

Arbitration in COVID times

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1. Introduction

A. What is arbitration?

B. Latest trends in arbitration

C. Key recent updates

A. What is arbitration?

Arbitration is a private dispute resolution procedure in which parties agree to let an impartial, independent third party (i.e. the arbitrator) decide the case.

Parties are free to select arbitrator(s), who is/ are ideally a person(s) familiar with the area or subject of dispute, or possess certain expertise or experience that will be helpful to understand and reach a sound decision on the disputed issues.

Parties also have flexibility in selecting the procedural rules governing the arbitration and shaping the procedure for the arbitration, subject to the applicable procedural rules and/ or laws if any.



ARBITRATION

SIAC's 2020 Annual Report



Highest record of 1,080 new case filings in 2020, of which there were 2 sets of associated cases involving 261 & 145 cases respectively. Up from 479 cases filed in 2019.

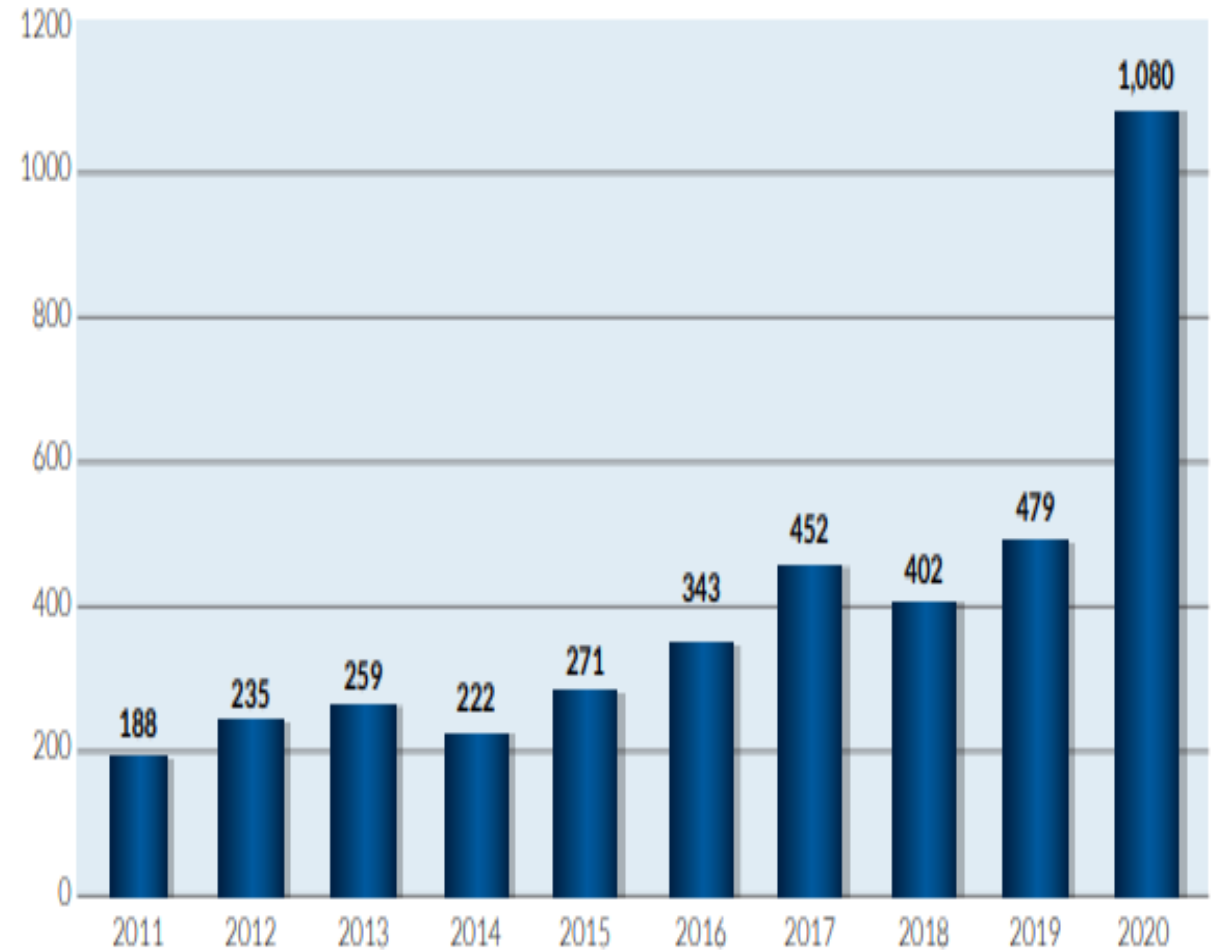


Total sum in dispute for all new cases amounted to USD8.49 billion (SGD11.25 billion).



Range of sectors, including construction/engineering, trade, commercial corporate, maritime/shipping, agriculture, etc

Total Number of New Cases Handled by SIAC (2011-2020)



ICC's 2020 Dispute Resolution Statistics



Reported 946 new cases filed with the ICC International Court of Arbitration – up from 869 in 2019. Most number of cases registered, save for 2016.

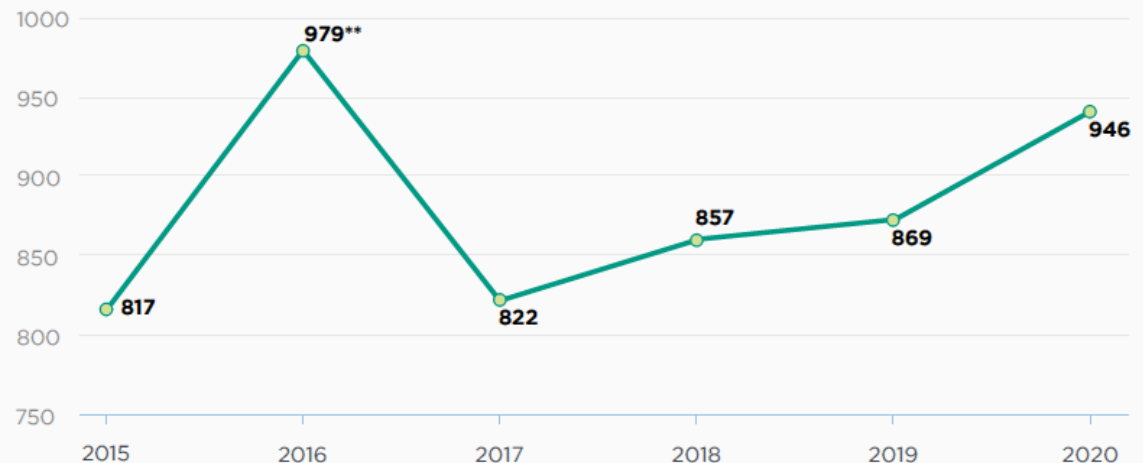


Average disputed amount among 1,833 pending cases at the end of 2020 was US\$145 million. 38% of newly registered cases ≤ US\$3 million



ICC arbitrations seated in 113 cities in 65 countries. Number of women arbitrators rose by 2.3% to a total of 23.4%.

NUMBER OF CASES REGISTERED*
2015-2020



* including cases filed under the Appointing Authority Rules

** of which 135 filings related to a collective dispute



Remote, virtual or hybrid hearings



Electronic submissions



Digital Assistive Presentation Materials

B. Latest Trends in Arbitration



Expedited arbitrations



Shorter sitting times/ longer arbitration periods



More participation in arbitration



C. Key updates

- Singapore International Arbitration (Amendment) Act 2020 (*with effect from 1 Dec 2020*)
 - Section 9B : Default procedure for appointing arbitrators in multi-party arbitrations.
 - Section 12(1)(j): Recognises the right of a tribunal and of the Singapore High Courts to exercise their power in the enforcement of confidentiality obligations.



C. Key updates

- SIAC Arbitration Rules
 - Latest version is 2016 Ed. 7th Ed of the SIAC Arbitration Rules expected to be released in 2021.
- SIAC Guide for Taking the Arbitration Remote



C. Key updates

- ICC Arbitration Rules 2020
 - Article 30(2) & Appendix VI: Expedited arbitral process limit increased to US\$3million from previous limit of US\$2million.
 - Article 7: Revised joinder rules permits joinder of additional party who accepts constitution of the tribunal 7 agrees to the TOR, even in the absence of agreement of all parties to the arbitration.
 - Article 10: Easier consolidation.
 - Article 26(1): Remote hearing by videoconference.

2. Disputes Suitable for Arbitration

- A. Complex disputes
- B. Claims already adjudicated on the merits
- C. “Respondent’s” disputes
- D. Disputes across multiple contracts
- E. Limitation period issues
- F. Claims suitable for third party funding
- G. Enforcement against a foreign party

A. Complex Disputes

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- ❖ Significant changes to the Building and Construction Industry Security of Payment Act 2004 (“SOP Act”) with effect from 15 December 2019

- ❖ Among others, Section 17(2A) of the SOP provides:

“In determining an adjudication application, an adjudicator must disregard any part of a payment claim or a payment response related to damage, loss or expense that is not supported by:

a) any document showing agreement between the claimant and the respondent on the quantum of that part of the payment claim or the payment response; or

b) any certificate or other document that is required to be issued under the contract.”

A. Complex Disputes

- ❖ At the second reading of the SOP Act amendment bill, Minister of State Zaqy Mohamad commented that:

“adjudicators are to consider claims on damages, losses, and expenses only when the claim is supported by documents showing the parties’ agreement on the quantum of the claim, or a certificate or document that is required to be issued under the contract. Parties that wish to dispute on complex claims should consider other avenues, such as arbitration or litigation.”

- ❖ Although Section 17(2A) does not refer expressly to “complex” claims, it is understandable why unquantified and disputed claims relating to damage, loss and expense are excluded from the SOP regime.
- ❖ Claims which for example, require support by way of witness evidence, expert analysis etc are bound to require more time to resolve, and will be challenging to determine within a speedy SOP regime.
- ❖ Such complex claims would be better referred to arbitration or litigation.

A. Complex Disputes

Complex disputes potentially includes claims for:

- ❖ Prolongation costs
- ❖ Liquidated damages, if the amount of delay has not been agreed and/ or certified
- ❖ General damages for breach of contract
- ❖ Rectification of defects

B. Claims already adjudicated on the merits

B. Claims already adjudicated on the merits

- ❖ A payment claim or any part thereof which has been validly brought to adjudication and dismissed on its merits cannot be the subject of a subsequent payment claim or subsequent adjudication. See the case of *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401.
- ❖ Any payment claim, even if “repeated” in more than one payment claim, could only be the subject of one adjudication on the merits. See the case of *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609
- ❖ Note: Exception in Section 17(5) of the SOP Act which allows previously adjudicated claims for which the value has changed since the previous determination, to be adjudicated in a subsequent SOP application.

B. Claims already adjudicated on the merits

Claims which have already been adjudicated on the merits **include**:

- ❖ Claims on which the adjudicator made “*findings on issues of facts and/or law*”. See case of *BBD Pte Ltd v BBE Corp* [2019] SCAdjR 396.
- ❖ Claims which were dismissed for “*insufficiency or want of evidence*”. See case of *Asplenium Land Pte Ltd v CKR Contract Services Pte Ltd* [2016] 3 SLR 1061.

But **excludes**:

- ❖ Value of work done in a previous month which was *not* included in the relevant payment claim, but subsequently included in a later payment claim.
- ❖ Unpaid payment claim included in a subsequent payment claim with no additional claim for new work done.
- ❖ Where a payment claim was submitted previously, but no adjudication application was made on it.
- ❖ A previous payment claim that was dismissed by an adjudicator for being served prematurely or untimely.

B. Claims already adjudicated on the merits

- ❖ Remains open to parties to *“initiate full curial proceedings to settle any grievances with a finding in an adjudication determination which they consider to be in error in law or in fact”*. See Mr Chow Kok Fong’s determination at [18] to [21] in the case of *ADT Pte Ltd v ADU Pte Ltd* [2010] SCAdjR 685.



C. “Respondent’s” Disputes

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- When commencing an SOP for its own claims is not an option for the Respondent, arbitration to be considered.

These claims include:

- ❖ Liquidated Damages
- ❖ Termination Costs
- ❖ Additional Costs for Rectifying Defective Works

D. Disputes Across Multiple Contracts

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- ❖ The same parties could be in dispute across multiple contracts. For example, in instances where:
 - Same supplier used for various projects and contracted not on specific project basis
 - Same supplier or contractor engaged on different projects
 - Same contractor appointed by the same employer for different phases of the same project under different contracts
- ❖ Regulation 3 of the SOP Regulations: Exclude supply contracts which do not specify or identify the construction site or project in relation to which goods are to be supplied.
- ❖ Pursuant to Section 5 of the SOP Act, the entitlement to progress payments arises for any “*person who has carried out any construction work, or supplied any goods or services, under a contract*”.
- ❖ See case of *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] SGCA 12 which left open the legal question of “Single Contract Interpretation”, i.e. whether a respondent is only entitled to rely on reasons for withholding payment arising out of the contract on which the payment claim has been submitted to an SOP.
- ❖ Notwithstanding the uncertainty on “Single Contract Interpretation”, less controversial that there is a “one payment claim, one contract” rule.

D. Disputes Across Multiple Contracts

- ❖ Arbitration allows for consolidation of disputes across multiple contracts.
- ❖ **SIAC Arbitration Rules 2016, Rule 8.1** allows for consolidation of arbitrations where:
 - (a) **Parties agree** to consolidate;
 - (b) All of the claims are made under the **same arbitration agreement**; or
 - (c) Arbitration agreements are found to be **compatible**, and disputes arise out of (i) the **same legal relationship(s)**, (ii) contracts consisting of a **principal contract and ancillary contract(s)**, or (iii) **same transaction or series of transactions**.

If a consolidation application is made after constitution of any Tribunal in any of the arbitrations sought to be consolidated, the same Tribunal must have been constituted in each of the arbitrations, or no Tribunal has been constituted in the other arbitration(s).

D. Disputes Across Multiple Contracts

❖ ICC Arbitration Rules 2021, Article 10 allows for consolidation of arbitrations where:

- (i) **Parties agree** to consolidate;
- (ii) All of the claims are made under the **same arbitration agreement or agreements**; or
- (iii) Claims are not made under the same arbitration agreement(s), but the arbitrations are **between the same parties**, disputes arise **in connection with the same legal relationship** and the Court finds the **arbitration agreements to be compatible**.

In deciding whether to consolidate, the Court may take any **relevant circumstances** into account such as whether arbitrators have been appointed in one or more of the arbitrations.

E. Limitation Period Issues

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- ❖ Limitation period is the time limit within which a party can bring a claim, and is determined by the applicable laws. Under Singapore laws, a party generally has 6 years to commence an action in contract or tort.
- ❖ Pursuant to the latest amendments to the SOP Act, a payment claim must be served no later than 30 months after:
 - (a) Date on which the goods and services were last supplied;
 - (b) Latest of the following dates:
 - (i) Date on which construction works were last carried out;
 - (ii) Issuance date of the last document certifying the completion of the constructions works;
 - (iii) Issuance date of the last TOP as at the time the payment claim is served.
- ❖ There could therefore be instances where there is no longer a right to serve a payment claim under the SOP Act, but the right to bring an action in contract or tort in arbitration (or litigation) still exists.

F. Claims Suitable for Third Party Funding

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- ❖ Third Party Funding refers to the funding of legal proceedings by a third party entity unconnected to a dispute in return for financial gain, such as a share of the damages awarded or a share of the settlement sum.
- ❖ In Singapore, only entities which meet criteria set out in the Civil Law (Third-Party Funding) Regulations 2017 may provide Third Party Funding. For instance, they must be professional funders whose principal business is funding the costs of dispute resolution proceedings, and they must have a minimum paid-up share capital.
- ❖ Note that from 28 June 2021, the Third Party Funding framework was extended to cover domestic arbitration proceedings, certain proceedings in the Singapore International Commercial Court (SICC), and related mediation proceedings.

F. Claims Suitable for Third Party Funding

- ❖ Against the backdrop of the COVID-19 pandemic, there is an observable rise in disputes and companies facing the risk of insolvency.
- ❖ Third Party Funding offers another solution for litigants facing financial constraints, but have meritorious claims to pursue.
- ❖ Although costs of an SOP adjudication (i.e. application fee payable to SMC and fees and expenses of the adjudicator) can be apportioned between the parties, the parties *“shall bear all other costs and expenses incurred as a result of or in relation to the adjudication”* pursuant to Section 30(4) of the SOP Act. For example, legal fees incurred for SOP applications will not be easily recoverable in an SOP proceeding, and such applications are thus unlikely to be viable for Third Party Funding.

G. Enforcement Against Foreign Party

G. Enforcement against a Foreign Party

- ❖ Disputes that are referred to arbitration result in an arbitral award.
- ❖ New York Convention of Enforcement of Arbitral Awards 1958 (“New York Convention”) allows an arbitral award issued in Singapore to be enforceable in any of the other 168* contracting states. (*as at May 2021)
- ❖ Where substantial claims are made against a foreign party, it may be necessary to eventually carry out enforcement proceedings against the foreign party’s assets in a foreign jurisdiction if the claimant is not promptly paid.
- ❖ Where an SOP adjudication determination is being enforced, Section 27(1) allows it to be enforced (with leave of court) in the same manner as a judgment or order of court to the same effect. However, the claimant may encounter issues if it needs to enforce a Singapore court order in a foreign jurisdiction with which there is no easy way of enforcing a Singapore court order.

Thank You

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