Corralling Defaulting Parties and their Unpaid Costs Deposits under the SIAC Rules 2016

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SIAC released new rules of procedure ("SIAC Rules") for the management of its arbitration practice, effective 1 August, 2016. Some of the new provisions are ground-breaking. New provisions include a consolidation procedure, a joinder procedure, and even rules providing for early dismissal of baseless claims. The SIAC Rules have drawn great attention to its numerous novel provisions. Nonetheless, it also adopted some subtle but no less weighty amendments. One amendment aims at costs deposits recovery. It allows the Tribunal to issue an interim order, or an award, for reimbursement of unpaid deposits for costs.

Rule 24 of the 2013 SIAC Rules had empowered the Tribunal to "issue an award for the unpaid costs of the arbitration." (Rule 24(i), 2013 Rules). The corresponding but much improved version from the 2016 SIAC Rules permits the Tribunal to "issue an order or Award for the reimbursement of unpaid deposits towards the costs of the arbitration." (Rule 27(g), 2016 Rules). The most critical new clarification replaces 'costs' with the term 'deposits.'

First, some background on costs. Each party, claimant and respondent, normally pays 50% each. (Rule 34.2, 2016 Rules). They often make payment in three tranches of deposits. The Registrar may demand further deposits. (Rule 34.4, 2016 Rules). Costs of the arbitration include the Tribunal's fees and expenses, SIAC's fees and expenses, and the expense or fees of Tribunal-appointed experts. (Rule 35.2 2016 Rules). Parties are responsible for their own legal and expert fees, but may recover these in a successful award. Unfortunately, respondents may fail to pay one or more tranches of deposits for costs. When confronted with such a default on deposits, SIAC's Registrar will not infrequently charge claimant the balance of respondent's default.

The revision's central purpose may simply be to provide clarity. Previously, Tribunals may have proven hesitant to enforce SIAC's cost demands, if the matter of unpaid costs (or deposits) had even crossed the Tribunal's mind at all. Under the new Rules, the Tribunal manifestly may enter an order for costs without a full hearing on the matter and before the conclusion of the case. Tribunals may have been hesitant or reluctant to employ the 2013 provision before the final award on the merits because of the lack of clarity on this point. They may not have even regarded the provision seriously or in any detail. Tribunals can now issue an order or an award to collect deposits against an uncooperative party after resolving jurisdiction, or even before doing so.

Whatever SIAC's purpose for the revision, practitioners may recognize its full tactical potential. Rule

27(g) allows claimants a potentially powerful recourse against recalcitrant respondents. An able practitioner should consider making a Rule 27(g) motion whenever an opposing party refuses to pay its deposits. Additionally, one of the following aggravating conditions might also be present: (1) the arbitration fees assessed for the case are significant in amount; or (2) the proceedings have become, or are in the process of becoming, protracted in complexity or duration of time. In any case, practitioners should only seek recourse with the Tribunal when the opposing party has obtained some real advantage, however minor, through the refusal to pay a costs deposit. When no aggravating conditions arise or persist, practitioners may consider briefly invoking Rule 27(g) during the merits hearing. This would serve as a gentle reminder to the Tribunal to address the opposing party's failure to pay deposits in its award and assessment of costs.

Certainly, Rule 27(g) motions promise an escape from the prior practice under which claimants simply bore the respondent's costs until the award on merits is issued, or sometimes even until the award enforcement phase. This distinct possibility should prompt the following dispositions from applicants and tribunals. Practitioners must not hesitate to resort to Rule 27(g). Meanwhile, tribunals should resolve such applications with both deference and expeditiousness towards its applicants. After all, if the respondent will not pay its deposits, claimant must do so instead. Otherwise SIAC's administration of the case may be suspended, or the relevant claims or counterclaims may be considered withdrawn (Rule 34.6, 2016 Rules). And leaving respondent to remain delinquent will not rehabilitate a respondent exhibiting a distinct lack of cooperation or good faith.

A party prevailing under Rule 27(g) would ordinarily obtain an order from the tribunal demanding the opposing party pay its deposits. At such an early stage of the proceedings, a prevailing party has a few apparent ways to enforce such an order, at least beyond a simple demand to the losing party to issue payment within a reasonable time period. Two remedies are obvious. On one hand, a successful application would in many cases become self-enforcing, as the party facing such an order would want to avoid open defiance of the tribunal's clear procedural directive. On the other hand, a particularly eager prevailing party could also enforce such an order in a court with jurisdiction over the assets of the other party. Notably, if the tribunal's decision takes the form of an award, the New York Convention would mandate enforcement in most other jurisdictions.

Tribunals may decide to bolster their Rule 27(g) orders with specific enforcement measures, particularly if aggravating circumstances accompany a respondent's non-payment. Tribunals will find the most appropriate manner of remedies reserved at the very end, following the award on the merits.

Indeed, the Tribunal's remedies or enforcement derives from its expansive discretion to determine in the award the apportionment of the costs of the arbitration among the parties. (Rule 35.1, 2016 Rules). The award of costs, of course, includes that of the tribunal, the SIAC administration fees, and even the prevailing party's expert and attorney fees. (Rules 35 and 37, 2016 Rules). Absent specific prohibition by the parties, SIAC's 2016 Rules mandate (employing "shall") that the tribunal is to specify the costs and determine their apportionment. SIAC's Rules does not instruct tribunals with further presumptions or principles that might inform their mandate, unlike other institutional rules. In contrast, the 2014 LCIA Rules explicitly favors the general principle of apportionment by relative success (or failure) with regard to the merits,

> "except . . . in the circumstances the application of such a general principle would be inappropriate under the Arbitration Agreement or otherwise. The Arbitral Tribunal may also take into account the parties' conduct in the arbitration, including any co-operation in facilitating the proceedings as to time and cost and any non-co-operation resulting in undue delay and unnecessary expense." (Rule 28.4, LCIA 2014 Rules).

As for SIAC, its silence as to the specific bases informing costs allocation should be understood as a purposeful and strategic position. Since the SIAC Rules mandate a decision on costs without signaling any obligatory first principles, SIAC appears to have reserved comparatively more latitude for tribunals in which to apportion costs with consideration to a party's default on deposits. Arguably, an arbitration clause designating the SIAC 2016 Rules must specifically restrict costs allocation to "parties bear their costs" or alternately, "costs follow the event," to foreclose Rule 27(g) cost shifting. Otherwise, any ambiguity may open the door for a tribunal to allocate costs at least partially against a party defaulting on deposits, as if punishment for non-co-operation were a secondary but available principle. After all, the parties will have agreed in their arbitration clause to submit to a tribunal's expansive power to allocate costs pursuant to application of SIAC Rule 35.1.

Best practice counsels that tribunals clearly forecast the possibility of cost shifting. Any effective Rule 27(g) order will spell out the tribunal's right at the end to withhold otherwise rightful costs from, or award substantial costs against, a defiant and delinquent party.

Ultimately, compliance or non-compliance regarding 27(g) orders will drive an assessment of costs, either explicitly or implicitly, overtly or subliminally. And normally, even if the threat remains inchoate, it will serve the proceedings adequately enough. After all, over the course of the arbitration, the pressure of an impending award and the heightened potential of an unfavorable costs allocation should motivate even the most spirited of non-cooperative parties to at least take minimal steps to expedite the proceedings. And perhaps in most cases, respondents will simply comply with the 27(g) order in a timely manner.