

SIAC INVESTMENT ARBITRATION:
RULE INNOVATIONS ARE ONLY THE FIRST STEP

Rule innovations alone – no matter how enlightened or essential – will not win customers away from the dominant forms of investment arbitration used today, namely ICSID and UNCITRAL rules-based arbitration. The groundbreaking new SIAC Investment Arbitration Rules (“IA Rules”) offer a substantially more efficient and progressive system of investment arbitration premised on a more muscular administrative apparatus.¹ However, until investors and states gain confidence that the new system works in practice or until they have some political reason to “buy in” to the new system, they will be hesitant to abandon the time-tested default options.

As such, the most important way in which SIAC can succeed in its quest to gain a foothold in the investment arbitration market is to shape the investment treaty landscape to its advantage and target a niche clientele of likely users.

Assessing the competition

Through 2015, claimants had filed a total of 451 ICSID-administered investment arbitration cases, with all but a handful administered in accordance with the ICSID Arbitration Rules or ICSID Additional Facility Rules, both of which were last revised in

¹ See Jonathan Lim and Dharshini Prasad, *Draft SIAC Investment Arbitration Rules 2016—an overview*, Lexis®PSL, 18 February 2016 (providing a comprehensive overview of the IA Rules’ main improvements to international investment arbitration procedure).

2006.² ICSID's main procedural flaws include, among other things, the secretariat's relative lack of authority in prompting action from sluggish parties and arbitrators, the indefinite "ceasefire" period of inactivity that accompanies arbitrator challenges, and various issues related to annulment proceedings, which now seem to follow initial proceedings almost as a matter of course.³ On the other hand, ICSID arbitration has the treaty-based advantage of eventually leading to an award that is final and binding within the territories of Contracting States to the ICSID Convention and thus not subject to set-aside procedures at the national level.⁴

Through 2015, the total number of publicly known investment arbitrations filed in accordance with the UNCITRAL Arbitration Rules was 212, with the most common administering institution being the Permanent Court of Arbitration at the Hague.⁵ While the long-awaited revision of the UNCITRAL Arbitration Rules in 2010 incorporated some important innovations on issues such as multi-party arbitration and interim measures, it is safe to assume that the UNCITRAL Arbitration Rules will never empower institutional actors as much as the IA Rules will, as it would be against the *ad hoc* spirit of the original UNCITRAL Arbitration Rules, designed as they were to give parties and arbitrators maximum autonomy, with minimal interference from an administering institution.⁶ Also, unlike ICSID awards, UNCITRAL awards often must overcome the additional hurdle of national-level enforcement proceedings, where the awards are typically subject to set aside on

² See United Nations Conference on Trade and Development (UNCTAD) Investment Policy Hub, <http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution>.

³ See Adam Raviv, *A few steps to a faster ICSID*, Global Arbitration Review, Vol. 8, Issue 5, at 23-26.

⁴ ICSID Convention, Arts. 53-54.

⁵ See UNCTAD Investment Policy Hub, <http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution>.

⁶ For instance, provisions such as Article 25 of the UNCITRAL Arbitration Rules, which states that "the arbitral tribunal may extend the time limits [for written statements] if it concludes that an extension is justified," are unlikely to be diluted to allow an arbitral institution to set strict deadlines.

New York Convention grounds, including public policy⁷ – but, on the other hand, they are not subject to an ICSID-like annulment process.⁸

Learning from the SCC’s experience

SIAC can learn the most about how to compete against the behemoths that are ICSID and UNCITRAL by studying the trajectory of the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”). Based on the number of cases filed, the SCC has emerged as the only serious alternative to ICSID for pursuing an investment arbitration claim at an institution in accordance with that institution’s own rules.⁹ Through 2015, the SCC had administered 85 investor-state arbitration cases, with 72% (62) administered under the SCC Arbitration Rules.¹⁰ Notably, 2015 was a record year in terms of new investor-state cases, with 12.¹¹

The SCC has historically thrived in this area thanks in large part to Sweden’s status as a neutral state in close geographic proximity to Eastern and Western Europe, as well as the former Soviet Union.¹² As of 2012, 61 bilateral investment treaties (“BITs”) called for arbitration under the SCC Arbitration Rules.¹³ Among these BITs, there are several between

⁷ See New York Convention, Art. V.

⁸ For an interesting recent example of the national-level set-aside process related to a very high-profile UNCITRAL award, see Alison Ross, Dutch Lawyers face off over Yukos, GAR Online, 12 February 2016, available at <http://globalarbitrationreview.com/news/article/34565/dutch-lawyers-face-off-yukos/> (subscription required).

⁹ Based on data on the UNCTAD website, the other institutions that have administered cases in accordance with their own rules include: ICC (4), LCIA (1), the Cairo Regional Center for International Commercial Arbitration (1) and the Moscow Chamber of Commerce and Industry (3). See <http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution>.

¹⁰ See <http://sccinstitute.com/statistics/investment-disputes-2015>.

¹¹ See <http://www.sccinstitute.com/statistics/investment-disputes-2015/>.

¹² K&L Gates, *Guide to Leading Arbitral Seats and Institutions* (stating that “[t]he SCC Institute was established in 1917 and, by the 1970s developed a reputation for dealing with East-West trade disputes”), at 17, <http://www.klgates.com/files/upload/guidetoleadingarbitralseatsandinstitutions.pdf>.

¹³ Arnette Magnusson, The SCC Experience of Investment Arbitration under UNCITRAL Rules, 11 October 2012, at 3, available at <http://www.josemigueljudice->

countries of Western Europe and Eastern Europe or parts of the former Soviet Union that provide for arbitration at the SCC, including, for example, the Belgium-Luxembourg Economic Union-Poland BIT,¹⁴ U.K.-Czech BIT,¹⁵ Spain-Russian Federation BIT,¹⁶ and U.K.-Russian Federation BIT.¹⁷

The East-West theme also undergirds the SCC's prominence as one of only two institutions permitted to administer disputes related to the Energy Charter Treaty ("ECT"), a multilateral treaty on cooperation in the areas of energy transit, trade, investments, and efficiency, as well as environmental protection.¹⁸ As one scholar has explained, "[t]he treaty was born out of the need to find a mutually accepted foundation for energy cooperation between Western European countries and countries of the former Soviet Union and Eastern Europe."¹⁹ Through 2015, of the 87 claims filed under the ECT and in the public domain, 13 have been administered by the SCC under the SCC Rules.²⁰ In comparison, 55 have been administered by ICSID.²¹

In addition to these historical and political considerations, the SCC has also developed its niche market for investment arbitration cases thanks to its advantage in terms of administrative costs. The high costs of registration and administration at ICSID make the pursuit of smaller claims there uneconomical. In particular, potential claimants from developing countries may lack the resources to initiate and sustain such expensive proceedings. ICSID-administered cases generally involve claim amounts that are relatively

arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/UNCITRAL_Disputes_The_SCC_Experience_AM.pdf.

¹⁴ BLEU-Poland BIT of 1987, Art. 9(2)(a).

¹⁵ U.K.-Czech BIT of 1990, Art. 8(2)(b).

¹⁶ Spain-Russian Federation BIT of 1990, Art. 10(2).

¹⁷ U.K.-Russian Federation BIT of 1989, Art. 8(3)(a).

¹⁸ Energy Charter Treaty, Art. 26(4)(c). The other option is, of course, ICSID. *Id.*, Art. 26(4)(a). In addition, an investor may choose to submit a dispute for resolution to a sole arbitrator or ad hoc arbitration tribunal established under the UNCITRAL Rules. *Id.*, Art. 26(4)(b).

¹⁹ Kaj Hobér, Foreword in Crina Baltag, *THE ENERGY CHARTER TREATY: THE NOTION OF INVESTOR*, INTERNATIONAL ARBITRATION LAW LIBRARY, Volume 25 (Kluwer Law International 2012), at xv.

²⁰ See UNCTAD Investment Policy Hub, <http://investmentpolicyhub.unctad.org/ISDS/AdvancedSearch>.

²¹ *Id.*

high, which justifies the institution charging claimants a \$25,000 lodging fee that is not adjustable depending on the amount in dispute.²² ICSID also charges a \$32,000 annual fee for its administrative services.²³

In contrast, the SCC only charges €2,000-2,500 (US\$2,280-2,850) for its registration fee,²⁴ and it determines administrative costs based on the amount in dispute.²⁵ So, for example, a claim for €120,000 would incur an estimated administrative fee of only €4,520 (US\$5,150). The relatively low cost of investment arbitration proceedings at the SCC has attracted many cases for which the claim amount was quite low.²⁶ But that is not to say that institutions such as the SCC are not capable of also administering high-value claims. In fact, SCC is currently administering the highest known investment arbitration claim to be filed in 2014, *Cem Uzan v. Republic of Turkey*, with an amount in dispute of US\$2.5 billion.²⁷

Creating targeted user bases for the SIAC IA Rules

Compared to the SCC, SIAC could enjoy an equally strong, if not stronger, reputation as a center for investment arbitration so long as it actively seeks to shape the evolving investment treaty regime and creates a niche clientele for itself, much like the SCC did a generation before.

International *commercial* arbitration is becoming more and more popular for Asians, and many are bringing their claims to SIAC. Last year, SIAC experienced a “milestone” year, with “the highest ever number of cases filed, highest ever number of administered cases

²² See <https://icsid.worldbank.org/apps/ICSIDWEB/icsidocs/Pages/Schedule-of-Fees.aspx>.

²³ *Id.*

²⁴ See <http://www.sccinstitute.com/dispute-resolution/arbitration/whats-the-procedure/>.

²⁵ See <http://www.sccinstitute.com/dispute-resolution/calculator/>.

²⁶ See, e.g., *Yuri Bogdanov and Yulia Bogdanova v. Republic of Moldova (IV)*, SCC Case No. V091/2012 (claim amount of US\$120,000); *State Enterprise Energorynok v. the Republic of Moldova*, SCC Case No. 2012/175 (claim amount of US\$1.8 million); *Anglia Auto Accessories et al. v. Czech Republic* (discontinued) (claim amount of US\$8 million, the lowest known amount in dispute of all cases in 2014, according to UNCTAD, IIA Issues Note, No. 2, May 2015, at 4, n. 7).

²⁷ See UNCTAD, IIA Issues Note, No. 2, May 2015, at 4, n. 8.

and highest ever total sum in dispute in the history of SIAC, which commenced operations in 1991.”²⁸ At the same time, international *investment* arbitration is also on the rise in Asia. For example, prior to 2012, only one ICSID claim had been filed against Korea, a contract-based claim from 1984.²⁹ In the last four years, however, the floodgates have opened up as two ICSID claims and one UNCITRAL claim have been lodged against the state, while two ICSID claims and one Moscow Chamber of Commerce and Industry claim have been filed by Korean investors against other states.³⁰

Of the roughly 2,850 investment treaties in existence (as of April 2014), 1,194 involve an Asian country (i.e., about 42%), and of the roughly 200 investment chapters under FTAs, 61 involve an Asian country (i.e., about one-third).³¹ This includes 24 intra-Asian FTAs with investment chapters.³² Among these international investment agreements, a few present historic opportunities for SIAC to expand its influence.

First, there is the Trans-Pacific Partnership (“TPP”), which involves 12 Pacific Rim countries, including five Asian countries and Australia and New Zealand. The TPP has already been concluded and, as such, does not list the SIAC IA Rules as an option for the filing of claims in its investment chapter. The TPP provides, however, that if the claimant and respondent agree, “[t]he claimant may submit a claim . . . [under] any other arbitral institution or any other arbitration rules.”³³ Under other investment treaties, language of the “any other institution” variety has been relied on by investors to proceed with arbitration at

²⁸ Press Release, *SIAC Announces Record Case Numbers for 2015*, 25 February 2016, <http://siac.org.sg/69-siac-news/474-siac-announces-record-case-numbers-for-2015>.

²⁹ ICSID ARB/84/2 (“Colt Industries”).

³⁰ The cases brought against Korea are Lone Star Funds v. Korea (ICSID Case No. ARB 12/37), Hanocal v. Korea (ICSID Case No. ARB/15/17) and Dayyani v. Korea (the UNCITRAL claim). The cases brought by Korean investors are Samsung v. Oman (ICSID Case No. ARB/15/30), Ansung Housing v. China (ICSID Case No. ARB/14/25) and Beck v. Kyrgyzstan (the Moscow Chamber of Commerce and Industry claim).

³¹ Julien Chaisse and Shintao Hamanaka, *The Investment Version of the Asian Noodle Bowl: The Proliferation of International Investment Agreements*, ADB Working Paper Series on Regional Economic Integration, No. 128, April 2014, at 3-5.

³² *Id.*

³³ TPP, Art. 9.19(4)(d).

non-enumerated arbitral institutions, such as the SCC.³⁴ Thus, SIAC can push for use of the IA Rules on this basis for disputes arising under the TPP. It might also seek to get the list of available institutions amended eventually, though that could be more difficult.

Second, the ASEAN Comprehensive Investment Treaty represents another key opportunity for SIAC to expand its clientele for investment arbitration claims. It provides for investor-state dispute resolution through, among others, ICSID, UNCITRAL, the Regional Centre for Arbitration at Kuala Lumpur or “any other regional centre for arbitration in ASEAN” or “if the disputing parties agree . . . any other arbitration institution.”³⁵ Thus, similar to the TPP, it would allow for investors to bring cases to non-enumerated institutions, such as the SIAC, provided that the state consents. And there is a possibility that the list of options could be amended as well.

Third, the Regional Comprehensive Economic Partnership, which has not yet been concluded, could be the first treaty to include the option to arbitrate according to the SIAC IA Rules. Or that honor could also go to a myriad of other investment treaties that are being negotiated or will be negotiated by states in the near future.

In addition to taking advantage of these historic opportunities, SIAC would benefit by promoting the IA Rules as an option for inclusion in model investment treaties, especially those of Asian states, and also to seek out “jackpot” opportunities to be the institution of choice for resolution of disputes related to sectoral treaties, such as the ECT.

As a practical matter, the SIAC should primarily be focused on marketing itself as the institution of choice for disputes involving one or more Asian party – as it is perfectly positioned, both geographically and politically, to serve as a central and virtually neutral

³⁴ See, e.g., *Biedermann v. Kazakhstan et al.*, SCC Case No. 97/1996 (details not public, but the case was administered by the SCC, apparently pursuant to Article VI(3)(iv) of the U.S.-Kazakhstan BIT of 1992, which allows for submission of a dispute, with the parties’ consent, to “any other arbitration institution”).

³⁵ ASEAN Comprehensive Investment Agreement, Art. 33.

investment arbitration hub catering to both intra-Asian disputes and disputes between Asians and parties from other parts of the globe.

SIAC should also be pitching its IA Rules to developing countries disillusioned by ICSID arbitration and those that are not ICSID Contracting States³⁶ by emphasizing that the IA Rules will provide them with a more fair and efficient system of dispute resolution than ICSID arbitration in the event that they are sued by an investor.

Finally, in marketing itself to both states and investors, SIAC will surely gain adherents by stressing the reasonableness of its administrative costs in comparison to those of ICSID.³⁷

Conclusion

As discussed above, in order to gain a foothold in the international investment arbitration market, SIAC will need to learn from the SCC's impressive example and promote its IA Rules as an option in the investment arbitration sections of numerous, targeted international investment agreements. If successful, SIAC will be able to develop a niche clientele of users – most likely, investors from Asia and developing countries, and also investors with claims against non-ICSID states. In due course, the IA Rules could very well become a credible alternative to the ICSID and UNCITRAL rules.

³⁶ Such states include, among others: Brazil, Bolivia, Ecuador, India, Iran, Laos, Mexico, Myanmar, Poland, Russia, South Africa, Thailand, Venezuela and Vietnam.

³⁷ See <http://www.siac.org.sg/estimate-your-fees/siac-schedule-of-fees>