

THE SIAC IA RULES: A NEW PLAYER IN THE INVESTMENT ARBITRATION MARKET

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Abstract

With the entering into force of the Investment Arbitration Rules of the Singapore International Arbitration Centre (SIAC) on January 1, 2017, a new player has emerged in the investment arbitration market. Asia's continued rise as one of the world's fastest-growing and most dynamic markets, Singapore's determination to consolidate its position as a leading hub for international dispute resolution services and SIAC's profound arbitration expertise form the commercial, political and legal framework for SIAC's Investment Arbitration Rules. The new Rules address – and present balanced solutions to the most pressing issues facing international investment arbitration, drawing on its experiences from the application of the SIAC Commercial Arbitration Rules as well as international best practice in investment arbitration. They foster efficiency, speed and transparency and offer a competitive cost regime. At the same time, the new Rules provide an innovative approach to issues such as third-party funding, amicus curiae submissions and frivolous claims. While it remains to be seen how many of those provisions will be administered in practice and whether the Rules will gain acceptance in the investment arbitration community, this article posits that the new Rules offer a viable alternative for investment arbitration both in Asia and beyond.

I. Introduction

The first edition of the Investment Arbitration Rules of the Singapore International Arbitration Centre [the “**SIAC IA Rules**”] entered into force on January 1, 2017.¹ This contribution highlights the main features and innovations of the SIAC IA Rules and compares them to other sets of rules that are being used in the field of investor-state disputes. After briefly outlining the background and main purpose of the SIAC IA Rules (section **II**), the authors will examine the scope of application of the new Rules (section **III**), before elaborating on the initiation of the arbitral procedure and the appointment and challenge of arbitrators (section **IV**). We will then address the conduct of the proceedings under the SIAC IA Rules, and, in particular, their innovative approach towards third-party funding and the early dismissal of claims (section **V**). Other significant innovations include the introduction of an emergency arbitrator procedure in investor-state dispute resolution (section **VI**) and the admission of third-party submissions in the proceedings (section **VII**). Following an analysis of the issues of confidentiality (section **VIII**) and awards (section **IX**), the article will finally address the approach of the SIAC IA Rules with respect to costs (section **X**), concluding with a brief summary and outlook on the prospects of success of the new Rules (section **XI**).

II. Background and Main Purpose

The global market for commercial arbitration continues to flourish. As of date, well over a hundred arbitral institutions compete regionally and globally for business and market shares, including in India, for example, the Indian Council of Arbitration and the Indian Institute of

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¹ Capitalized terms not defined in this contribution derive from the definitions set out in Rule 1.5 of the Investment Arbitration Rules of the Singapore International Arbitration Centre, 2017, <http://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf> [hereinafter “SIAC IA Rules”] (last accessed on Aug. 11, 2017).

Arbitration and Mediation, or the most recent, the Mumbai Centre for International Arbitration. By contrast, the investment arbitration market is dominated by only a handful of arbitral institutions.

Currently, investment disputes are primarily conducted under the auspices of the International Centre for the Settlement of Investment Disputes [“ICSID”]², the Stockholm Chamber of Commerce [“SCC”]³, the International Chamber of Commerce [“ICC”]⁴, or are administered *ad hoc* under the Arbitration Rules of the United Nations Commission on International Trade Law [“UNCITRAL”]⁵; with a majority of cases being handled by ICSID, i.e. by the World Bank.

The SIAC IA Rules mark a first: they constitute the first set of dedicated investment arbitration rules enacted by a private arbitral institution.⁶ At the same time, the SIAC IA Rules reflect Singapore’s continued dedication to becoming a prime hub for international dispute resolution. The SIAC⁷, the Singapore International Mediation Centre⁸ and the Singapore International Commercial Court⁹ already successfully offer a wide array of dispute resolution services. Their eminent success is a result of several factors, not the least of which is the strong political and governmental support, as only recently demonstrated by the enactment of the Civil Law (Amendment) Bill No. 38/2016, which makes Singapore the first state to formally regulate third-party funding.¹⁰

The SIAC IA Rules round off the range of services and aim to establish Singapore as a venue for investment arbitration. They entered into force following a comprehensive public consultation process and draw on the wealth of experience gained from the application of the SIAC Arbitration Rules¹¹ on which they are largely modeled, as well as the best practices developed by other investment arbitration institutions such as ICSID, SCC and the Permanent Court of Arbitration. Moreover, they address many of the concerns that have been the focus of discussions both within the international arbitration community and amongst the public at large,

² Disputes are administered under the ICSID Rules of Procedure for Arbitration Proceedings as amended effective from April 10, 2006 [*hereinafter* “ICSID Rules”].

³ Disputes are administered under SCC Arbitration Rules in force as of January 1, 2017, including notably Appendix III (Investment Treaty Disputes) [*hereinafter* “SCC Rules”].

⁴ Disputes are administered under the Rules of Arbitration of the International Chamber of Commerce in force as of March 1, 2017 [*hereinafter* “ICC Rules”].

⁵ United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules as revised in 2013 [*hereinafter* “UNCITRAL Transparency Rules”].

⁶ The SCC applies its regular commercial arbitration rules, supplemented by an appendix addressing the specificities of investment arbitration.

⁷ SINGAPORE INTERNATIONAL ARBITRATION CENTRE (SIAC), <http://www.siac.org.sg/> (last accessed on Aug. 11, 2017).

⁸ SINGAPORE INTERNATIONAL MEDIATION CENTRE, (SIMC), <http://simc.com.sg/> (last accessed on Aug. 11, 2017).

⁹ SINGAPORE INTERNATIONAL COMMERCIAL COURT (SICC), <http://www.sicc.gov.sg/> (last accessed on Aug. 11, 2017).

¹⁰ For a detailed discussion of legislative developments, see Christopher Boog & Julie Raneda, *Third-Party Funding in Singapore and Hong Kong: Recent Developments Towards Legalization*, SCHELLENBERG WITTMER NEWSLETTER (February 2017), <http://www.swlegal.ch/Publications/Newsletter/Third-Party-Funding-in-Singapore-and-Hong-Kong-Rec.aspx> (last accessed on Aug. 11, 2017).

¹¹ Unless otherwise stated, references to the SIAC Arbitration Rules are references to the 2016 edition of the Rules, effective as of January 1, 2016 [*hereinafter* “SIAC Rules”]. For a detailed discussion of the latest edition of the SIAC Rules, see Christopher Boog & Julie Raneda, *The 2016 SIAC Rules: A State-of-the-Art Rules Revision Ensuring an even more Efficient Process*, 34(3) ASA BULLETIN, 584 § 1 (2016).

including delays and spiralling costs, frivolous claims, confidentiality, public interest considerations, submissions by non-disputing parties and third-party funding arrangements.

III. Scope of the Rules

One of the most significant innovations of the SIAC IA Rules concerns their scope of application.

The introduction to the Rules states that “[t]hese Rules may be agreed and applied in any type of arbitration, the application of which shall not be subject to objective criteria, such as the existence of a qualifying “investor” or “investment” or the presence of a State, State-controlled entity or intergovernmental organization [...]”¹² Rather, the SIAC IA Rules are applicable if the parties have agreed on their application, and regardless of whether the dispute arises out of a “contract, treaty, statute or other instrument”. The parties’ agreement may be formalised in writing, but may also result from implied consent to an express stipulation in this regard. Rule 1.2 explicitly provides that a party is deemed to have consented to the application of the SIAC IA Rules if, following an offer in writing from the other party, it initiates arbitration proceedings.

The approach taken by the SIAC IA Rules is very different from the approach taken, for instance, by the ICSID. Under Article 25(1) of the ICSID Convention, an ICSID tribunal may only assume jurisdiction of disputes “*arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State*”. The notion of ‘investment’ is arguably the central notion of ICSID investment arbitration and a major procedural obstacle for any party advancing claims under a bilateral investment treaty which provides for ICSID arbitration. In fact, more than a quarter of all awards currently rendered by ICSID tribunals are awards rejecting jurisdiction due to a lack of an ‘investment’ in the sense of Article 25(1) of the ICSID Convention.¹³

By contrast, the scope of application of the SIAC IA Rules, which renounce the requirement for objective notions such as ‘investment’ or ‘investor’, is significantly broader and likely to avoid lengthy disputes on jurisdiction, which are frequent under the current ICSID regime. The only restrictions regarding jurisdiction under the SIAC IA Rules are the substantive requirements in the respective contract, treaty, statute or other instrument. Furthermore, by referring a dispute to arbitration under the SIAC IA Rules, the parties waive any right to immunity from jurisdiction.¹⁴

In sum, due to their broad scope the SIAC IA Rules are likely to avoid costly preliminary disputes on jurisdictions, thereby contributing to more streamlined and efficient proceedings.

¹² SIAC IA Rules, intro. (ii) (emphasis added).

¹³ In addition, it can be assumed that uncertainties regarding jurisdiction also account for a significant portion of the ICSID cases which proceed to settlement (currently about one third of all proceedings). For further details, see ICSID, *The ICSID Caseload – Statistics*, ISSUE 2017-1, 14, 15 (2017), [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf) (last accessed on Aug. 11, 2017).

¹⁴ SIAC IA Rules, r. 1.3. Importantly, by waiving immunity from *jurisdiction* the Parties do not automatically waive immunity from *execution*. In practice, immunity from execution is frequently invoked by State Parties and severely limits the investor’s ability to enforce investment arbitration awards (see e.g. Olga Gerlich, *State Immunity from Execution in the Collection of Awards rendered in International Investment Arbitration: The Achilles’ Heel of the Investor-State Arbitration System?*, 26 (1) AM. REV. OF INT’L ARB. 47-99 (2015)). It is therefore likely that costly and time-consuming enforcement proceedings – or, as an alternative, post-award settlements – will remain the rule in investment arbitration, including under the SIAC IA Rules.

The SIAC's approach will be particularly relevant in comparison to the ICSID Rules. The likely appeal of the Rules to investors may, however, be offset by reservations harboured by State parties, for instance in relation to the right to waive immunity from jurisdiction. The current negative bias in public opinion against investor-state arbitration, which became apparent, for example, in the opposition to the Trans-Pacific Partnership ["**TPP**"] and the Trans-Atlantic Trade and Investment Partnership ["**TTIP**"] and specifically to the dispute resolution mechanisms set forth in those agreements, leaves the future of investor-state dispute settlement unclear. In addition, the withdrawal of a growing number of States, including India, from bilateral investment treaties,¹⁵ and proposals for alternative investment dispute resolution models such as the European Commission's Investment Court system¹⁶ will arguably also have an impact on the new SIAC IA Rules and their relevance in practice. It remains to be seen how SIAC – and also other institutions such as ICSID – will deal with those more fundamental challenges in the coming years.

IV. Appointment and Challenge of Arbitrators

The SIAC IA Rules include a detailed regime on the appointment (section IV.A) and challenge (section IV.B) of arbitrators.

A. Appointment of Arbitrators

Under the SIAC IA Rules, the Parties may appoint any odd number of arbitrators, a three-arbitrator tribunal being the default rule if no party agreement exists.¹⁷ In line with international investment arbitration practice, a three-arbitrator tribunal is therefore likely to become the standard in proceedings under the Rules. Interestingly, the SIAC Court of Arbitration [the "**Court**"] may appoint a sole arbitrator if it considers that this is warranted by the circumstances of the case.¹⁸ It remains to be seen how the Court will apply this provision, which bears resemblance to similar – and at times controversial – provisions in other arbitration rules¹⁹, in practice. In a commercial arbitration setting, these provisions aim to improve procedural efficiency by submitting smaller or less complex disputes to a sole arbitrator. Given the

¹⁵ In July 2016, India sent notices to 58 countries announcing its intention to terminate (or not renew) various bilateral investment treaties, with the aim to replace them with its new 2016 Model BIT, which marks a shift from India's previous foreign investment policy. For further background on the 2016 Model BIT, see Prabhash Ranjan & Pushkar Anand, *The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction*, 38 NW. J. INT'L L. & BUS. (forthcoming, 2018), draft available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946041 (last accessed on Aug. 11, 2017). Other recent examples of withdrawals from bilateral investment treaties include South Africa, Indonesia and Ecuador.

¹⁶ See Transatlantic Trade and Investment Partnership [*hereinafter* TTIP], Trade in Services, Investment and E-Commerce, ch. II – Investment (Commission draft text TTIP – investment, Sept. 16, 2015), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (last accessed on Aug. 11, 2017). For further background see Gabrielle Kaufmann-Kohler & Michele Potestà, *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?*, (CIDS - Geneva Ctr. for Int'l Disp. Settlement Research Paper, Jun. 3, 2016), <https://lk-k.com/wp-content/uploads/2016/05/KAUFMANN-KOHLER-POTESTA-CIDS-Research-Paper-Reform-of-Investor-State-Arbitration-2016.pdf> (last accessed on Aug. 11, 2017).

¹⁷ SIAC IA Rules, r. 5.1 & 5.2.

¹⁸ SIAC IA Rules, r. 5.2 *in fine*. The criteria to be considered by the Court in this regard are "*the complexity, the quantum involved or other relevant circumstances of the dispute*".

¹⁹ ICC Rules, art. 2(1) app. VI ("*Expedited Procedure Rules*") authorises the ICC Court of Arbitration to appoint a sole arbitrator in arbitration proceedings under the Expedited Procedure rules, even if the parties had agreed otherwise, i.e. to a three-arbitrator tribunal, in the arbitration agreement. SIAC Rules, r. 5.2(b) contains a similar provision.

complexity and workload of most investment arbitration proceedings, however, it appears unlikely that the Court will make extensive use of this rule.

In contrast to the ICSID Rules, and taking into consideration the criticism investor-State arbitration frequently faces regarding the time taken to constitute a tribunal, the SIAC IA Rules provide relatively short deadlines for the nomination of arbitrators. If, on a three-arbitrator tribunal, a party fails to nominate its arbitrator within 35 days after receipt of the other party's nomination, the Court will appoint an arbitrator *in lieu* of that party.²⁰ Failing an agreement among the parties, the Court will also appoint the presiding arbitrator.

These deadlines are longer than the nomination deadlines under the SIAC Arbitration Rules²¹, which require a nomination within 14 days after receipt of the other party's nomination of an arbitrator, but are substantially shorter than the deadlines under the ICSID Rules²² pursuant to which the tribunal must be constituted within 90 days from the dispatch of the notice of registration by the Secretary-General. It remains to be seen how the short deadlines under the Rules, which especially for States with their administrative processes (which may, for example, require prior authorisation of certain procedural decisions by superordinate government bodies) are likely to prove quite challenging, will fare with potential users.

Having said that, the appointment system adopted under the SIAC IA Rules not only shortens and streamlines the nomination procedure, but the active role of the Court also ensures that the non-participation of a party, often for strategic reasons, does not prevent the proceedings from advancing. Given the significant amount of time that usually passes between the initiation of the proceedings and the constitution of the tribunal, this is a welcome development which is likely to contribute to more cost and time efficient arbitral proceedings.

Finally, it is worth mentioning that even in cases where an arbitrator is appointed by the Court, SIAC involves the parties in the procedure. Pursuant to Rule 8(a)-(e), the Court initially invites the parties to express their views on the necessary qualifications of the arbitrator and, on that basis, compiles a list of candidates (including at least five names), which is then communicated to the parties. The parties may delete any candidates they consider unfit and must number the remaining names in order of preference. If a candidate is acceptable to both parties, the Court will appoint that candidate. Only if a mutually acceptable candidate cannot be found, the Court will appoint a candidate at its discretion. While this approach is decidedly more liberal than the closed-list approach favoured by other arbitral institutions (e.g. by the Court of Arbitration for Sport), it does impose certain limitations on the freedom of each party to appoint an arbitrator of its choice. However, in view of the parties' ability to participate in the appointment procedure, in particular by setting out the relevant qualifications, and the added value of the Court's

²⁰ SIAC IA Rules, r. 7.2. If a sole arbitrator is to be appointed, the time limit for a joint appointment by the parties is 42 days after the commencement of the arbitration, failing which the Court will appoint the sole arbitrator (SIAC IA Rules, r. 6.2).

²¹ SIAC Rules, r. 10.2 & 11.2.

²² Convention on the Settlement of Investment Disputes between States and Nationals of other States, March 18, 1965, 575 U.N.T.S. 159, art. 38 [*hereinafter* "ICSID Convention"]; ICSID Rules, r. 4. The first draft of the SIAC IA Rules, however, provided for even shorter deadlines of 28 days for the (joint) nomination of a sole arbitrator and the nomination of a party-appointed arbitrator on a three-member tribunal respectively.

expertise with respect to suitable candidates, SIAC's list approach appears to be a sensible compromise with particular benefits for less experienced parties.

B. Challenge of Arbitrators

The challenge of arbitrators under the SIAC IA Rules follows similar efficiency considerations.

The opportunity to challenge an arbitrator protects the right of the parties to an independent and impartial tribunal²³ and constitutes a fundamental pillar of arbitration. In recent years, however, arbitrator challenges have increasingly become an instrument of obstruction. This is particularly visible in investment arbitration where (repeated) challenges against arbitrators are increasingly made in order to delay and frustrate the proceedings.²⁴

In ICSID proceedings, arbitrator challenges are particularly effective because they must be decided by the tribunal itself and – until resolved – effectively suspend the on-going proceedings.²⁵ Moreover, while challenges are to be filed “*promptly*” under the ICSID Rules²⁶, the content of this notion is vague and likely to lead to debate between the parties as to whether a challenge was raised in time. Furthermore, the ICSID Rules expressly permit challenges until the proceedings are closed and, in practice, challenges are indeed often brought late in the proceedings.

The SIAC IA Rules opt for a different approach in which challenges to arbitrators are decided not by the tribunal, but by the Court.²⁷ While the Court decides on the challenge, the arbitration may, at the discretion of the Registrar, proceed.²⁸

Moreover, strict deadlines for challenges apply under the SIAC IA Rules. Arbitrator challenges must be made within 28 days of (i) the appointment of the arbitrator, or (ii) after the challenging party became aware of circumstances giving rise to justifiable doubts as to the arbitrator's impartiality or independence.²⁹ Moreover, and notably, the challenging party must pay a non-refundable challenging fee.³⁰ This approach is based on and consistent with the SIAC Rules³¹ and may serve to prevent or at least reduce vexatious challenges. If, within 21 days from receipt of

²³ SIAC IA Rules, r. 10.1.

²⁴ For prominent examples of investment arbitrators being subjected to repeated challenges by the parties, see Lacey Yong, *Ruling rejecting Kaufmann-Kohler conflict upheld by ICSID committee*, GLOBAL ARB. REV. (May 7, 2017); (ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (July 26, 2016).

²⁵ See ICSID Convention, art. 57 & 58. However, arbitrator challenges and their effects on pending proceedings were identified as a potential area of amendment in the current ICSID Rules amendment process initiated in October 2016, see <https://icsid.worldbank.org/en/Documents/about/ICSID%20Rules%20Amendment%20Process-ENG.pdf> (last accessed on Aug. 11, 2017).

²⁶ ICSID Rules, r. 9(1).

²⁷ SIAC IA Rules, r. 12 & 13. The main advantages of this approach are (i) that the Court may adjudicate arbitrator challenges as a neutral instance, (ii) that the arbitration may proceed while the Court decides on the challenge and (iii) that the decision of arbitrator challenges by the Court rather than by arbitral tribunals may (as demonstrated by the practice of the LCIA Court which regularly publishes its challenge decisions) contribute to the development of a more uniform and reliable “case law” on arbitrator challenges.

²⁸ SIAC IA Rules, r. 12.4.

²⁹ SIAC IA Rules, r. 12.1.

³⁰ SIAC IA Rules, r. 12.3 and sched. 2. The challenge fee is SGD 8,000 for overseas Parties and SGD 8,560 (including 7 % Goods and Services Tax) for Singapore Parties.

³¹ See SIAC Rules, r. 15 & 16.

the challenge, the other party does not agree to the challenge and the challenged arbitrator does not withdraw from office, the Court will decide on the challenge.³²

V. Conduct of the Proceedings

This section will set out the procedural powers granted to the tribunal under the SIAC IA Rules (section V.A) and then address the approach of the Rules with respect to third-party funding (section V.B) as well as the early dismissal of claims and defences (section V.C).

A. Powers of the Tribunal

The SIAC IA Rules aim to reduce the kind of “procedural deadlocks” that often occur in other investor-state disputes by providing the tribunal with broad procedural powers even in the absence of a party agreement to that effect.

In accordance with international arbitral practice and unless otherwise agreed by the Parties, Rule 16.5 authorizes the presiding arbitrator to make procedural rulings alone. Furthermore, unless otherwise agreed upon by the parties, the tribunal may appoint an expert to report on specific issues and may require the parties to provide that expert with relevant information.³³ Experts may provide opinions on points of both law and fact, with legal opinions having become particularly prevalent in recent years. Finally, the tribunal may decide on the number of submissions and the content and style of those submissions.³⁴ While all of these points are relatively minor, their impact on the conduct of the proceedings should not be underestimated. In practice, they may serve to circumvent the deadlocks frequently experienced once the proceedings have been initiated, particularly in the early stages of the proceedings, and before the tribunal has rendered its first procedural order.

The other procedural powers of the tribunal under Rule 24 reflect international arbitral practice and rely, *inter alia*, on the SIAC Rules. In the absence of an agreement between the parties on central procedural issues, the tribunal is provided with significant case management powers, including with respect to the setting of time limits, the investigation of the facts, including production of documents, the issuance of orders on securities for costs or the determination of the applicable law.

B. Third-Party Funding

A major innovation of the SIAC IA Rules is Rule 24(l) which provides specific guidance with respect to third-party funding arrangements in investor-state arbitration.

In recent years, third-party funding – which is the funding of a dispute by a (usually commercial) non-party in exchange for an agreed return – has emerged as one of the hot topics in international arbitration. It plays a particularly prominent role in investment arbitration where disputes tend to be both long and costly, creating a need for external financing.³⁵ Third-party

³² In accordance with SIAC IA Rules, r. 13.4, the Court will issue a reasoned decision.

³³ SIAC IA Rules, r. 23.

³⁴ SIAC IA Rules, r. 17 requires memorial-style submissions, i.e. the parties are required to submit witness statements and/or expert opinions together with their written submissions. This is in contrast to pleading-style submissions (*see e.g.*, SIAC Rules, r. 20) which do not require the parties to attach their evidence, and aims to further expedite and streamline the proceedings.

³⁵ From the abundance of recent literature on this topic, *see only* Khushboo Hashu Shadadpuri, *Third-Party Funding in International Arbitration: Regulating the Treacherous Trajectory*, 12 (2) ASIAN INT'L ARB. J. 77 (2016).

funding arrangements enable not only parties with limited liquidity and/or funds but also those simply wishing to outsource their litigation risks to obtain the funds necessary to pursue a potential multi-year dispute. As a result, a rapidly growing market for third-party funders has emerged which, among others, finances the overwhelming majority of currently pending investment arbitration cases.

Unsurprisingly, these developments have sparked discussion on whether and how this market should be regulated. Singapore and Hong Kong have been at the forefront of legislative action, each introducing third-party funding bills in January of 2017.³⁶ Third-party funding arrangements have also triggered debate among legal scholars and arbitrators, relating *inter alia* to the question of whether such agreements must be disclosed in order to avoid possible conflicts of interest, and also to broader ethical and regulatory considerations such as, if and to what extent funders may control the proceedings and how they should be regulated (e.g. with respect to their financial endowment).³⁷ Recently, several ICSID tribunals have ordered parties to disclose the identity of third-party funders, basing their decision on the “*inherent powers*” of the arbitral tribunal, instead of specific rules addressing this issue.³⁸

The SIAC IA Rules expressly authorize tribunals to order the disclosure of the existence of a third-party funding arrangement and/or the identity of the third-party funder. Where appropriate, the tribunal may also order the disclosure of details of the third-party funder’s interest in the outcome of the proceedings.³⁹ Furthermore, the tribunal may take into account the existence of third-party funding arrangements when making decisions on costs.⁴⁰ Although the draft SIAC IA Rules went even further by, *inter alia*, authorizing the Tribunal to render cost orders against funders, the SIAC IA Rules have provided investment arbitrators with new and far-reaching powers whose application in practice will have to be monitored.

Nonetheless, the SIAC’s approach to third-party funding under the SIAC IA Rules provides welcome certainty on an increasingly important subject-matter and authorises the tribunal – even in the absence of a party agreement – to investigate the factual background of a third-party funding arrangement and its possible implications on the arbitral proceedings to the extent it considers this necessary.

C. Early Dismissal of Claims and Defences

Much of the negative publicity that investment arbitration is currently facing relates to actual or perceived ‘frivolous’ claims advanced by private parties against sovereign States. Irrespective of whether these claims are actually ‘frivolous’ or not, which is rarely evident and almost always

³⁶ For further information see Boog & Raneda, *supra* note 10. In Singapore, one of the central requirements is that third-party funders must fulfill certain minimum requirements related to their financial resources in order to be able to offer third-party funding services. In Hong Kong, the existence of a funding agreement (but not its content) must be disclosed at the outset of the arbitral proceedings.

³⁷ See e.g., JONAS VON GOELER, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION AND ITS IMPACT ON PROCEDURE, ch. 4, 125 – 162 (2016).

³⁸ EuroGas Inc. and Belmont Resources v. Slovak Republic, ICSID Case No. ARB/14/14, Procedural Order No. 3, (June 23, 2015); Muhammet Çap & Sehil İn_aat Endustri ve Ticaret Ltd. Sti v. Turkmenistan, ICSID Case No. ARB/12/6, Procedural Order No. 3 (June 12, 2015). See also South American Silver Limited (Bermuda) v. Bolivia, PCA Case No. 2013-15, Procedural Order No. 10 (Jan. 11, 2016).

³⁹ SIAC IA Rules, r. 24(l). In an earlier draft of the SIAC IA Rules, the tribunal was also granted the power to issue a cost award against the third-party funder. This provision was subsequently removed.

⁴⁰ SIAC IA Rules, r. 33.1.

subject to disagreement between the parties, it is undisputed that, in recent years, arbitral proceedings have become increasingly costly and time-consuming, frequently due to deliberate obstructive behaviour by certain parties.

As a consequence of these developments, arbitral institutions have increasingly been looking for means to address manifestly meritless claims and defences as swiftly as possible in order to streamline the arbitral process and reserve time and resources for 'real' cases.

Rule 26 of the SIAC IA Rules addresses this issue by providing for an early dismissal procedure. According to Rule 26, a party may apply for early dismissal of a claim at any point during the proceedings. Such a request may be made on the basis that the claim or defence is:

- (i) manifestly without legal merit;
- (ii) manifestly outside the jurisdiction of the Tribunal; or
- (iii) manifestly inadmissible.

The early dismissal procedure set forth in Rule 26 was inspired by Rule 41.5 of the ICSID Rules, according to which a party may file an objection with the tribunal that a claim is manifestly without legal merit. However, Rule 26 is significantly broader than the ICSID Rules which permit 'preliminary objections' only against the claim itself, but not against defences raised by the Respondent. By contrast, Rule 26 explicitly permits the early dismissal of both claims *and defences* and, in addition to imposing stricter time limits on the Tribunal for rendering its decision, provides the Tribunal with tools to streamline the arbitral procedure and to address inefficiencies as well as possible dilatory tactics employed by the Parties. The revised 2016 SIAC Rules also include an early dismissal procedure.⁴¹ Under the 2016 SIAC Rules, an early dismissal is possible for claims and defences which are either manifestly without legal merit or manifestly outside the jurisdiction of the tribunal.

The SIAC IA Rules are broader than both the ICSID Rules and the 2016 SIAC Rules and expand the scope of the early dismissal procedure to claims and defences that are manifestly inadmissible. While the available ICSID case law on claims that are "*manifestly without legal merit*"⁴² may offer some guidance as to the future application of this provision, it remains to be seen how SIAC investment tribunals will apply Rule 26 in practice.

In terms of procedure, a party seeking early dismissal must first make an application to the tribunal (copying the other party), stating in detail the facts and law supporting its application. The tribunal will then decide, in its discretion, whether or not to allow the application to proceed. If the tribunal allows the application to proceed, it will hear all parties and then render its decision.⁴³ Under the SIAC IA Rules, the tribunal must decide on the application within 90

⁴¹ SIAC Rules, r. 29. For further details, see Boog & Raneda, *supra* note 11, at 597 *et seq.*

⁴² See *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, The Tribunal's Decision on the Respondent's Objection under Rules 41(5) of the ICSID Arbitration Rules (May 12, 2008).

⁴³ The Tribunal may render its decision as an order or as an Award (SIAC IA Rules 2017, r. 26.4).

days of the date of its filing.⁴⁴ Although compared to the SIAC Rules⁴⁵ this time limit is extended, for investment arbitration standards they are rather strict.

Whether or not the early dismissal procedure will have a significant impact on arbitral proceedings under the SIAC IA Rules remains to be seen. While the SIAC's approach generally deserves approval, it cannot be ignored that it bears the risk of additional "procedural battles" – resulting in additional cost and delay. Moreover, it can be expected that tribunals will be reluctant to make use of this instrument too frequently, as any early dismissal entails the risk of subsequent challenges of the arbitral decision for an alleged violation of a party's right to be heard.

VI. Interim and Emergency Interim Relief

The SIAC IA Rules not only expressly authorize the parties to seek interim relief from the tribunal⁴⁶ or from the state courts⁴⁷, but also introduce an Emergency Arbitrator procedure.⁴⁸

In recent years, emergency arbitrator procedures have become increasingly popular and several arbitral institutions have amended their rules to include such procedures.⁴⁹ SIAC was and still remains one of the pioneers of emergency arbitration, having introduced an emergency arbitrator procedure in its Rules for the first time in 2010. As of March 31, 2017, SIAC has administered 57 emergency arbitrations, far more than any other arbitral institution.⁵⁰

Other institutional rules have taken different approaches to the applicability of emergency arbitrator provisions to investor-State disputes. Under the ICC Rules, emergency arbitrator proceedings are expressly excluded for any treaty-based arbitration. By contrast, under the SCC Rules, the parties' agreement to arbitrate includes their presumed agreement to the emergency arbitrator provisions set out in Appendix II of the Rules, without any exception for investor-State disputes, whether treaty-based or otherwise.⁵¹ As a result, a party may initiate emergency arbitrator proceedings against a State without that State having expressly consented to such emergency arbitration.⁵² The ICSID Rules does not provide for emergency arbitration at all.

The SIAC IA Rules take a mediating position. While they provide for the possibility of an emergency arbitrator, these provisions only apply if all parties have given their express and

⁴⁴ SIAC IA Rules, r. 26.4.

⁴⁵ Under the SIAC Rules, the time limit is 60 days (SIAC Rules, r. 29.4).

⁴⁶ SIAC IA Rules, r. 27.1.

⁴⁷ *Id.* r. 27.2.

⁴⁸ *Id.*, r. 27 and sched. 1.

⁴⁹ Emergency arbitrator provisions have *inter alia* been introduced by the International Centre for Dispute Resolution of the American Arbitration Association, the Stockholm Chamber of Commerce, the Swiss Chambers' Arbitration Institution, the Hong Kong International Arbitration Centre, the London Court of International Arbitration and the World Intellectual Property Organization.

⁵⁰ For details on the SIAC emergency arbitrator mechanism, see Boog & Raneda, *supra* note 11, at 598 *et seq.*

⁵¹ The Introduction to the SCC Rules states: "Under any arbitration agreement referring to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "Arbitration Rules") the parties shall be deemed to have agreed that the following rules, or such amended rules, in force on the date of the commencement of the arbitration, or the filing of an application for the appointment of an Emergency Arbitrator, shall be applied unless otherwise agreed by the parties." (emphasis added).

⁵² Since 2014, a total of four applications for emergency relief have been filed against State parties under the SCC Rules (TSIKinvest v. Republic of Moldova, SCC Emergency Arbitration No. EA (2014/053) (Apr. 29, 2014); JKX Oil & Gas plc, Poltava Gas BV and Poltava Petroleum Co. v. Ukraine, SCC, Emergency Award, (Jan. 14, 2015); Evrobal v. Republic of Moldova, SCC Case No. 2016/082 (May 30, 2016); Kompozit v. Republic of Moldova, SCC Arbitration EA (2016/095) (Jun. 14, 2016).

specific consent.⁵³ In contrast to the opt-out mechanism of the SCC Rules, the SIAC IA Rules thus favour an opt-in approach which gives more deference to the conscious decision of the parties for or against emergency arbitration.

In its details, the emergency arbitrator procedure set out in Schedule 1 of the SIAC IA Rules is largely modelled after the emergency arbitration provisions in the SIAC Rules.

Proceedings are initiated by filing a written application for emergency interim relief with the SIAC Registrar. The application must specify the nature of the relief sought, the reasons why the applicant is entitled to such relief and a statement certifying that all parties have been provided with a copy of the application.⁵⁴ The Court will then decide in its discretion whether or not to allow the application to proceed. If the Court accepts the application, it will seek to appoint an emergency arbitrator within one day of receipt of the application and payment of the administration fee and deposits.⁵⁵ Within two days of its appointment, the emergency arbitrator will establish a procedural schedule. While the schedule must provide reasonable opportunity for the parties to be heard, the emergency arbitrator and the parties are largely free to determine the details of the procedure, including, for example, the freedom to agree to proceedings by telephone or video-conference or to have written submissions only *in lieu* of a hearing.⁵⁶ The emergency arbitrator must render his/her decision within 14 days from the date of appointment.⁵⁷ Extensions of this time limit will be granted by the Registrar only in exceptional circumstances.⁵⁸

Given its significant experience with emergency arbitration procedures, there is no doubt that SIAC possesses the necessary expertise and administrative capabilities to successfully administer emergency arbitrations under the SIAC IA Rules. Yet, as the emergency arbitrator provisions only become applicable if all parties – including State parties – expressly declare their consent, it is uncertain whether these provisions will play a significant role in practice. In view of the reservations that State parties may harbour against emergency arbitrator procedures, which may be perceived by them as a measure to curtail their sovereign rights, and also taking into consideration the fact that emergency interim relief will almost always be sought against State parties, there is reason to believe that State parties will rarely grant their consent to emergency arbitration.

Further, emergency arbitrator proceedings in the context of investment arbitration raise additional questions, the detailed discussion of which goes beyond the scope of this piece, but which would likely also influence the decision of the parties on whether to opt for emergency

⁵³ SIAC IA Rules, r. 27.4.

⁵⁴ *Id.* sched. 1, ¶ 1.

⁵⁵ The non-refundable administration fee for emergency arbitrator applications is SGD 5,350 (including 7 per cent GST) for Singapore Parties and SGD 5,000 for Overseas Parties. In addition, the applicant must pay a deposit of SGD 30,000 toward the Emergency Arbitrator's fees and expenses, the standard fee for the Emergency Arbitrator being SGD 25,000.

⁵⁶ SIAC IA Rules, sched. 1, ¶ 7.

⁵⁷ *Id.* sched. 1, ¶ 9. For comparison, under the SCC Rules the emergency arbitrator must render its decision within five days from the date on which the application was referred to it (SCC Rules 2017, art. 8 app. II). Under the ICC Rules, the emergency arbitrator must render its decision within 15 days from the date of the transmission of the file (ICC Rules, art. 6(4), app. V).

⁵⁸ *Id.* sched. 1, ¶ 9.

arbitration. These include, for example, the compatibility of emergency arbitration with the cooling-off periods provided for in many bilateral investment treaties or the question of whether the right to emergency arbitration can be “*exported*” to other treaty regimes by means of most-favoured nation (MFN) clauses.⁵⁹

VII. Third-Party Submissions

In recent years, the legitimate role of public interests in investment arbitration proceedings and, more specifically, the participation of third parties (also referred to as “*amici curiae*”) in those proceedings have become a frequently debated issue. Several ICSID tribunals⁶⁰, as well as the WTO Panels and the Appellate Body⁶¹, have addressed this question and have attempted to strike a balance between the privacy and confidentiality interests of the parties to the dispute on the one hand and the public interest often represented by non-governmental organisations on the other hand, with regard to public access to proceedings and information on how governmental decision-making and public funds will be affected by the decisions of investment arbitration tribunals. As the legitimacy of the investment arbitration system is increasingly coming under scrutiny, the international community has reacted by making arbitral procedure more transparent, *inter alia* by enacting the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration [the “**UNCITRAL Transparency Rules**”].⁶²

The SIAC IA Rules must be understood against this trend towards greater transparency in investment arbitration. The Rules focus on a particular aspect of third-party participation, namely the right of non-disputing parties to make written submissions to the tribunal. They distinguish between two scenarios:

- 1) Submissions by Non-disputing Contracting Parties on questions of treaty interpretation that are directly relevant to the dispute (Rule 29.1);
- 2) Submissions by Non-disputing Contracting Parties or Non-disputing Parties regarding a matter within the scope of the dispute (Rule 29.2).

A Non-disputing Contracting Party is defined in Rule 1.5 as “*a party to a treaty pursuant to which the dispute has been referred to arbitration in accordance with these Rules and that is not a Party to the arbitration*” whereas a Non-Disputing Party is defined as “*a person or entity that is neither a Party to the arbitration nor a party to a treaty pursuant to which the dispute has been referred to arbitration in accordance with these Rules*”. A Non-disputing Contracting Party may make a submission pertaining to treaty interpretation at its own discretion without having to seek leave from the tribunal to do so. The only requirement for the Non-disputing Contracting Party is to provide, together with its

⁵⁹ For background, see Joel Dahlquist, *Emergency Arbitrators in Investment Treaty Disputes*, KLUWER ARB. BLOG, (Mar. 10, 2015), <http://klowerarbitrationblog.com/2015/03/10/emergency-arbitrators-in-investment-treaty-disputes/> (last accessed on Aug. 11, 2017).

⁶⁰ Between 2003 and 2017, ICSID tribunals rendered a total of 51 decisions on amicus curiae applications, 20 in 2016 and 2017 alone. For further detail, see *Decisions on Non-Disputing Party Participation*, ICSID, <https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Non-Disputing-Party-Participation.aspx> (last accessed on Aug. 11, 2017).

⁶¹ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Apr. 5, 2001); Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS/58/AB/R, ¶ 99 *et seq* (Oct. 12, 1998).

⁶² The UNCITRAL Transparency Rules came into effect on April 1, 2014 and provide members public access to documents and hearings in UNCITRAL arbitrations, and grant them the opportunity to make submissions in certain circumstances. Nonetheless, they allow for exceptions to be made to protect confidential information.

submission, a written notice to the Registrar and the parties. The Non-disputing Contracting Party's right to make submissions results from the fact that it is a signatory to the relevant treaty and is therefore assumed to have a legitimate interest in setting forth its position regarding the interpretation of such treaty which may become relevant in future disputes where this Party is involved.

By contrast, submissions by Non-disputing Contracting Parties or Non-disputing Parties regarding a matter within the scope of the dispute require a prior application to the tribunal. The legitimate interest of a Non-disputing Party to participate in the proceedings may not be immediately apparent. In determining whether to allow an application under Rule 29.2 to proceed, the tribunal will consider the views of the parties and notably, whether the submission would assist the tribunal in the determination of a factual or legal issue, and whether the Non-disputing Contracting Party or Non-disputing Party has a 'sufficient interest' in the arbitral proceedings.⁶³ With respect to the 'sufficient interest' criterion, SIAC tribunals may draw on the case law handed down with regard to similar provisions in the ICSID Rules⁶⁴ and under the North American Free Trade Agreement ["NAFTA"]⁶⁵ which require a 'significant interest' for third parties to be admitted as *amici curiae*.

The form, content and time limits of any submission by a Non-disputing Party are subject to the discretion of the tribunal.⁶⁶ The tribunal may also, at its discretion, grant the Non-disputing Party access to procedural documents, provided that it takes appropriate measures to safeguard the confidentiality of sensitive information.⁶⁷ It is likely that such issues of confidentiality will play a significant role in practice and will, in each case, require a careful balancing of interests by the tribunal.

VIII. Confidentiality and Publication of Decisions

Investment arbitration proceedings under the SIAC IA Rules are confidential. Rule 37.1 sets forth a comprehensive confidentiality obligation which requires all involved persons as well as the institution itself to keep any information on the proceedings, including their existence, confidential. In addition, hearings are private and any recordings, transcripts or documents used in relation to the arbitral proceedings are also confidential.⁶⁸

There are, however, significant exceptions to the general rule of confidentiality which reflect a broader trend towards greater transparency in investment arbitration. For reasons of political accountability and the often significant public interest in investment arbitration cases, investor-state disputes have gradually become more transparent in recent years. Inspired by a number of

⁶³ SIAC IA Rules, r. 29.3(a) & (c).

⁶⁴ ICSID Rules, r. 37(2)(c). For further background, see A. Saravanan & S.R. Subramanian, *The Participation of Amicus Curiae in Investment Treaty Arbitration*, 5 (4) J. CIV. & LEGAL SCI. 1 (2016), <https://www.omicsgroup.org/journals/the-participation-of-amicus-curiae-in-investment-treaty-arbitration-2169-0170-1000201.pdf> (last accessed on Aug. 11, 2017).

⁶⁵ *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae' (Jan. 15, 2001); *United Parcel Service of America Inc. v. Canada*, ICSID Case No. UNCT/02/1, Award on Jurisdiction (Nov. 22, 2002).

⁶⁶ SIAC IA Rules, r. 29.5 & 29.6.

⁶⁷ *Id.* r. 29.8.

⁶⁸ *Id.* r. 21.4.

decisions by arbitral tribunals, this trend culminated in the adoption of the UNCITRAL Transparency Rules.⁶⁹

The SIAC IA Rules reflect this trend in that they allow the SIAC to publish certain case-relevant information even without the consent of the parties.⁷⁰ By agreeing to arbitration under the SIAC IA Rules, the parties are deemed to have consented to the SIAC publishing information on the nationality of the parties, the identity of the members of the tribunal, the relevant legal instrument and the current status of the proceedings.⁷¹ Furthermore, SIAC may publish redacted excerpts of the tribunal's reasoning and redacted decisions by the Court on challenges to arbitrators.⁷²

The publication of other information, for example the identity of the parties and their counsel, the subject-matter of the dispute, the amount in dispute and the procedural history, requires the express consent of the parties.⁷³

In its approach, Rule 38 is very similar to the ICSID Rules.⁷⁴ However, it is decidedly less transparent than the UNCITRAL Transparency Rules which aim to provide transparent proceedings through publication of documents, information and open hearings.⁷⁵ The SIAC IA Rules, by contrast, take a more nuanced approach which reveals and reflects their inspiration from the SIAC's commercial arbitration rules and their corresponding standard of transparency. Admittedly, striking a balance between the interests of the parties, which will generally prefer confidential proceedings, and of the broader public, which will insist on greater transparency, is a difficult undertaking. While the UNCITRAL Transparency Rules take a clear pro-transparency stance, which is likely to also influence the upcoming revision of the ICSID Arbitration Rules⁷⁶, the SIAC IA Rules give greater deference to the presumed confidentiality interests of the parties. Whether and to what extent those interests indeed exist in every case and how SIAC investment tribunals will interpret the Rules and balance the concerned interests in practice remains to be seen.

IX. Awards

In accordance with the objective to streamline arbitral proceedings, the SIAC IA Rules emphasize that the award shall be made as promptly as possible. Rule 30.3 grants the tribunal 90 days from the date on which the tribunal declared the proceedings closed, which in turn shall be done "*as promptly as possible*" after the tribunal is satisfied that the parties have no further relevant

⁶⁹ See *supra* section VII.

⁷⁰ SIAC IA Rules, r. 38.

⁷¹ *Id.* r. 38.1 & 38.2.

⁷² *Id.* r. 38.2. ICSID has been publishing redacted excerpts of awards since 1972. The publication of challenge decisions, which serves to elucidate current international best practice in this regard, was started by the London Court of International Arbitration in 2011, see Thomas W. Walsh & Ruth Teitelbaum, *The LCIA Court Decisions on Challenges to Arbitrators: An Introduction*, 27 (3) ARB. INT'L 283 (2011).

⁷³ SIAC IA Rules, r. 38.3.

⁷⁴ ICSID Rules, r. 48.4.

⁷⁵ The first cases in which the UNCITRAL Transparency Rules were applied are *Iberdrola, S.A. and Iberdrola Energia, S.A.U. v. Bolivia*, PCA Case No. 2015-05, Procedural Order (Aug. 7, 2015); *BSG Resources Limited v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 2 (Sept. 17, 2015).

⁷⁶ The ICSID Arbitration Rules reform process formally commenced in October 2016. The scope of the contemplated rules revision is set out in an ICSID paper, *The ICSID Rules Amendment Process*, <https://icsid.worldbank.org/en/Documents/about/ICSID%20Rules%20Amendment%20Process-ENG.pdf> (last accessed on Aug. 11, 2017).

and material evidence, to send the draft award to the SIAC Registrar. This time limit may only be extended upon agreement by the parties or decision by the Registrar. By contrast, no such time limit to render the award exists under the ICSID Rules.⁷⁷ The award is subject to scrutiny by the Registrar who may “*suggest modifications as to the form of the Award and, without affecting the Tribunal’s liberty to decide the dispute, draw the Tribunal’s attention to points of substance*”.⁷⁸ While scrutiny of awards is practiced by a number of commercial arbitration institutions, most notably the ICC, it is uncommon in investment arbitration. Neither the ICSID Rules nor the SCC Rules provide for a review of the award by the institution.

Rule 30.11 clarifies that the award is final and binding and that the parties are obligated to carry out the award immediately. It further states that the parties also “*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*”. Combined with the fact that – as is the case under the ICSID regime⁷⁹ – SIAC awards are not subject to annulment proceedings, the Rules ensure the finality of any decision taken by the tribunal.

However, the issue of immunity from enforcement remains and it is therefore likely that many of the problems linked to the State party’s principal immunity from enforcement will persist. In addition, it remains to be seen whether the decidedly investor-friendly approach taken by the SIAC IA Rules will *a priori* deter State parties from submitting their investment disputes to the SIAC.

X. Costs

The fee regime of the SIAC IA Rules⁸⁰ is based on the SIAC Rules. As a rule, administrative and arbitrator fees are based on the amount in dispute and may thus vary depending on the financial scope of the matter.

All arbitrations initiated under the SIAC IA Rules are subject to a reasonable yet non-refundable filing fee of SGD 2,000.⁸¹ In addition to the filing fee, and depending on the amount in dispute, SIAC charges an administration fee between SGD 3,800⁸² and SGD 95,000⁸³. Arbitrator fees also vary depending on the amount in dispute and range from SGD 6,250⁸⁴ to SGD 605,000⁸⁵, plus a percentage of the amount in dispute.⁸⁶

By comparison, the ICSID fee schedule is not based on the amount in dispute, but applies fixed rates both for administrative and arbitrator fees. The administrative fee charged by ICSID upon

⁷⁷ ICSID Rules, r. 47.

⁷⁸ SIAC IA Rules, r. 30.3.

⁷⁹ ICSID Convention, art. 52.

⁸⁰ SIAC IA Rules, r. 32-35 & Schedule of Fees.

⁸¹ The filing fee is SGD 2,140 (including 7 % Goods and Services Tax) for Singapore Parties.

⁸² Sum in dispute of up to SGD 50,000.

⁸³ Sum in dispute above SGD 100,000,000.

⁸⁴ Sum in dispute of up to SGD 50,000.

⁸⁵ Sum in dispute above SGD 500,000,000.

⁸⁶ The percentage decreases as the sum in dispute increases, and varies between 13.8 % (of excess over 50,000) and 0.004 % (of excess over 500,000,000) of the sum in dispute. The maximum fee for an arbitrator is capped at SGD 2,000,000.

initiation of the arbitral proceedings is currently USD 42,000.⁸⁷ It is an annual fee which becomes due each year thereafter for the duration of the proceedings. ICSID arbitrators are paid a flat per-day fee of USD 3,000.⁸⁸ In view of the often long duration of ICSID proceedings, the costs of the proceedings can become very significant. Particularly for less complex proceedings and those with potentially smaller amounts in dispute, the SIAC IA Rules may therefore offer a cheaper alternative to ICSID proceedings.

XI. Conclusion and Outlook

With the enactment of the SIAC IA Rules, Singapore is aiming to position itself as a new hub for investment arbitration, both in Asia and beyond.

The SIAC IA Rules offer a modern, innovative and high-quality set of rules. They address – and present balanced solutions to – the most pressing issues facing international investment arbitration, drawing on its experiences from the application of the SIAC Rules as well as international best practice in investment arbitration.

The SIAC IA Rules actively address some of the main points of criticism which have been raised against investment arbitration in recent years, in particular, with respect to the transparency of proceedings and the participation of non-disputing stakeholders. Here, the SIAC IA Rules aim to strike a (difficult) balance between the interests of the parties and that of the broader public. As a result of this balanced approach, in terms of transparency and third party participation, the SIAC IA Rules do not go as far as the UNCITRAL Transparency Rules, for instance, and also do not reflect all of the numerous amendment suggestions which are currently being debated in the context of the revision of the ICSID Arbitration Rules.

However, irrespective of the above, the question of whether or not the SIAC will manage to establish itself as a viable alternative to ICSID and ad hoc investment arbitration proceedings will primarily depend on whether the SIAC IA Rules will gain acceptance by both investors *and* States. While certain features of the SIAC IA Rules such as the comparatively lower administrative costs may appeal to both sides, other more investor-friendly features such as their broad scope of application or shorter time limits may in particular deter State parties from consenting to their application. On the other hand, the possibility to make reservations (for example in relation to jurisdictional matters or time limits) may accommodate some of the concerns that State parties may harbour regarding the application of the SIAC IA Rules.

In any event, as demonstrated by the example of other investment arbitration bodies such as ICSID, new players need a long breath. It will likely be some time before the SIAC IA Rules will be put to test for the first time and it remains to be seen if and how they will pass this test. While Singapore undoubtedly has the expertise, the experience and the infrastructure to handle complex investment arbitration cases, the challenges to legitimacy that investment arbitration itself is currently facing from a critical public as well as from recently elected administrations, and the proposals for new forms of investor-State dispute settlement mechanisms such as standing investment courts, render any prediction as to the future success the SIAC IA Rules difficult.

⁸⁷ ICSID Schedule of Fees (effective July 1, 2017), ¶ 5. In addition, ICSID charges a filing fee of (currently) USD 25,000 (ICSID Schedule of Fees, ¶ 1) as compared to the SGD 2,000 filing fee under the SIAC IA Rules.

⁸⁸ Exclusive of reimbursement for travel and other expenses.

The success of the SIAC IA Rules will largely depend on whether investment arbitration as a whole is able to constructively react and adapt to the new *zeitgeist*. The enactment of the UNCITRAL Transparency Rules and the approach taken by the SIAC IA Rules, demonstrate that there is a significant commitment to this goal within the investment arbitration community.