SIAC Indochina Academy 2020: Time and Cost Savers at SIAC: Emergency Arbitration, Expedited Procedure and Early Dismissal (Virtual Edition) (Day 1)

By Khoa Nguyen, Associate, YKVN

The inaugural SIAC Indochina Academy held on 15 and 16 October 2020, featured sessions on Emergency Arbitration (**EA**), Expedited Procedure, and the innovative Early Dismissal procedure introduced in the SIAC Arbitration Rules 2016. The teaching faculty was chaired by Mr Gary Born (*President, SIAC Court of Arbitration; Chair, International Arbitration Practice Group, Wilmer Cutler Pickering Hale and Dorr LLP*), and included members of the SIAC Court of Arbitration, as well as other leading international arbitration practitioners and arbitrators.

I. OPENING ADDRESS BY MR GARY BORN

The Academy started with an opening address by Mr Gary Born. Mr Born introduced the purpose of this Academy, which is to help SIAC users better understand the time and cost-saving mechanisms in the SIAC Rules, in this case, the EA procedure, Expedited Procedure and the Early Dismissal procedure.

Mr Born first turned his attention to the EA procedure. He explained that historically, emergency relief was not available through arbitrations. This has changed over time. Now most jurisdictions globally acknowledge the arbitration tribunal's power to grant provisional measures or interim relief to preserve the status quo before the formal arbitration can be conducted. However, there are many situations where the tribunal cannot grant provisional measures, for example, when the tribunal has not yet been constituted. Thus, the EA mechanism was born for the purpose of granting emergency relief at the preliminary stage of the arbitration.

Mr Born then discussed the EA procedures under the SIAC Arbitration Rules. Under the SIAC Arbitration Rules, the Claimant can submit a request for an EA simultaneously with the filing of the Notice of Arbitration. Mr Born emphasised that an EA is typically appointed within 24 hours of the filing of the request for an EA. Mr Born observed that sometimes the EA procedure may lead the parties to resolve their dispute amicably by providing parties with a chance to evaluate the merits of their case at an early stage of the arbitration.

Mr Born went on to discuss the benefits of the Expedited Procedure. The Expedited Procedure is particularly useful for smaller and less complex arbitrations that can be resolved relatively quickly. Under the SIAC Arbitration Rules, a dispute that involves less than SGD6 million, or in cases of exceptional urgency, can be the subject of a request for Expedited Procedure. If the request is accepted, the final Award has to be issued within 6 months from the constitution of the tribunal. However, as Mr Born pointed out, the SIAC Arbitration Rules also anticipate that the arbitration could become more complex as the arbitration proceeds, so the parties can still "put the genie back

in the bottle" and remove the arbitration from the expedited track and return the arbitration to the normal time frame.

Finally, Mr Born summarised the latest tool that SIAC users can use to save time and costs: the Early Dismissal procedure. Mr Born observed that the Early Dismissal procedure was first developed under ICSID Arbitration Rule 41(5). Under ICSID Arbitration Rule 41(5), the Early Dismissal procedure is applicable to only claims manifestly without legal merit, and the request must be brought within 30 days of constitution of the tribunal. Mr Born explained that the SIAC Arbitration Rules further improved upon the ICSID Early Dismissal procedure. First, in addition to "claims", Early Dismissal under the SIAC Arbitration Rules may also be applied to "defenses" which are manifestly without legal merit or outside of jurisdiction of the Tribunal. Second, unlike the 30-day limitation under the ICSID Rules, Early Dismissal under the SIAC Arbitration Rules may be brought at any time during the arbitration.

II. SESSIONS ON EA

The innovative EA procedure was the focus of Day 1 of the SIAC Indochina Academy 2020 on 15 October 2020.

The first panel session considered the theory and practice of emergency arbitration from both the practitioner's as well as the tribunal's perspective. It was moderated by Ms K. Shanti Mogan (*Member, SIAC Court of Arbitration; Partner, Shearn Delamore & Co*). The panellists were Ms Sapna Jhangiani QC (*Partner, Clyde & Co Clasis Singapore*), Mr Jainil Bhandari (*Partner, Rajah & Tann Singapore LLP*), Mr Timothy Cooke (*Partner, Stephenson Harwood (Singapore) Alliance*), Dr Hop Dang (*Arbitrator, Hop Dang's Chambers*), and Ms Amanda Lees (*Partner, Simmons & Simmons JWS*).

The two main issues that the panel discussed were (i) the test applicable to emergency relief, and (ii) whether the request for an emergency relief should be made to an arbitral tribunal or a court.

The panellists all agreed that as the SIAC Arbitration Rules do not provide for the applicable test to be applied for emergency interim relief, in Singapore, most tribunals would apply the test for interim measures set out in the UNCITRAL Arbitration Rules or the American Cyanamid test. Mr Cooke pointed out that the current trend is to apply a transnational test, such as the UNCITRAL's test, or the test proposed by Mr Born in his International Commercial Arbitration treatise. The test applied by tribunals typically involves a balancing of three factors: (i) a likelihood of success on the merits; (ii) urgency; and (iii) serious or irreparable harm. On some occasions, a fourth factor of preservation of the status quo may also be considered. Dr Dang opined that as an arbitrator, he would typically focus on the likelihood of success on the merits by the applicant. For Dr Dang, the applicant only needs to show "a prospect of success" to pass this test at this early stage of the arbitration.

The panel also considered whether it would be more beneficial to apply to an arbitration tribunal, or a court for the emergency relief. This issue also led to an interesting discussion on enforceability of an emergency relief.

The panel agreed that in jurisdictions such as Singapore, an arbitral tribunal is better suited to issue the emergency relief. Under the Singapore International Arbitration Act, an arbitral tribunal has a wide discretion to issue any relief necessary, and the court can only assist the tribunal in cases where the tribunal does not have power to issue the relief in question. However, Mr Bhandari pointed out that there are two limitations with respect to emergency relief issued by an arbitral tribunal. The first is that an arbitral tribunal is unable to issue emergency relief *ex parte* as opposed to a court. Therefore, the petitioner may lose the element of surprise. Second, an arbitral tribunal cannot issue emergency relief against a third party because of the consensual nature of an arbitration agreement. Thus, Mr Bhandari proposed that it could be worth considering seeking emergency relief before a court in these types of cases.

Left to Right: Amanda Lees, Sapna Jhangiani QC, Jainil Bhandari, Shanti Mogan, Dr Hop Dang and Timothy Cooke

This discussion naturally led to a consideration of the enforceability of an emergency arbitrator award. A member of the audience queried whether the tribunal should consider the enforceability of the emergency arbitrator award before issuing one. All panellists agreed that a tribunal should not consider enforceability as another factor when considering the application for emergency interim relief because (i) the tribunal should not be concerned with the applicant's case strategy; and (ii) there are as many jurisdictions that allow enforcement of emergency arbitrator awards as there are jurisdictions that prohibit it. Particularly, Ms Mogan and Ms Jhangiani pointed out that Malaysia, Hong Kong, New Zealand and Singapore, among others, allow for the enforcement of an emergency arbitrator award. On the other hand, Dr Hop Dang confirmed that Vietnam does not. Ms Lees then observed that in some jurisdictions, the enforceability of an emergency arbitrator award may turn on its label i.e. whether the tribunal issued it as an order, or as an award.

The second panel session shone a light on the administrative proceedings of EA from the perspective of the SIAC Secretariat. The panel was again moderated by Ms Mogan, with Ms Delphine Ho (*Registrar, SIAC*) and Ms Angela Yap (*Counsel, SIAC*) joining as panellists.

The panellists provided a practical look at the EA application process. The panellists shared that SIAC would not consider the merits of the case when deciding whether to accept the filing of the EA application. As a rule, SIAC considers three factors when deciding whether or not to accept an EA application: (i) have the requirements in Schedule 1 of the SIAC Arbitration Rules been met; (ii) is it a true emergency; and (iii) whether the requisite fees have been paid. In fact, SIAC would only reject an EA application if there is clearly no emergency. As a matter of practice, SIAC would also not consider any jurisdictional issues, because that is within the jurisdiction of the Tribunal. Ms Ho explained that in practice, the most common causes for a delay in appointing an EA application are (i) the failure of the applicant to pay the requisite fee deposits for the EA application, and (ii) arbitrator conflict checks when there are a number of related parties being named in the Notice of Arbitration or EA application.

Left to Right: Angela Yap and Delphine Ho

The panel session was followed by the Lunchtime Chat on "*Award Writing Tips and Scrutiny of Draft Awards at SIAC*". The Lunchtime Chat was moderated by Mr Minn Naing Oo (*Managing Director, Allen & Gledhill (Myanmar) Co., Ltd*). The panellists were Mr Cooke, Dr Hop Dang,

Ms Delphine Ho, Ms Blossom Hing (*Director, Drew & Napier*), and Ms Smitha Menon (*Partner, WongPartnership LLP*).

The discussion mostly focused on practical tips for writing an award within a strict timeline. Mr Cooke explained that early preparation is the key to success, to which the other panellists agreed. His approach is also to have the parties agree on some key issues during case management conferences, especially the List of Issues, which will become the framework for the Tribunal during the hearing. Dr Hop Dang was of the opinion that the award should strive to address every issue, especially procedural issues, which required more careful consideration, because that would be essential for the enforceability of the award in the future.

Ms Hing shared four tips for writing an award. First, write in plain language, which means using short sentences, direct speech and making each word count. Second, on structure, the arbitrator should decide on either a chronological or a thematic structure. Third, the arbitrator should start writing early when his or her memory is still fresh and accurate. Fourth, and most importantly, the arbitrator needs to treat the losing party with respect.

Blossom Hing

Smitha Menon

Ms Menon turned the conversation around to the issue of the Tribunal secretary, and the general rule for using a Tribunal secretary. In her experience, there have been some concerns from both an institutional perspective and a users' perspective about the role of the Tribunal secretary after the Yukos award controversy. In that case, Russia tried to set aside the award, *inter alia*, on the ground that the Tribunal secretary was acting as a fourth arbitrator on the Tribunal. Ms Menon emphasised that the role of the tribunal secretary is only to help with the drafting. The Tribunal secretary does not decide on the award. A recent LCIA award was reviewed by the High Court on the very question of the role of the Tribunal secretary. The High Court held that the determination on whether the Tribunal secretary becomes a "fourth arbitrator" depended on whether the Tribunal was completely dependent on the Tribunal secretary in drafting the award. In most cases, the Tribunal has the discretion to make use of the Tribunal secretary to assist them.

Following the Lunchtime Chat, participants broke out into groups for the Workshop on Drafting and Handling an Application for Emergency Interim Relief. The workshops were facilitated by Ms Monica WY Chong (*Partner, WongPartnership LLP*), Mr Kelvin Kek (*Partner, Allen &*

Gledhill LLP), Ms Lee Chia Ming (*Partner, Dentons Rodyk & Davidson LLP*), Mr Shaun Leong, FCIArb, (Partner, Withersworldwide), Mr Aditya Singh (*Counsel, White & Case*), and Ms Tan Weiyi (*Partner, Harry Elias Partnership LLP*).

The workshops afforded participants an opportunity to share and exchange their views and personal experiences of dealing with EA applications in a small group setting, as well as clarify any queries that they might have with their assigned facilitators and faculty members. After the Workshop, each group conducted a series of Mock Emergency Arbitration Hearings with faculty members role playing as Presiding Arbitrators, and facilitators acting as Co-arbitrators. The Mock Emergency Arbitration Hearings afforded participants an invaluable opportunity to put into practice what they had learnt in the course of the day, and to receive feedback from faculty members and facilitators on their oral advocacy skills.

After the Mock Emergency Arbitration Hearings, participants, faculty members and facilitators gathered for the Virtual Networking Drinks. In an informal setting, participants were afforded a chance to mingle and engage with faculty and facilitators from both Day 1 and Day 2 of the Indochina Academy, as well as meet each other virtually.

SIAC Indochina Academy 2020: Time and Cost Savers at SIAC: Emergency Arbitration, Expedited Procedure and Early Dismissal (Virtual Edition) (Day 2)

By Witchaphon Techasawatwit, Associate, Herbert Smith Freehills (Thailand) Ltd.

The SIAC Indochina Academy was conducted virtually on 15-16 October 2020 in the midst of the COVID-19 pandemic. Day 2 of the course focused on the Expedited Procedure and Early Dismissal mechanisms under the SIAC Arbitration Rules.

The discussion topic for the first session was "**Managing a Case under the Expedited Procedure – from Tribunal's Perspective**". This session was moderated by Mr Edmund J Kronenburg, FCIArb, FSIArb *(Managing Partner, Braddell Brothers LLP*). The panel comprised of Mr Pisut Attakamol (*Partner, Baker & Mckenzie Ltd.; Co-President, YTHAC*), Mr Minn Naing Oo (*Managing Director, Allen & Gledhill (Myanmar) Co., Ltd*), Ms Gitta Satryani (*Partner, Herbert Smith Freehills LLP*), Ms Sitpah Selvaratnam (*Consultant, Messrs, Tommy Thomas*), and Mr K. Luan Tran (*Partner, King & Spalding*).

The session kicked-off with a discussion of the requirements for an application for Expedited Procedure. Under the Expedited Procedure track, the whole arbitration process will be concluded within a 6-month timeframe from the date on which the tribunal is constituted. The mechanism aims to resolve the problem of lengthy arbitrations, whilst managing any downside in expediting the process.

The panellists also discussed the importance of time management if the Expedited Procedure applies. Mr Naing Oo suggested that a useful approach is to work backwards from the time required to finalise the final award, including the time required for the SIAC to scrutinise the draft award. By working backwards and drawing up a procedural timetable for the case, this ensures that both parties will be provided a fair and equal opportunity to be heard by the Tribunal, and that the 6-month deadline will be complied with.

Left to right: Edmund J Kronenburg, K. Luan Tran, Gitta Satryani, Minn Naing Oo, Sitpah Selvaratnam and Pisut Attakamol

The possibility of holding a documents-only hearing was also discussed among the panellists. The general consensus was that it depended on the complexity of the case. In some cases, the evidence for the substantive issues are the documents. However, if witnesses are required to testify before the Tribunal, the necessary arrangements would have to be made. With improvements in technology and with travel restrictions due to the pandemic, conducting hearings by way of video conference has become more common, which in turn, could reduce the time for arbitrations to be concluded.

The next session was the "**Workshop on Drafting and Handling an Application for Expedited Procedure – from Arbitration Practitioners Perspective**", where the participants were divided into small groups of 6 or 7 people to discuss the application for an Expedited Procedure.

One of the key takeaways from my group, shared by facilitator, Ms May Jean Lim (*Director, Dispute Resolution, Drew & Napier*), and faculty member, Ms Gitta Satryani (*Partner, Herbert Smith Freehills LLP*), was that even if you represent a respondent facing an application involving the Expedited Procedure, it is not always in the respondent's interest to object to such an application, or increase the counterclaim amount so that the total amount of the claim exceeds the threshold of SGD 6 million. This may result in a protracted arbitration and increase the costs incurred by the client.

After the workshop discussions, participants proceeded to attend the Lunchtime Chat, titled "**The "A" to "Z" of Persuasive Written and Oral Advocacy**" moderated by Mr Warathorn Wongsawangsiri (*Member, YSIAC Committee; Partner, Herbert Smith Freehills (Thailand) Ltd.*). The panellists were Mr Pisut Attakamol (*Partner, Baker & Mckenzie Ltd.; Co-President, YTHAC*), Ms Sapna Jhangiani QC (*Partner, Clyde & Co Clasis Singapore*), Mr Edmund J Kronenburg FCIArb, FSIArb (*Managing Partner, Braddell Brothers LLP*), Ms Amanda Lees (*Partner, Simmons & Simmons JWS*), and Mr K. Luan Tran (*Partner, King & Spalding*).

The panellists shared effective tips and techniques for persuasive advocacy. Mr Attakamol noted that the post-hearing brief should be convincing rather than confusing, the submissions must comprise of logical points, easy for the Tribunal to understand, and without any contradictions or

inconsistencies. In a similar vein, Ms Jhangiani stressed that the important facts and legal evidence referred to in the submission must be supported sufficiently to further strengthen the case. The panellists were in agreement that persuasive written advocacy must consist of clear words and meanings without having the reader to guess the writer's true intentions.

Warathorn Wongsawangsiri

Mr Wongsawangsiri put an interesting question to the panellists: How should counsel deal with weaknesses in a case in order to prevent them from ruining the case? Mr Tran brought up a very simple but important point, that counsel must be aware of all the aspects of their case and not 'fall in love' with only the good parts. They must be aware of the "ugly" parts as well. Mr Kronenburg added two interesting points: (1) deal with the weaknesses in your case because you can control the narrative, and (2) do not do your opponent's job for them. The first point is that there is no perfect case. There will always be some issues in the case for the counsel to deal with. If they are obvious issues, it is better for the counsel to deal with them in the best way possible at the outset. You will have control on how to tell the story surrounding these facts. The second issue is that the counsel may have some insight to the case that the opposing side may not have seen. If the issues are not quite obvious, then it may be worth taking a shot and leaving them alone to see if the opponent brings them up.

Lastly, the panellists also shared their approach on how to proficiently conduct a virtual hearing. Mr Kronenburg stressed that great overall impression is key. Counsel should speak more clearly and slower than usual in a virtual hearing, because the words transmitted through the online platform may become unclear. Ms Lees also noted that counsel must be prepared and be comfortable with the documents because there may be some difficulties in presenting the documentary evidence using the share screen function. A proper document management set up for the tribunal and the witnesses is necessary for the virtual hearing to go smoothly.

The next panel discussion was titled "**Theory Practice and Hearing of an Application for Early Dismissal – from Arbitration Practitioner's and Arbitrator's Perspective**". Mr Gary Born (*President, SIAC Court of Arbitration; Chair, International Arbitration Practice Group, Wilmer Cutler Pickering Hale and Dorr LLP*) moderated the discussion. The panellists were Ms Blossom Hing (*Director, Drew & Napier*), Mr Luong Van Ly (*Partner, Global Vietnam Lawyers*), Mr Mark Mangan (*Partner, Dechert LLP*), Ms Smitha Menon (*Partner, WongPartnership LLP*), and Mr Abraham Vergis (*Managing Director, Providence Law Asia*). Mr Born kicked-off the session with

an introduction on the Early Dismissal application and highlighted that the point of the application is to save time and money in the arbitration.

The discussions went over the issues of when is the proper time to apply for Early Dismissal and when should be the latest time to do so. Mr Vergis shared that the SIAC Arbitration Rules does not provide a time limit to apply for Early Dismissal. However, the longer it takes to make the application, the fewer arguments may be made to apply for the same. The question would be, if there were any manifest issues that could dismiss the claim, why would it appear only now? Nonetheless, if the applicant is able to justify its point of view, for instance, if there was late discovery of documents which raised issues of the claim being manifestly without legal merits or outside the jurisdiction of the Tribunal, the applicant may proceed with this application. Ms Hing noted that if the application of Early Dismissal comes in very late in the proceedings, her first impression would be that it is just a tactical play rather than a meritorious claim.

Left to right: Gary Born, Mark Mangan, Luong Van Ly and Abraham Vergis

One of the key issues that was discussed among the panellists was how the tribunal should deal with an Early Dismissal application where it will only resolve a part of, and not the entirety, of the claim. Ms Menon mentioned that the timing of when the application is submitted should direct the outcome of such an application. If the application is made early on in the case, it should be able to narrow down the issues of the case, and help increase case management efficiency. On the contrary, if the application comes in at a later stage, it may make no difference to disregard some issues before the hearing. Mr Born stressed that the factor to be considered in this regard is how much time and costs it will save if the application was successful.

After the panel discussions, the participants moved on to the "**Workshop on Drafting and Handling an Application for Early Dismissal – from Arbitration Practitioners' Perspective**" which gave the participants the opportunity to further discuss Early Dismissal applications.

The last session for the Indochina Academy was the Mock Applications for Early Dismissal. The participants were divided into groups of 6 to role-play as either the Claimant applying for Early Dismissal or the Respondent objecting to the same.

Overall, the SIAC Academy was a series of very fruitful discussions with experienced practitioners who shared a ton of invaluable insights on various issues which were very helpful to the participants.