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Focus on SIAC Procedures

Recognition and Enforcement of Arbitration Agreements and Awards under the New York Convention

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Focus on SIAC Procedures

A. Expedited Procedure (Rule 5)

B. Early Dismissal (Rule 29)

C. Emergency Arbitrator Provisions (Rule 30.1 / Schedule 1)

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Expedited Procedure
(Rule 5)

Overview

- Compresses arbitration proceedings
  - Party may apply for expedited procedure on 3 bases – SIAC Rule 5:
    - Amount in dispute is less than S$6 million
    - Parties agreement
    - Exceptional urgency
  - Sole arbitrator – but President of Court has discretion to appoint 3
  - Award delivered within 6 months – may be in summary form
- Documents only (Rule 5.2)
  - Tribunal has discretion to decide on documents (but must consult parties)

Applying for Expedited Procedure

- Mostly granted based on amount in dispute
- Otherwise, exceptional urgency or by agreement
  - What is exceptional urgency?
    - Delay in proceedings may aggravate dispute or cause further loss
    - Risk of dissipation of assets

Factors for Application of Expedited Procedure

- What considerations are relevant when determining whether to apply Expedited Procedure?
  - Amount in dispute should not be only criterion – otherwise, no need for exercise of discretion
  - Should consider legal and factual issues in dispute and whether issue is suitable to be addressed in summary form award
  - Have to compare speed and costs against giving parties opportunity to present their case
    - What if factual and legal issues not straightforward?
    - What if award potentially impinges on a continuing relationship between the parties and therefore has to be carefully considered – is a summary-form award appropriate?
  - What if parties dispute complexity of the legal and factual issues?
    - Would ordering expedited procedure be equivalent to President pre-judging the dispute?

1 or 3 Member Tribunal?

- Constitution of 3 member panel in Expedited Procedure
  - President has discretion to decide 1 or 3-member panel
  - 1 member panel generally more cost and time efficient
  - However, there is precedent for 3-member panel:
    - Where issues in arbitration are more complex
- But is there a point in having a 3-member panel for Expedited Procedure?
  - If 3 member panel is constituted, then cost benefit negated and compressed timelines become more challenging
  - If purpose of appointing a 3 member panel is to allow parties to air complex issues, then maybe Expedited Procedure is not appropriate and parties and Tribunal should be given time to make and consider issues

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Early Dismissal
(Rule 29)

SIAC Rule 29

- 2016 addition to SIAC Rules
  - First arbitral institution globally to introduce these provisions for international commercial arbitrations
  - Inspired by ICSID Rules, which govern investment treaty arbitrations
- Rule 29
  - Allows party to apply to Tribunal for dismissal of claim or defence on the basis that claim or defence is manifestly:
    - Without legal merit, or
    - Outside Tribunal's jurisdiction
- 2 stage test
  - Tribunal first decides whether to hear application
  - If Tribunal decides to hear application, it will give parties opportunity to be heard

What is Early Dismissal?

- If Tribunal decides to hear application:
  - Award may be in summary form
  - Order or award must be given within 60 days of date of filing application (unless in exceptional circumstances Registrar extends time)
- Useful addition to arbitration toolkit
  - Previously Tribunal determined similar applications as preliminary issues
  - Rule 29 provides a structured basis for applications for early determination

Exercise of Discretion

Tribunal has wide discretion. How should the Tribunal exercise this discretion?

- One concern is that the Tribunal in exercising its discretion at the 1st stage does not prejudge the merits of the application before hearing the parties' full arguments. A Tribunal would have to be careful in expressing any final view on the merits of the application at 1st stage.
- This does not mean that the Tribunal should not form any view at all on the merits of the application at the 1st stage. This would be abdicating the exercise of the discretion that the Tribunal is clearly called to exercise.

Exercise of Discretion

- Tribunals should bear in mind the purpose of Rule 29 – which is the saving of time and cost. If the Tribunal comes to the view that the application is bound to fail and allowing the application to proceed would result in a waste of time and cost, the Tribunal would be justified in not allowing the application to proceed.

- Other situations in which the Tribunal may refuse to hear the application may include where the application is brought very close to final hearing or where a repeat application is brought after having been dismissed previously purely to delay proceedings.

Manifestly Without Legal Merit / Outside Jurisdiction

- Meaning of manifestly – borrowed from ICISID Rule 41.5 – objection can be established "*clearly and obviously, with relative ease and despatch*". ICSID standard is high.

- "Manifestly" in the ICSID context – which is at a very preliminary stage of the proceedings – refers to a determination that can be made without significant further examination of the facts and evidence.

- What is "manifestly" without merit may be different at an early stage of the proceedings compared with a later stage of the proceedings.

- More facts and submissions may be available at a later stage in the proceedings which may make the legal merits more "manifest".

- In Rule 29 "manifest" should not be read to impose a higher standard of proof than ordinarily applicable.

Manifestly Without Legal Merit / Outside Jurisdiction

- "*Without legal merit*" – distinguishes legal from factual merits – Rule 41.5 is primarily intended to deal with disposition of claims on legal points – not factual points. Generally, tribunals will take the facts as alleged by the party against whom the application is brought and would dismiss the claim (or defence) only if this was justified when taking that party's case at its highest.

- However legal merits have to be considered in the context of the supporting facts.

- SCC and HKIAC Rules expressly refers to determination of legal and factual issues.

Emergency Arbitrator

(Rule 30.1 and Schedule 1)

Overview

- Allows parties to appoint an arbitrator for emergency interim relief before tribunal is constituted – an alternative to applying to court

- Choice between applying to an EA and applying to court – is one better than the other? (Third parties, without notice procedure, enforcement)

- There may be limitations to the relief that a court can order e.g. court may only make order for preservation of assets or evidence; court can only make order to the extent Tribunal is unable to act

- The standard applied by a court and an EA to determine interim relief may be different – court may apply standards used in domestic litigation – GMR Maldives case

Recognition and Enforcement of Arbitration Agreements and Awards under the New York Convention

Articles II, III and V of the New York Convention

Arbitration Agreements

Article II New York Convention

Article II of the New York Convention

Article II NYC :

(1) *Each Contracting State* ***shall*** *recognize* ***an agreement*** *in writing* ***under which the parties undertake to submit to arbitration*** *all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*

(2) *The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*

(3) *The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article,* ***shall****, at the request of one of the parties,* ***refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.***

Article II of the New York Convention

- Article II imposes a mandatory obligation that Contracting States "***shall*** *recognise*" agreements to arbitrate that adhere to uniform international rules of formal and substantive validity

- An agreement in writing to arbitrate disputes between the parties is **presumed** to be valid.

- This presumption of validity is only rebutted if generally-applicable, and internationally neutral contract law exceptions apply – i.e. "*null and void, inoperative or incapable of being performed*."

Article II of the New York Convention

- Mandatory language of Articles II(1) and (3) indicates these uniform international rules apply regardless of the national law chosen to govern their arbitration agreement

- Contracting States are not free to fashion additional grounds for denying recognition of agreements to arbitrate. See *Bautista v Star Cruises* 396 F.3d 1289 at 1302 (11th Cir. 2005):

  The limited scope of the Convention's null and void clause 'must be interpreted to encompass only those situations – such as fraud, mistake, duress, and waiver – that can be applied neutrally on an international scale.

- Any exceptions or special rules that would invalidate a contract under national law (i.e. unusual requirements **outside** the defined Article II(3) exceptions) cannot be relied on to invalidate an arbitration agreement

Article II of the New York Convention

- Article II also contemplates application of a **validation principle**.
- The validation principle provides that an arbitration agreement is valid and enforceable if any national law potentially applicable to the agreement would uphold its validity.
- This validation principle gives effect to both the parties' intentions and the Convention's rule of presumptive validity, and is mandated by the Convention's pro-enforcement objectives.

Arbitration Awards

Articles III and V New York Convention

Article III of the New York Convention

- Article III NYC – National Treatment requirement

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. ***<u>There shall not be imposed substantially more onerous conditions</u>*** or higher fees or charges ***<u>on the recognition or enforcement of arbitral awards</u>*** to which this Convention applies ***<u>than are imposed on the recognition or enforcement of domestic arbitral awards.</u>***

- Article III imposes a "national treatment" requirement that Contracting States treat Convention awards no less favourably than domestic awards.

Article V of the New York Convention

- Article V provides that the recognition and enforcement of an award may be refused if certain proscribed circumstances arise – as understood and applied within an international framework mandated under the Convention:
  - Article V(1)(a): Incapacity or invalidity
  - Article V(1)(b) to (e): Procedural fairness
  - Article 2(a) (read with Article II(1)): Arbitrability
  - Article 2(b): Public policy

Article V(1)(a): Incapacity or Invalidity

- Recognition / enforcement can be refused if:
  - The parties were, under the law applicable to them, under some incapacity, or
  - The agreement is not valid under the law to which to parties have subjected it, or
  - Failing any indication thereon, under the law of the country where the award was made.

- This is closely related to Articles II(1) and (3):
  - To determine any incapacity or invalidity to the arbitration agreement, the same objective principles under Article II apply to Article V(1)(a), as the same legal rules apply at all stages of the arbitral process.
  - Under Article II, Contracting States "*shall recognise*" agreements to arbitrate that adhere to uniform international rules of formal and substantive validity.
  - This presumption of validity is only rebutted if a series of generally-applicable, and internationally neutral contract law exceptions apply – i.e. "*null and void, inoperative or incapable of being performed*."

Article V(1)(a): Incapacity or Invalidity

- Article V(1)(a) is also subject to a "validation principle."
- The validation principle states that an arbitral award is valid and enforceable if any national law potentially applicable to the award would uphold its validity.
- This validation principle gives effect to both the parties' intentions and the Convention's rule of presumptive validity, and is mandated by the Convention's pro-enforcement objectives.

Article V(1)(b) to (e): Procedural Unfairness

- Recognition / enforcement can be refused if there is a breach of international standards of procedural fairness.

- National courts cannot impose their own idiosyncratic views of what constitutes "procedural fairness." Doing so contradicts:

  - The international character of the NYC
  - The arbitral process
  - The central roles of party autonomy in the arbitral process

- Developed jurisdictions generally agree on what is fair:

  - An equal, adequate opportunity to present one's case
  - Counsel of one's choice
  - An impartial tribunal which applies regular, rational and neutral adjudicatory procedures

Article V(2)(a): Arbitrability

- Articles II(1) and V(2)(a) of the NYC allows Contracting States to exceptionally apply their own law to refuse enforcement of an otherwise valid and binding arbitration agreement or award on non-arbitrability grounds.

- However, since non-arbitrability is an exception to the Convention's pro-enforcement regime, the exceptions must be:

  – Narrowly-tailored to achieve specifically-defined, articulated public policies
  – Not inconsistent with state practice under the Convention

- In international cases, national conceptions of public policy and mandatory law should be moderated, in light of:

  – Existing competing public policies of other states
  – Shared international policy encouraging the resolution of international commercial disputes through arbitration

Article V(2)(b): Public Policy

- The public policy which may be invoked to resist recognition of an award under Article V(2) of the NYC and Article 36(1)(b) of the Model Law is national public policy.

- It is inevitable that the content of public policy may differ from one legal system to another.

- Nonetheless, it has been a consistent theme of recognition decisions under Article V(2)(b) to interpret national public policies in a manner that is **consistent**, insofar as possible, with the objectives of the Convention and the public policies and interests of other Contracting States.

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