Submission to the SIAC Arbitration Rules 2016 Revisions Consultation

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I. INTRODUCTION

In August 2015, the Singapore International Arbitration Centre (‘SIAC’) announced that the process of revising its 2013 arbitration rules (the ‘SIAC Rules 2013’) had begun. This process was commenced with a view to the release of a revised version of SIAC’s arbitration rules (the ‘Revised SIAC Rules’) in mid-2016. Upon this announcement, SIAC commenced the process of consultation for which this submission has been prepared.

This submission addresses one particular aspect of the SIAC Rules 2013 – the way in which arbitrators identify the substantive law governing the merits of the parties’ dispute, where the parties have not themselves made a choice of law. Though the terminology used in the literature is inconsistent,¹ in this submission this issue is referred to as the conflicts of laws.

II. THE POSITION TAKEN UNDER THE SIAC RULES 2013

Conflicts of laws, as well as broader issues involving the application of laws and rules in arbitration, are dealt with in Art. 27 SIAC Rules 2013. That rule provides as follows:

Rule 27: Applicable Law, Amiable Compositeur

27.1. The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply the law which it determines to be appropriate.
27.2. The Tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorised the Tribunal to do so.
27.3. In all cases, the Tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.

¹ See, eg, Lord Lawrence Collins (ed), Dicey, Morris and Collins on the Conflict of Laws (Sweet & Maxwell, 15th ed, 2012) 3 [1-001].
Conflicts of laws questions are addressed by the second sentence of Art. 27(1) SIAC Rules 2013. This sentence empowers arbitrators to apply the voie directe methodology in identifying the governing law. The voie directe methodology involves the exercise of a broad discretion by arbitrators, with the only requirement being that the law identified must be ‘applicable’ or (in the case of Art. 27(1) SIAC Rules 2013) ‘appropriate’. This sentence also empowers arbitrators to apply law. Law, in this context, is understood as referring to substantive law as it is embodied in State legal systems and does not extend to a-national rules of law.

III. HISTORICAL POSITIONS TAKEN UNDER PREVIOUS VERSIONS OF THE SIAC RULES

Previous versions of SIAC’s arbitration rules have addressed conflicts of laws questions in various ways.

The 2010 version (4th edition) of SIAC’s arbitration rules (the ‘SIAC Rules 2010’) adopted substantially the same position as that contained in Art. 27 SIAC Rules 2013. Pursuant to Art. 27 SIAC Rules 2010:

Rule 27: Applicable Law, Amiable Compositeur

27.1. The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply the law which it determines to be appropriate.
27.2. The Tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorised the Tribunal to do so.
27.3. In all cases, the Tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.


Art. 24 SIAC Rules 2007 provided:

Rule 24: Additional Powers of the Tribunal

In addition to and not in derogation of the powers conferred by any applicable law of the arbitration, the Tribunal shall have the power to: …
p. determine any question of law arising in the arbitration and receive and take into account such written or oral evidence as it shall determine to be relevant, whether or not strictly admissible in law.

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3 See also Art. 34(1) ACICA Rules 2011; Art. 29(1) ACICA Expedited Rules 2011; Art. 35(1) HKIAC Rules 2013; Art. 21(1) ICC Rules 2012; Art. 31(1) ICDR Rules 2014; Art. 22(3) LCIA Rules 2014; Art. 27(2) VIAC Rules 2013.
Art. 26 SIAC Rules 1997 provided:

Rule 26: Jurisdiction of the Tribunal …

26.3. In addition to the jurisdiction to exercise the powers defined elsewhere in these Rules, the Tribunal shall have jurisdiction to determine any question of law arising in the arbitration; proceed with the arbitration notwithstanding the failure or refusal of any party to comply with these Rules or with the Tribunal’s orders or directions, or to attend any meeting or hearing, but only after giving that party written notice that it intends to do so; and to receive and take into account such written or oral evidence as it shall determine to be relevant, whether or not strictly admissible in law …

Art. 24 SIAC Rules 1991 provided:

Rule 24: Additional Powers of the Tribunal

24.1. Unless the parties at any time agree otherwise, and subject to any mandatory limitations of any applicable law, the Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a proper opportunity to state their views, to:
24.1.a. determine what are the rules of law governing or applicable to any contract, or arbitration agreement or issue between the parties; …

The position taken in Art. 27 SIAC Rules 2013, and previously taken in Art. 27 SIAC Rules 2010, broadly reflects the contemporary approach to the conflicts of laws taken in modern institutional arbitration rules. Other institutional arbitration rules also adopting the voie directe methodology along with arbitrators’ authorisation to apply law include Art. 47(2) CIETAC Rules 2012, Art. 35(1) IAMA Rules 2014, and Art. 35(1) KLRCA Rules 2013 (the latter adopting the position taken in Art. 35(1) UNCITRAL Rules 2010).

IV. PROPOSAL 1 – THE CLOSEST CONNECTION TEST

This submission’s first proposal is that the Revised SIAC Rules should adopt the closest connection test, rather than the voie directe methodology.

International commercial arbitration exists to serve the needs of commercial parties, who are the ultimate users of arbitration. It is widely acknowledged that business desires certainty. Arbitration is a popular means of dispute resolution because of its procedural flexibility. However, with respect to the parties’ substantive rights and obligations, certainty is the more important norm. The resolution of conflicts of laws questions can significantly affect party rights and obligations, and in some cases can directly determine the outcome of a case. As

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Greenberg argues, parties surely do not choose arbitration because the process involves flexibility as to who will win.9

The voie directe methodology is the prevailing approach in contemporary institutional arbitration rules. It can be rightly criticised, however, on the basis that its wide discretion is productive of uncertainty.10 Arbitrators can exercise voie directe discretions in many ways, meaning that the outcomes of conflicts of laws analyses will not necessarily be predictable. Indeed, the particular methodology that arbitrators will apply cannot be known in advance. Further, there is no recourse against an award in international commercial arbitration regarding the way in which arbitrators resolve conflicts of laws questions.11 Arbitrators’ conflicts decisions are treated in the same way as errors of law, in that they are not the type of procedural irregularity that would justify challenge to an award.12 While published arbitral awards demonstrate that arbitrators might apply the closest connection test in exercising their voie directe discretions,13 they are not required to do so,14 and do not always do so.15 Commercial parties, seeking certainty in their business relations, can benefit from the Revised SIAC Rules providing a more structured approach to arbitrators’ conflicts of laws determinations.

The closest connection test appropriately balances considerations of certainty and flexibility. Commercial parties would be provided with a knowable framework within which arbitrators will identify the governing law, and would be better able to predict the outcome of arbitrators’ conflicts analyses. Their ability to present and argue their case, make sensible settlement decisions, and also to properly perform their contracts in the first place would be improved. At the same time, some discretion remains under the closest connection test. Arbitrators are required to exercise discretion in identifying relevant connecting factors, and determining the weight that they will be given.16 In this way, the closest connection test remains capable of providing solutions that are properly adapted to the needs of individual cases.

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11 Cf Arts. V(1) & (2) New York Convention; Art. 34(2) UNCITRAL Model Law 2006.
15 See, eg, ICC Case No. 10303 / 2000 (2008) 19(1) ICC International Court of Arbitration Bulletin 114, 114. The Tribunal in this case applied the closest connection test as it is particularly and uniquely embodied in Art. 4 Rome Convention 1980, but only because of its primary decision to apply the conflicts of laws rules of the seat of arbitration, rather than the closest connection test per se.
While the voie directe is the prevailing contemporary approach, there is also contemporary Swiss precedent for instead using the closest connection test in international commercial arbitration. Art. 187(1) Swiss Private International Law Act 1987 provides that in the absence of party choice, arbitrators must decide ‘according to the rules of law with which the case has the closest connection’. Similarly, Art. 33(1) Swiss Rules 2012 requires arbitrators to decide in the absence of party choice ‘by applying the rules of law with which the dispute has the closest connection’. Swiss arbitration law and the Swiss arbitration rules are renowned for being both liberal and fair, yet both see fit to break from the voie directe as contemporary wisdom and instead adopt the more structured closest connection test. This submission proposes that by doing likewise, the Revised SIAC Rules can improve upon the SIAC Rules 2013, in the interests of commercial parties as SIAC’s ultimate users.

V. PROPOSAL 2 – RULES OF LAW

This submission’s second proposal is that the Revised SIAC Rules should allow arbitrators to apply rules of law, rather than only law, in the absence of party choice.

Despite these phrases’ apparent linguistic similarity, it is well understood that there is an important functional difference between arbitrators’ authority to apply law, and rules of law. Law is understood as referring to substantive law as it is embodied in State legal systems. Where arbitrators are empowered to apply law in the absence of party choice, resort to a-national rules is precluded. The phrase ‘rules of law’, on the other hand, is a ‘coded reference’ to a broader concept that encompasses both State law and also a-national bodies of rules. Where arbitrators are empowered to apply rules of law, they may therefore apply State law or a-national rules, which might be found in the lex mercatoria, including the lex mercatoria as codified by sources such as the Trans-Lex Principles and the UNIDROIT Principles.

Contemporary institutional arbitration rules vary as to whether arbitrators may apply rules of law, or only law. Art. 27(1) SIAC Rules 2013 authorises parties to choose rules of law, but only allows arbitrators to apply State law in the absence of party choice. On the other hand, rules such as Art. 34(1) ACICA Rules 2011, Art. 29(1) ACICA Expedited Rules 2011, Art. 35(1) HKIAC Rules 2013, Art. 21(1) ICC Rules 2012, Art. 31(1) ICDR Rules 2014, Art. 22(3) LCIA Rules 2014 and Art. 27(3) VIAC Rules 2013 allow arbitrators to apply rules of law where conflicts of laws questions arise. In addition, Art. 187(1) Swiss Private International Law Act 1987 and Art. 33(1) Swiss Rules 2012 authorise arbitrators to apply rules of law while also providing for a closest connection test rather than the voie directe. Though there is not complete consistency in the approach taken by contemporary institutional rules, arbitrators’ authority to apply rules of law is widely recognised.

The lex mercatoria is a topic historically generating significant controversy. Much debate has centred around whether the lex mercatoria is a viable and defensible source of a-national rules for the resolution of international commercial disputes, especially where the lex mercatoria’s application has not been chosen by the parties. However, while the lex mercatoria’s application was by definition productive of considerable uncertainty at one point in time, these objections should not be a cause for concern in preparing the Revised SIAC Rules. Today, it is possible for arbitrators to apply modern and well-known codifications such as the Trans-Lex Principles and the UNIDROIT Principles, which has not always been the case where the lex mercatoria was applied in the past.

Should the Revised SIAC Rules incorporate the closest connection test, as previously proposed, allowing arbitrators to apply rules of law would also be an important complementary change. According to Swiss doctrine, the power to apply rules of law when coupled with the closest connection test authorises arbitrators to apply a-national rules where the true closest connection lies with international commerce, rather than a particular State. This is important because it addresses a practical problem rarely, but still sometimes, encountered in applying the closest connection test in practice – the problem of evenly balanced connecting factors. Under this submission’s proposed model, arbitrators would be able to apply a-national rules as a fall-back position where the closest connection test would not otherwise yield a clear result. That this would be the case is confirmed by comparing the facts and reasoning employed in several published ICC awards.

This submission therefore proposes that the Revised SIAC Rules should, in addition to adopting the closest connection test, improve upon the SIAC Rules 2013 by authorising arbitrators to apply rules of law in the absence of party choice.

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27 See, eg, Coast Lines Ltd v Hudig & Veder Chartering NV [1972] 2 QB 34, 44 (Lord Denning MR).
VI. A PROPOSED AMENDED TEXT

A proposed amended text for the second sentence of Art. 27(1) SIAC Rules 2013, as might appear in the Revised SIAC Rules, is:

Failing such designation by the parties, the Tribunal shall apply the rules of law which are most closely connected to the parties’ case.

It is proposed that the closest connection be assessed by reference to the parties’ case, rather than the parties’ contract or the dispute. This is because reference to the parties’ case is apt to allow a consideration of all contextual factors relating to their controversy that has led them to arbitration, and which might be relevant in assessing where the relevant legal centre of gravity lies.

To further the interests of certainty which lie at the heart of this submission, SIAC may also consider adding a further sentence based on the closest connection test as embodied in Art. 4 Rome Convention 1980:

It shall be presumed that the closest connection lies with the law of the State of the party who is to effect characteristic performance of the contract, unless characteristic performance cannot be determined or the circumstances as a whole show that other rules of law are clearly more closely connected.

Though Art. 4 Rome I Regulation now takes a different approach to conflicts of laws within the European Union, the characteristic performance presumption formerly adopted in Art. 4 Rome Convention 1980 is well-understood and would provide for a clear presumptively-applicable law in many common categories of case.

VII. CONCLUSION

In conclusion, this submission proposes that the Revised SIAC Rules depart from the conflicts of laws position currently taken in Art. 27(1) SIAC Rules 2013 in two respects.

First, the closest connection test should be adopted. Instead of exercising a broad voie directe discretion, arbitrators should resolve conflicts of laws questions by seeking the law most closely connected to the parties’ case.

Secondly, arbitrators should be empowered to apply rules of law in the absence of party choice. Instead of being limited to State law, arbitrators should be able to apply a-national rules in the unlikely (but possible) event that the closest connection test does not lead to a clear result.

Together, these changes would improve the Revised SIAC Rules in the interests of commercial parties, who are the ultimate users of SIAC arbitration and to whom the Revised SIAC Rules will ultimately be directed.