's liberty to decide the dispute.<sup>147</sup> As a matter of practice, the Registrar may also draw the tribunal's attention to any questions of clarity relating to the substance of the draft award. This process enhances the enforceability of awards.

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<sup>146</sup> Rule 5.2(e) of the SIAC Rules.

<sup>147</sup> Rule 32.1.

The procedure under Rule 32.3 for the Registrar’s scrutiny of an award applies equally to any award made by an arbitral tribunal under both the early dismissal procedure set out in Rule 29 of the SIAC Rules, and the Expedited Procedure set out in Rule 5 of the SIAC Rules.

As noted in Section 23 above, Rule 9 of Schedule 1 of the SIAC Rules has been added to provide for scrutiny by the Registrar of the Emergency Arbitrator’s order or award as to its form prior to issuance of the order or award.

The general principle is that once the arbitral tribunal has published its award on the merits of a dispute within its mandate, it becomes *functus officio*, that is, “*having performed his or her office*”. The IAA, AA, and the SIAC Rules contain limited exceptions to the principle to extend the arbitral tribunal’s mandate.

Pursuant to Article 33(1)(a) of the Model Law, within 30 days of receipt of the award, unless another period of time has been agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to correct in the award “*any errors in computation, any clerical or typographical errors or any errors of similar nature*”, and, pursuant to Article 33(1)(b) of the Model Law, if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

In either case, if the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request. Any interpretation shall form part of the award. Pursuant to Article 33(2) of the Model Law, the arbitral tribunal may also correct any error of the type referred to in paragraph 1(a) on its own initiative within 30 days of receipt of the date of the award.

Identical provisions to the Model Law for correction or interpretation of an award are contained in Sections 43(1) to (3) of the AA in relation to domestic awards, except that in the case of a request for interpretation of an award under Section 43(1)(b), any party can make the request, whereas under Article 33(1)(b) any such request must be made by both parties.

Parties also have identical rights under Rule 33.1 and 33.4 of the SIAC Rules to apply to correct an award or an interpretation of an award respectively, and in the case of interpretation of an award, under Rule 33.4, similar to Section 43(1)(b) of the AA, any party can make the request. The arbitral tribunal, pursuant to Rule 33.2, also has the power to correct any error of the type referred to in Rule 33.1 on its own initiative. The various time limits are identical to Article 33(1) and (2) of the Model Law.

There is a trend to give more scope to arbitral tribunals to alter the award. However, there remains a distinction between the arbitral tribunal having second thoughts or intentions in relation to the substance of the award, which is beyond the tribunal’s power, and correcting an award to give true effect to the arbitral tribunal’s first thoughts or intentions (*Westnave Container Services v Freeport Properties Ltd* [2010] BCCA 33).

Pursuant to Article 33(3) of the Model Law and Section 43(4) and (5) of the AA, a party, within 30 days of receipt of the award and upon notice to the other party, request the arbitral tribunal to make an additional award as to claims presented during the arbitral proceedings but omitted from the award, and if the arbitral tribunal considers the request to be justified, the tribunal is obliged to make the additional award within 60 days of receipt of such request.

Parties also have an identical right under Rule 33.3 of the SIAC Rules to apply to the arbitral tribunal to make an additional award, except that the tribunal is obliged to make the additional award within 45 days of receipt of the request, rather than 60 days under the Model Law and AA.

The reference to the arbitral tribunal's power to make an additional award relates to a head of claim or some other remedy, where the arbitral tribunal has not fulfilled its mandate, as distinct from an issue which is part of the process by which the decision is arrived at, since the tribunal is not required to set out every step by which it reaches its conclusion or deal with each point made by a party.<sup>148</sup>

One of the amendments to the SIAC Rules is the removal in Rules 33.1, 33.3, and 33.4, relating to correction, consideration of a claim, and interpretation of an award respectively, of the right of any other party to comment on such request within 15 days of its receipt. The author submits, that as a matter of practice, arbitral tribunals will seek the views of any other party to the arbitration on any application under Rules 33.1, 33.3, and 33.4 of the SIAC Rules, and removal of the specified time period of 15 days gives the arbitral tribunal flexibility to set a time period for a response consistent with the circumstances of any particular application.

## **28. Are there Time Periods in which the Arbitral Tribunal is obliged to publish the Award?**

Neither the IAA nor the AA specifies any timelines for the arbitral tribunal to publish an award.

The SIAC Rules provide for time periods for the making of the three different types of awards referred to in the Rules, (a) an award issued under the usual procedure under the SIAC Rules; (b) an award issued under the Expedited Procedure; (c) an order or award under the early dismissal procedure; and (d) an order or award issued under the Emergency Arbitrator Procedure.

As noted earlier, Rule 32.3 of the SIAC Rules requires the arbitral tribunal to issue its award in draft form to the Registrar within 45 days of the arbitral tribunal declaring the proceedings closed. Pursuant to Rule 32.1, the tribunal is obliged "*as promptly as possible*" (as amended in the SIAC Rules), after consulting with the parties and upon being satisfied that the parties have no further

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<sup>148</sup> *Torch Offshore v Cable Shipping* [2004] EWHC 787.



relevant and material evidence to produce or submission to make, to declare the proceedings closed. The Registrar has the power to extend this time period.

As a matter of practice, the SIAC prompts the tribunal at the appropriate time to close the proceedings, and reminds the tribunal, if required, to seek an extension of time to the 45 day time period specified in Rule 32.3.

As noted in Section 24 above, pursuant to Rule 5.2(d) above, the award under the Expedited Procedure shall be made within six months from the date when the arbitral tribunal is constituted unless, in exceptional circumstances, the Registrar extends the time limit.<sup>149</sup> As also noted in Section 20 above, pursuant to Rule 29.4 of the SIAC Rules, the tribunal is obliged to issue its order or award on a party's application for early dismissal of a claim or defence under Rule 29.1, with reasons, which may be in summary form, within 60 days of the date of filing of the application.

Arbitral tribunals should therefore take into account the likely review period by the Registrar in setting the Expedited Procedure, any procedure under the early dismissal provisions, and in preparing draft awards.

As also noted in Section 23 above, Rule 9 of Schedule 1 has been added to specify a time limit for the Emergency Arbitrator to make his or her order or award of 14 business days from the Emergency Arbitrator's appointment, subject to the Registrar extending the time period in "*exceptional circumstances*". As also noted in Section 23 above, Rule 9 of Schedule 1 also provides that no Emergency Arbitrator's order or award shall be made by the Emergency Arbitrator until it has been approved by the Registrar as to its form. Again, the Emergency Arbitrator should take into account the likely review period by the Registrar in setting the Emergency Arbitrator Procedure, and in preparing his or her draft order or award. In the author's experience, as a matter of practice, the Registrar and the SIAC counsel are on standby during Emergency Arbitrator Procedures to review any draft order or award.

Parties should be cautious about stipulating in their arbitration agreements a fixed time period for the arbitral tribunal to issue its award which cannot be extended without agreement of both parties. In domestic arbitrations under the AA, the Singapore Court has a discretionary power under Section 36 of the AA to extend contractual time periods for the tribunal to issue its award, upon application by a party or by the tribunal itself. However, there is no equivalent provision under the IAA.

In light of the Singapore Court's power being discretionary under Section 36 of the AA, there remains a risk that any such application will not be granted. In the Singapore High Court's

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<sup>149</sup> Rule 5.2(d) of the SIAC Rules.

decision in *Ting Kang Chung John v Teo Hee Lai Building Construction Pte Ltd*,<sup>150</sup> Quentin Loh J refused to grant an application by a sole arbitrator under Section 36 of the AA in arbitration proceedings conducted under the Singapore Institute of Architects Arbitration Rules where the arbitrator had missed a fixed time period under the rules for issuing his final award, and Loh J confirmed that the arbitrator's mandate had come to an end.

## 29. What if a Party refuses or fails to Participate?

A party may attempt to disrupt proceedings by refusing to participate in the arbitration from the outset by failing to nominate its party appointed arbitrator in a three member arbitral tribunal. Under the AA<sup>151</sup> and IAA,<sup>152</sup> if a party fails to appoint its party-appointed arbitrator within 30 days of the other party's request to do so, or the parties are unable to agree on appointment of a third arbitrator within 30 days of a request to do so, a party can request the appointing authority to make the appointment. As noted earlier, the appointing authority under both the AA and the IAA is the President.

Similarly, pursuant to Rule 11.2 of the SIAC Rules, if a party fails to make a nomination of an arbitrator for a three member tribunal within 14 days after receipt of a party's nomination of an arbitrator, or within the period otherwise agreed by the parties or set by the Registrar, the President is obliged to proceed to appoint the arbitrator on its behalf.

In the case of a sole arbitrator, under the AA<sup>153</sup> and the IAA,<sup>154</sup> if the parties are unable to agree on the appointment, either party can request the appointing authority to make the appointment. Similarly, pursuant to Rule 10.2 of the SIAC Rules, if within 21 days after the date of commencement of the arbitration (defined in Rule 3.2 as the date of receipt of the complete notice of arbitration under the Rules by the Registrar), the parties have not reached an agreement on the nomination of a sole arbitrator, or if at any time either party so requests, the President is obliged to appoint the sole arbitrator.

A party may also refuse to participate in the arbitration proceedings post-formation of the arbitral tribunal, for example, by failing to submit its statement of claim or other written submissions, or failing to attend the hearing. The arbitral tribunal is empowered under the AA,<sup>155</sup> and the IAA,<sup>156</sup> to terminate the proceedings if the claimant fails to file its statement of claim, and to continue and make an award on the documents before it if the respondent fails to file its statement of defence.

<sup>150</sup> [2010] 2 SLR 625.

<sup>151</sup> Section 13(4)(a) of the AA.

<sup>152</sup> Section 9A(2) of the IAA, and Article 11(3)(a) of the Model Law, IAA.

<sup>153</sup> Section 13(3)(b) of the AA.

<sup>154</sup> Article 11(3)(b) of the Model Law, IAA.

<sup>155</sup> Section 29(2) of the AA.

<sup>156</sup> Article 25 of the Model Law, IAA.

The respondent's failure to file a statement of defence within the stipulated time is not treated as an admission of the claimant's allegations.<sup>157</sup>

The arbitral tribunal has similar powers under the SIAC Rules. Pursuant to Rule 20.8 of the SIAC Rules, if the claimant fails within the time specified to submit its statement of claim, the tribunal may issue an order for the termination of the arbitral proceedings or give such other directions as may be appropriate. Similarly, pursuant to Rule 20.9 of the SIAC Rules, if the respondent fails to submit its statement of defence, or if at any point any party fails to avail itself of the opportunity to present its case in the manner directed by the tribunal, the tribunal may proceed with the arbitration.

Under both the AA and IAA, if a party fails to appear at the hearing or to produce documentary evidence without showing sufficient cause, the arbitral tribunal is also empowered to continue and make an award on the evidence before it.<sup>158</sup> Similarly, pursuant to Rule 23.3 of the SIAC Rules, if any party fails to appear at a meeting or hearing without showing sufficient cause for such failure, the tribunal may proceed with the arbitration and may make the award based on the submissions and evidence before it.

Note that Rule 23.3 has been amended in the SIAC Rules to include the reference to a party's failure to appear at a "*meeting*", which indicates the tribunal's power under Rule 23.3 applies not only to a party's failure to appear at a substantive hearing of the issues in dispute, but also to a party's failure to attend a procedural meeting during the conduct of the arbitral proceedings. The author submits that arbitral tribunals are likely to use this power only in circumstances where a party's failure to attend a procedural meeting is a symptom of a party's wider conduct of failing to participate in the proceedings.

In practice, an arbitral tribunal will afford a defaulting party sufficient opportunity to participate in the arbitral proceedings to ensure the tribunal complies with its obligation to give each party a reasonable opportunity of presenting its case, but will proceed to make an award if a party does not avail itself of the opportunity.<sup>159</sup> Notwithstanding failure of a party to participate in the proceedings, the proceedings do not become the equivalent of a summary judgment in litigation proceedings, and the arbitral tribunal must determine whether the non-defaulting party has proved its case on the balance of probabilities on the available evidence.

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<sup>157</sup> Section 29(2)(b) of the AA, and Article 25(b) of the Model Law, IAA.

<sup>158</sup> Section 19(2)(c) of the AA, and Article 25(c) of the Model Law, IAA.

<sup>159</sup> Article 18 of the Model Law, IAA, and Section 22 of the AA.

### 30. Are there any Limits on Remedies?

Arbitral tribunals have similar powers to the Singapore Courts in terms of remedies. They have the power to grant interim and conservatory relief under the AA,<sup>160</sup> the IAA,<sup>161</sup> and under Rules 27(e) and (i) and 30.1 of the SIAC Rules, as discussed in Section 22 above.<sup>162</sup> The Singapore High Court has the same power to make interim orders in respect of arbitrations as it has in relation to Court proceedings.<sup>163</sup> However, the Court will not make an interim order unless the arbitral tribunal has no power or is unable for the time being to act effectively.<sup>164</sup> This would apply, for example, where the tribunal is yet to be formed, or the disputed assets are under the control of third parties not subject to the arbitration agreement. The practical effect of these provisions is that a party must apply to the arbitral tribunal, if constituted, in the first instance.<sup>165</sup>

The parties' option of applying to the Singapore High Court for interim orders prior to constitution of the arbitral tribunal is an alternative to the Emergency Arbitrator Procedure under the SIAC Rules, where these apply, as discussed in Section 23 above. However, the advantage of the Emergency Arbitrator Procedure is confidentiality, and the growth in the number of Emergency Arbitrator applications under the SIAC Rules suggests parties now consider this procedure to be a viable alternative to an application to Court.

The Singapore High Court also has the power to make an interim order in support of an international arbitration taking place outside Singapore.<sup>166</sup>

### 31. How are Costs and Interest Dealt With?

A successful party in arbitration proceedings generally recovers at least part of its legal and other costs from the unsuccessful party. The percentage of costs awarded by the arbitral tribunal will vary depending upon the circumstances of the matter.

Rule 35.1 of the SIAC Rules provides that unless the parties have agreed otherwise, the arbitral tribunal shall determine in the award the apportionment of the costs of the arbitration among the

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<sup>160</sup> Section 28(2) of the AA.

<sup>161</sup> Section 12(1)(d), (f) and (i) of the IAA.

<sup>162</sup> Rules 27(e) and (i) and 30.1 of the SIAC Rules.

<sup>163</sup> Section 12A(2) of the IAA.

<sup>164</sup> This is now clear from the terms of Section 12A(6) of the IAA, added as an amendment on 1 January 2010.

<sup>165</sup> Refer also to the discussion in Section 22 above as to whether the existence of an emergency arbitrator procedure may influence the Singapore Court's power to grant interim measures prior to constitution of the arbitral tribunal.

<sup>166</sup> Section 12A(1) of the IAA, added as an amendment on 1 January 2010.

parties.<sup>167</sup> Rule 35.2 defines “*costs of the arbitration*” as being (a) the tribunal’s fees and expenses; (b) the SIAC’s administrative fees and expenses and (c) the costs of expert advice and other assistance required by the tribunal.

With respect to the parties’ legal and other costs, Rule 37 gives the arbitral tribunal the power to order in its award that all or a part of the legal or other costs of a party be paid by another party, and arbitral tribunals usually award costs applying the principle that the successful party is awarded its costs.

With respect to the amount of arbitrators’ fees, for arbitrations administered by the SIAC, hourly rates no longer apply (unless the parties agree for this method of determining arbitrators’ fees), and the SIAC applies a quantum based scale proportionate to the amount in dispute in its Schedule of Fees. For example, for a disputed amount of S\$10,000,000, the maximum amount paid to each arbitrator is S\$161,900. However, pursuant to Rule 34.1 of the SIAC Rules, the parties can agree alternative methods of determining the tribunal’s fees prior to constitution of the tribunal.

The SIAC also applies a quantum based fee for administration of arbitrations. For example, for a claim of amount S\$10,000,000, the maximum administration fee payable by the parties is S\$38,800.

The SIAC has increased in the SIAC Rules the amount of arbitrator’s fees as a proportion of the amount claimed, by approximately 7% to 10%, for sums in dispute up to S\$500m. For example, each arbitrator’s fee for a S\$50m sum in dispute has increased from S\$263,000 to S\$281,900. The Emergency Arbitrator cap on fees has been set at S\$25,000, whereas previously there was a cap of 20% of the sole arbitrator’s fee, and an overall cap on the Emergency Arbitrator’s fees and expenses set at S\$30,000. This fixed amount provides parties with greater certainty on the cost of an Emergency Arbitrator application, particularly in high value arbitration proceedings.

Similarly, the SIAC’s administration fees have increased by approximately 15% for a given sum in dispute, and the administration fee for Emergency Arbitrator appointments has increased by S\$2,140 to S\$5,350 for Singapore parties and S\$2,000 to S\$5,000 for overseas parties, and the case filing fee by approximately S\$1,000.

The SIAC has also introduced a fee for challenging an arbitrator under Rule 15.1 of amount S\$8,560 for Singapore parties and S\$8,000 for overseas parties.

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<sup>167</sup> The SIAC Rules, unlike the LCIA and UNCITRAL rules, do not expressly state that the successful party will be entitled to recover its reasonable costs, but adopts the approach of giving the arbitral tribunal wide discretion to award costs.

The SIAC has amended Rule 27(g) of the SIAC Rules expressly to give the tribunal the power to issue an order or award for reimbursement of unpaid deposits towards the costs of the arbitration where a party to the arbitration has paid the other party's share of the deposits on behalf of the non-paying party. The previous provision only permitted the tribunal to issue an award for unpaid costs of the arbitration.<sup>168</sup> Respondents sometimes refuse to pay its 50% share of the advance on costs for the arbitration proceedings, and claimants are therefore obliged to pay the full advance on costs. Arbitral tribunals now have the express power under Rule 27(g) to order or award payment of unpaid deposits towards costs.

With respect to interest, pursuant to Rule 32.8 of the SIAC Rules, the arbitral tribunal may award simple or compound interest at such rates as the parties may have agreed or, in the absence of agreement, as the arbitral tribunal determines to be appropriate, in respect of any period the tribunal determines as appropriate.

Both the AA<sup>169</sup> and IAA<sup>170</sup> were amended, effective from 1 June 2012, to provide that arbitral tribunals have the power to award simple or compound interest on the principal amounts claimed and on amounts awarded in costs "*for any period ending not later than the date of payment*", but subject to "*unless otherwise agreed by the parties*". Rule 28.7 (now Rule 32.8) was amended on 1 July 2013 in consistent terms with the AA and the IAA.

However, for earlier editions of the SIAC rules, regard must be given to the interaction between the agreed rules, and the terms of Sections 35 and 20(1) of the AA and IAA respectively. For example, parties are likely to be regarded as having "*otherwise agreed*" by the terms of rule 28.7 of the fourth edition of the SIAC rules, which limits the tribunal's discretionary power to award interest only for the period up to the date of the award, thereby taking precedence over the terms of the AA and IAA.

The amendments in the Acts also make clear that awarded sums carry interest from the date of the award at the rate prescribed for judgment debts, unless the award directs otherwise.<sup>171</sup> These provisions apply where parties have not agreed otherwise for the treatment of interest, either in their agreement or by an agreed set of rules, or, with respect to post-award interest, the arbitral tribunal has not determined the issue.

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<sup>168</sup> Rule 24(g) of the fifth edition of the SIAC rules.

<sup>169</sup> Section 35 of the AA.

<sup>170</sup> Section 20 of the IAA.

<sup>171</sup> Section 20(3) of the IAA.

## 32. Can Arbitral Awards be Appealed or Set Aside?

Parties can appeal domestic arbitral awards on a question of law under the AA.<sup>172</sup> There is no equivalent appeal right under the IAA. However, even in cases of domestic arbitrations under the AA, where the parties have agreed application of the SIAC Rules, Rule 32.10 provides that parties irrevocably waive their rights to any form of appeal, review or recourse to any state court or other judicial authority insofar as such waiver may be validly made.

The Singapore High Court in *Daimler South East Asia Pte Ltd v Front Row Investment Holdings (Singapore) Pte Ltd*<sup>173</sup> held that a reference in the arbitration agreement that the arbitration would be conducted under the ICC Rules 1998 was sufficient to exclude the right of the parties under Section 49 of the AA to appeal a question of law to the Singapore Courts. Article 28(6) of the ICC Rules 1998 (now Article 34(6)) states that “...the parties...shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.” The Court held that use of the word “recourse” in Article 28(6) widened the scope of the previous Article 24, and that it was quite clear that, by adopting the ICC Rules 1998, the parties had agreed to exclude the right of appeal under Section 49(1) of the AA.<sup>174</sup>

Rule 32.10 of the SIAC Rules, in light of its wide scope, is sufficiently clear to be effective to waive any appeal rights on a question of law under the AA. This is also consistent with the parties’ right to agree for an arbitration which would otherwise fall within the scope of the AA to be governed by the IAA, which does not contain a right of appeal on a question of law. The implication of the terms of Rule 32.10 and the Singapore High Court’s decision in *Daimler South East Asia Pte Ltd* is that if parties to an arbitration within the scope of the AA have agreed for the SIAC Rules to apply, if parties wish to retain their rights of appeal on a question of law under Section 49(1) of the AA they should expressly stipulate this right in their arbitration agreement.

The position is less clear as to whether Rule 32.10 is effective to waive a right to set aside an award under the AA or the IAA. The Courts in some jurisdictions have held that parties can exclude the limited grounds for setting aside an award set out in Article 34 of the Model Law,<sup>175</sup> whilst in other jurisdictions, such as New Zealand, Courts have held Article 34 to be of fundamental importance, which parties cannot exclude.<sup>176</sup> Singapore Courts have not expressly considered the issue, however, the author submits the Courts are likely to follow the New Zealand Courts’ approach as to the fundamental importance of Article 34 of the Model Law

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<sup>172</sup> Section 49 of the AA.

<sup>173</sup> [2012] SGHC 157.

<sup>174</sup> *Ibid*, [19].

<sup>175</sup> Ontario Supreme Court’s decision in *Noble China Inc v Lei* ((1998) 42 OR (3d) 69; 42 BLR (2d) 262).

<sup>176</sup> The New Zealand Court of Appeal’s decision in *Methanex Motonui Ltd v Joseph Spellman* (CA 171/03, June 2004).

Awards can be set aside under both the AA and the IAA on various grounds principally related to due process. Section 48 of the AA and Article 34 of the Model Law sets out the grounds for setting aside an award, which are as follows:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement is not valid;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the subject matter of the dispute is not capable of settlement by arbitration under the law of this state; or
- the award is in conflict with Singapore public policy.

In addition to the Model Law grounds set out above, Section 24 of the IAA sets out two additional grounds (a) that the making of the award was induced or affected by fraud or corruption or (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced. However, it is unlikely that these provisions, as a matter of substance, add to any rights to set aside an award under Article 34 of the Model Law.

The application to set aside, under both the AA and IAA, must be made by originating motion within three months from the date of receipt of the award by the applicant.<sup>177</sup> In light of the time period for an application for setting aside an award under both the AA and IAA commencing from the applicant's receipt of the award, the arbitral tribunal should dispatch the signed award to the parties as promptly as possible. The SIAC, as a matter of practice, issues the signed award under the SIAC Rules to the parties and the tribunal.

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<sup>177</sup> Section 48(2) of the AA, and Article 34(3) of the Model Law, IAA.



Although Singapore Courts have set aside awards where there are clear grounds, they generally adopt a non-interventionist approach to setting aside arbitral awards, “giving primacy to the autonomy of arbitral proceedings and upholding the finality of arbitral awards”.<sup>178</sup> Three recent Singapore Court decisions demonstrate this non-interventionist approach, being the Singapore Supreme Court decision in *AKN v ALC*,<sup>179</sup> and the Singapore High Court decisions in *Coal & Oil Co LLC v GHCL Ltd* (“Coal & Oil”)<sup>180</sup> and *Mount Eastern Holdings Resources Co Limited v H&C S Holdings Pte Ltd* (“Mount Eastern Holdings”).<sup>181</sup>

In *Mount Eastern Holdings*, the most recent of the three cases, H&C S Holdings Pty Ltd (“H&C”) entered into a contract to supply iron ore to Mount Eastern Holdings Resources Co Limited (“Mount Eastern”). The delivery was never made, and Mount Eastern commenced arbitral proceedings against H&C for a claim for damages under the contract. H&C, before the tribunal, argued that Mount Eastern was required to establish an anticipatory breach of the contract and that this defence had not been pleaded. The tribunal rejected H&C’s defence, and ordered it to pay Mount Eastern contractual damages of US\$1,527,660, plus costs. H&C applied to set aside the award on three grounds, first, that the tribunal granted an award not specifically pleaded, secondly, that the tribunal failed to give H&C a fair hearing, and thirdly, that there was a breach of natural justice.

Justice Quentin Loh considered that success on either or both of the first two issues would establish a breach of natural justice, which would render the award liable to be set aside. His Honour stated that the law on setting aside of an international arbitration award on the ground of breach of natural justice is well established, referring to the Singapore Court of Appeal’s decision in *Soh Beng Tee & Co Pte Ltd v Fairmount Developments Pte Ltd*,<sup>182</sup> that a party challenging an award as having contravened the rules of natural justice must establish: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights.<sup>183</sup>

With respect to the pleading issue, Loh J found that it was clear that the tribunal did not reach its determination on the basis of unpleaded issues, but rather Mount Eastern pleaded its case on the basis of clause 13.1.1 of the contract, and the tribunal applied this clause to reach its conclusion. With respect to the fair hearing issue, Loh J found that it was evident from the award that the tribunal had given due consideration to the objections raised by H&C regarding failure to plead anticipatory breach and its failure to rely on clause 14.2 of the contract.

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<sup>178</sup> Recently confirmed by the Singapore Court of Appeal in *AJU v AJT* [2011] SGCA 41.

<sup>179</sup> *AKN v ALC* [2015] SGCA 18.

<sup>180</sup> [2015] SGHC 65.

<sup>181</sup> [2016] SGHC 1.

<sup>182</sup> [2007] 3 SLR(R) 86.

<sup>183</sup> [2016] SGHC 1, [18].

The Singapore Supreme Court, in its 2015 decision in *AKN v ALC*<sup>184</sup>, considered an application to set aside an award on various grounds. In the High Court, the respondent successfully set aside the award on the grounds of breach of natural justice (Section 24(b) of the IAA, and Article 34(2)(a)(ii) of the Model Law) and excess of jurisdiction (Article 34(2)(a)(iii) of the Model Law), on seven grounds, including the tribunal’s failure to consider the respondent’s arguments, and awarding damages for loss of opportunity to earn profits in excess of the tribunal’s jurisdiction.

The Singapore Court of Appeal reversed the High Court’s decision on four of the seven grounds, and restricted the effect of the successful challenge only to the affected parts of the award. The Court considered that the High Court had, on some issues, dealt with the merits of the underlying dispute, rather than considering only whether there had been a breach of natural justice. The Court’s judgment affirms its policy of minimum intervention in arbitral proceedings, and its refusal to interfere with the merits of the award.

In a further 2015 decision in *Coal & Oil*,<sup>185</sup> the High Court confirmed that there is a high threshold for setting aside an award on grounds of a breach of natural justice (Section 24(b) of the IAA, and Article 34(2)(a)(ii) of the Model Law) and public policy (Article 34(2)(b)(ii) of the Model Law). The tribunal in that case had issued its award almost two years after the oral hearings, and 19 months after the parties had submitted their post-hearing submissions. The respondent in the arbitration proceedings applied to the High Court to set aside the award on the grounds of breach of the parties’ agreed procedure, the award was in conflict with the public policy of Singapore, and breach of natural justice, based upon the tribunal’s alleged failure to comply with rule 27.1 of the fourth edition of the SIAC rules in not submitting the draft award to the Registrar within 45 days from the date on which the tribunal declared the proceedings closed (now Rule 32.3), and alleged inordinate 19 month delay between the parties’ post-hearing submissions and the date of the award

The High Court commenced by describing the case as “*another novel attempt to set aside an arbitral award*”.<sup>186</sup> The Court considered that rule 27.1 gave the tribunal the power to declare the proceedings closed, but did not impose a duty to do so, but in any event, did not consider a breach of arbitral procedure should result in an award being set aside. The Court considered that to have that effect, the breach must be a material breach, often requiring proof of actual prejudice. The Court did not consider the 19 month delay to be a breach of the agreed procedure, given that the SIAC rules did not prescribe a time limit for release of an award. The respondent also failed on the public policy ground, with the Court referring to the test for setting aside on public policy grounds as the award being “*clearly injurious to the public good*” or “*wholly offensive to the ordinary reasonable and fully informed member of the public*”, or where it “*violates the forum’s*

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<sup>184</sup> *AKN v ALC* [2015] SGCA 18.

<sup>185</sup> [2015] SGHC 65.

<sup>186</sup> *Ibid*, [4].

*most basic notion of morality and justice*".<sup>187</sup> The Court described the ground of public policy, together with breach of the rules of natural justice as "*appear to be the last refuge of the desperate*".<sup>188</sup>

In summary, the Singapore Courts will only set aside an award where there are clear grounds, and in relation to the grounds of breach of natural justice and breach of public policy, the Courts apply a high threshold.

The implication from the Singapore Courts' approach is that it is important for parties to address issues in dispute in a comprehensive manner as they arise in the arbitral proceedings, since if the Court is of the view that a party has been given a reasonable opportunity to address an issue, it is unlikely the Court will set aside an award on the grounds either that the issue is not within the scope of the submission to arbitration or breach of the principles of natural justice.

A similar principle is contained in Rule 27(m) of the SIAC Rules, which provides that the arbitral tribunal has the power to decide any issue not expressly or impliedly raised in the parties' submissions, as long as such issue was clearly brought to the notice of the other party and that other party had been given adequate opportunity to respond;

The application of this principle will clearly involve addressing issues raised in the parties' respective pleadings, but may also involve issues not pleaded but raised by parties during the conduct of the arbitration.

### **33. What are the Procedures for Enforcement of Foreign and Domestic Awards?**

For domestic arbitral awards under the AA, an award made by the arbitral tribunal pursuant to an arbitration agreement may, with leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect.<sup>189</sup> Similarly, international arbitral awards under the IAA may, by leave of the High Court, be enforced in the same manner as a judgment or an order to the same effect.<sup>190</sup>

A foreign arbitral award may be enforced in a Singapore Court either by action or in the same manner as an award of an arbitrator made in Singapore.<sup>191</sup> A foreign award rendered in any of the

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<sup>187</sup> Ibid, [61], applying the Singapore Court of Appeal's decision in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597.

<sup>188</sup> Ibid, [61].

<sup>189</sup> Section 46(1) of the AA.

<sup>190</sup> Section 19 of the IAA.

<sup>191</sup> Section 29 of the IAA.

New York Convention countries can be enforced in Singapore within six years of the making of the award, following the same enforcement procedure as a domestic award.

In all cases, an application must be supported by an affidavit exhibiting the arbitration agreement and the original award, stating the name and the usual or last known place of residence or business of the respondent, and stating either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

Most awards where Singapore is the enforcement jurisdiction are paid without the need for a party to implement enforcement proceedings.

### **34. What are the Opportunities for Settlement?**

Parties in arbitration proceedings can settle the dispute at any stage, and cease the proceedings, reflecting the principle of party autonomy in arbitration proceedings. Parties can also agree to suspend the arbitration proceedings pending settlement negotiations or mediation.

Any settlement can be recorded in a settlement agreement in the form of an arbitral award.<sup>192</sup> Section 18 of the IAA provides that if the arbitral tribunal has recorded the terms of the settlement in the form of an arbitral award on agreed terms in accordance with Article 30 of the Model Law, the award shall be treated as an award on an arbitration agreement, and may, by leave of the Singapore High Court, be enforced in the same manner as a judgment or order to the same effect.

Article 30 of the Model Law requires the consent of both parties for the arbitral tribunal to issue a consent award, and provided the arbitral tribunal does not object. The arbitral tribunal should not issue a consent award if it would violate public policy, is fraudulent, or may be for the purpose of money laundering.

Section 37 of the AA is drafted in similar terms to Section 18 of the IAA and Article 30 of the Model Law for consent awards in Singapore domestic arbitrations.

There is a significant amendment to Rule 32.9 of the SIAC Rules to provide that if the parties request, the tribunal may render a consent award recording the settlement of the parties, whereas in the previous edition of the rules “*any party*” could request the tribunal to render a consent award (previous rule 28.8). This amendment is now consistent with Article 30 of the Model Law, and Section 37(1) of the AA.

A consent award may be enforced under the New York Convention in the same manner as a reasoned award by the arbitral tribunal.

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<sup>192</sup> Expressly provided for in Section 18 of the IAA, and Rule 31.8 of the SIAC Rules.

As noted in Section 12 above, one of the SIAC's model arbitration clauses is an Arb-Med-Arb clause, in conjunction with the Singapore International Mediation Centre ("SIMC"). This procedure allows parties to suspend the arbitral proceedings and conduct mediation with a separate mediator appointed by SIMC. If the mediation is unsuccessful, the parties can recommence to the arbitral proceedings. This procedure of having a separate mediator overcomes the principal objection to arb-med-arb procedures of having an arbitrator as mediator and therefore the risk of the arbitrator hearing confidential information not otherwise disclosed in the arbitration proceedings.

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Gordon has substantial experience as counsel in complex international arbitrations, having conducted over 50 arbitrations of up to \$US2.2b in value in London, Hong Kong, Singapore, Tokyo, Kuala Lumpur, Bangkok, and Jakarta under institutional rules ICC, SIAC, HKIAC, TAI, Bani, KLRCA, and ad-hoc arbitrations (UNCITRAL). He has also conducted a major, US\$200m, investor state dispute on behalf of an investor against an Asian state under the auspices of ICSID.

*Note: This publication is intended to provide general guidance to parties on the Singapore arbitration regime, and is not intended to be a substitute for legal advice.*