SCMA
SINGAPORE CHAMBER OF MARITIME ARBITRATION

SCMA Rules Revision – Background to Public Consultation

17th June 2020

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Background

The maritime arbitration scene is constantly evolving. In order to remain relevant, it is important to review and update the Rules from time to time. Arising from extensive feedback received from both local and international SCMA members, as well as users of the current Rules (as well as its previous edition), the SCMA is considering various amendments and proposals to enhance the Rules. The SCMA is committed to and strives to meet the needs of its members and users with maritime and trade disputes.

INVITATION FOR FEEDBACK

The SCMA invites its members, arbitrators, users and potential users of SCMA Arbitration and other persons and organisations who may be interested in maritime and trade arbitration, under the SCMA Rules, to provide feedback and/or comments on the possible amendments. The SCMA wishes to emphasise the importance of the consultation and that these possible amendments are intended to enhance the experience of the users of the SCMA Rules; and will not be adopted (or may well be further revised) if the feedback from consultees indicates that the proposals are inappropriate or that further revision should be considered.

Consultation Structure & Consultation Period

For the purposes of this consultation paper, the possible amendments are outlined below and have been divided into 3 broad categories.

(a) First, amendments that are being proposed as they promote clarity. These relate to Rules 1, 3, 5,7,9 to 12, 15, 20, 30, 31, 33, 35, 40, 42, 44 and 50 and the proposed amendments can be found in the detailed SCMA Procedure Committee Report.

(b) Second, possible amendments to various other parts of the Rules, which are discussed in the rest of the presentation.

(c) Additionally, various possible structural changes to the Rules have been highlighted and the SCMA also welcomes feedback and/or comments on these structural changes. This is discussed in the last slide.

The consultation period is from 16th June to 31st August 2020.

Rule 3.2 – Improvements on “deemed notice” provision

Under the current Rule 3.2, notice of delivery of documents is deemed to have been received on the day of physical delivery to the addressee, or the day of delivery to his habitual residence, place of business or mailing address, or if they cannot be found upon reasonable inquiry, his last known residence or place of business.

VIEWS SOUGHT: Questions have been raised as to whether the “deemed notice” provision in Rule 3.2 might be improved (or the need for a reliance on a deemed notice provision might be avoided) by reference to the most up to date technology for demonstrating receipt of electronic communications made by the many different means now available. Feedback and/or comments, in particular from those with specialist technical skills, are invited. It would be helpful to respond with detailed, workable proposals that might be short but comprehensive.

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Rule 4 - Limited amendments to procedural requirements in commencement of arbitration

Rule 4 sets out the procedural requirements for commencing an arbitration under the Rules. Under the current Rule 4.1, the commencement of arbitration under the Rules is effected by service of a written Notice of Arbitration. The requirements for the content of the Notice of Arbitration are also contained within Rule 4.1.

VIEWS SOUGHT: Rules 4.1 and 4.2 reflect a “minimalist” approach in terms of procedural hurdles in the commencement of arbitration. Limited amendments have been proposed for efficiency and to introduce a new Rule 4.3 in relation to the modified Small Claims Procedure.

Rule 6.1 - Possibility to change the number of Tribunal members from three to one sole arbitrator

Under the current framework, as set out in Rule 6.1 of the Rules, three arbitrators shall be appointed in the absence of the parties' agreement. A Tribunal of three arbitrators is expensive, time consuming and objectively unjustifiable in many cases. Such an amendment would also be distinctively consistent with Singaporean practice in other arbitral fields where the default is generally a sole arbitrator.

There are, however, also reasons to be circumspect about this possible amendment. SCMA is known for defaulting to 3 arbitrators and contracts incorporating the SCMA Rules current at the time of commencement of arbitration may have been entered anticipating that 3 arbitrators would be the default option. There may be a perception that 3 arbitrators are more likely to arrive at the right result than a sole arbitrator. The reduction in default tribunal size may also afford fewer opportunities for developing arbitrators.

PROPOSAL FOR CONSULTATION: The amendment considers a possibility of reducing that number from three arbitrators to one arbitrator in the absence of parties' agreement

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Rule 6.2 to 6.4 – Appointment of Tribunal Members

Under the current framework, the mode of appointment of arbitrators is set out at Rules 6.2 to 6.4.

Where parties are unable to agree on the appointment of a sole arbitrator, the Chairman shall appoint said arbitrator upon application by any party. Where 3 arbitrators are to be appointed, each party shall appoint one arbitrator and the 2 arbitrators shall appoint the third arbitrator.

Where parties are unable to agree on the appointment of a sole arbitrator or if there is disagreement on the appointment of the third arbitrator, the appointment shall, upon request, be made by the Chairman. The applicable service fee for such appointment is S$750 per party.

PROPOSAL FOR CONSULTATION: There is merit in publishing the appointment procedure in the Rules. Not only does it promote transparency but it also helps the members and users understand how appointments are made.

The additional wording at Rule 6.2, which deals with the appointment of a sole arbitrator, requires the Chairman to consult the Secretariat before appointing the sole arbitrator where either party has made an application to invoke the Small Claims Procedure.

The further amendment, at Rule 6.3(a), provides that where a party fails to appoint an arbitrator and give notice that it has done so, the other party may appoint its arbitrator as the sole arbitrator without giving notice.

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Rule 6.2 to 6.4 – Appointment of Tribunal Members

Another new amendment is reflected at Rule 6.3(b). In cases where 2 arbitrators have already been appointed, this Rule provides that the appointment of the third arbitrator should be made no later than before any substantive hearing or forthwith if there is any disagreement between the 2 arbitrators in any matter relating to the arbitration. The new Rule further provides that upon the expiry of 14 days of being called upon by any one of the 2 arbitrators to appoint a third arbitrator and where no third arbitrator has been appointed, the Chairman shall make the appointment of the third Arbitrator upon application by either Arbitrator or party.

The parties should also be obliged to declare to the Chairman if they have agreed that the arbitrator(s) should possess any special qualifications. The new Rule 6.4 further clarifies that whilst the Chairman is not bound to appoint any candidates proposed, where the parties have agreed that the arbitrator(s) should possess special qualifications, this must be declared to the Chairman at the time of application for appointment.

The considerations in connection with this proposal are similar to those set out in paragraphs 10 and 11 above. However, there is an additional consideration that the IAA (and Model Law) provide for appointment of a sole arbitrator by an appointing authority and not on a default basis, as anticipated in the proposal. There is a possibility that this might raise issues in certain jurisdictions in relation to the enforcement of an award of a sole arbitrator appointed by a party and made sole arbitrator by default. The SCMA Rules Committee considers this possibility to be low, but would welcome comments from the industry.

Rule 6.7 and 29.1 – Liability for Arbitrator's fees and expenses

Under the current framework, Rules 6.5, 6.6 and 29.1 regulate the amount of appointment fees and booking fees payable to the Arbitrator(s). The appointment fee payable to the Arbitrator(s) upon appointment is currently fixed at S$500 per Arbitrator, and is non-refundable. The booking fee for the Tribunal is currently fixed at S$1,500 per day and varies depending on the duration of the hearing.

PROPOSAL FOR CONSULTATION: The amended Rule 6.7 expressly provides for the joint and several liability of the parties for all fees and expenses incurred by the Arbitrators in discharging their duties and each party will be liable to pay one half of the appointing fee of the third Arbitrator (if necessary).

It also removes the standard S$1,500 per day booking fee for the Tribunal and provides for any matters concerning the Arbitrator's fees and expenses, including terms of engagement and payment, to be the subject of agreement between the Arbitrators and the parties. The rationale for this amendment is that this provision is, in practice, seldom used. In default of such agreement, the default position, in the possible amended Rule 6.7, would be that of the Standard Terms of Appointment as set out at Schedule [X] of these possible amended Rules.

Rule 13 – Tribunal's security for costs

Under the current framework, a Tribunal is entitled to reasonable security up to the making of an Award and the form of such security and when it shall be provided is within the Tribunal's discretion. This Rule is however open to abuse where arbitrators require excessive amounts of security at too early a stage in the reference and without providing proper estimates to justify the extent of security.

PROPOSAL FOR CONSULTATION: The SCMA seeks feedback and/or comments on the issuance of Practice Guidance Notes, in relation to any request for security, which will be issued in conjunction with the updated Rules. Further, the inclusion of a new Rule 13.6 is intended to remind the parties of the fund holding services which the SCMA also offers (see Rule 42) and to avoid a situation where the parties unknowingly adopt a more expensive means of providing security.

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Rule 6.8 – Additional information required from Tribunals

The present Rule 6.8 requires the Tribunal to inform the Secretariat of its appointment along with a brief nature of the dispute. In practice, Tribunals often overlook this requirement.

PROPOSAL FOR CONSULTATION: The possible new Rule 6.8 expressly outlines the additional information to be provided by the Tribunal to the Secretariat as opposed to current reference to “a brief nature of the dispute”, which is ambiguous.

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Rule 8 – Reduction of time for delivery of case statements

Under the current framework, Rule 8 provides for a standard 30 day period for the parties to deliver their Statement of Claim, Statement of Defence and Counterclaim (if any) and Statement of Reply and Defence to Counterclaim (if necessary). Given the increased use of technology in maritime arbitrations, whereby most if not all communications today sent are via electronic means, the current time frames should be reviewed.

PROPOSAL FOR CONSULTATION: The amendments to Rule 8 contemplate a reduction of the current 30 day limits to 14 days each, hence reducing the overall period it would take for a dispute to reach the hearing stage from 90 days to 42 days (where no extensions are granted). The reduced timelines prevents respondents from exploiting the current Rule 8, where there is no defence or the decision turns on a short point of fact or of construction, and where the respondent is merely seeking to put off the day of reckoning for as long as possible.

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Rules 16 to 18 - Clarification to Challenge procedure set out within the Rules

The current Rule 16 sets out a challenge procedure, as follows:

Rules 16.1 – 16.3: the grounds on which an arbitrator may be challenged, reflecting those set out in Article 12(2) in the Model Law.
Rules 16.4 – 16.6: a reasoned notice of challenge must be delivered to the tribunal within 14 days of appointment/circumstances of challenge become known.
Rule 16.7: proceedings may continue pending determination of the challenge
Rule 16. 8: the other party may agree to the challenge; the arbitrator may withdraw.

Rule 17 provides that the Chairman of the SCMA shall decide any challenge and that any such decision "shall not be subject to any appeal".

Rule 18 provides for the removal of the Tribunal in certain circumstances that appear similar to those set out in Article 14 of the Model Law.

PROPOSAL FOR CONSULTATION: The possible amendments recasts the current Rules 16 and 17 into three separate rules to clearly outline the applicable test and challenge procedure, and its determination.

Rules 16 to 18 - Clarification to Challenge procedure set out within the Rules

By stipulating the challenge procedure clearly as a separate rule, it is easier to read this in conjunction with Article 13 of the Model Law and to understand that this is a procedure agreed by the parties pursuant to Article 13(1) therein.

The new Rule 17 provides that the decision of the Chairman on the challenge is not subject to an appeal within the framework of the Rules but does not exclude the mandatory provision of Article 13(3) of the Model Law which provides for a limited right of intervention by the court.

In conjunction with the proposed amendments, the current Rule 18 should be deleted as it is otiose and is potential cause for confusion where the removal of an arbitrator is a separate process from the challenge procedure. Further, it is not appropriate for the Rules to purport to confer on a court the right to determine an application to remove an arbitrator, the grounds on which such an application ought to be determined and who has standing to appear before the court. Such matters are best left to be determined in accordance with Article 14 of the Model Law.

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Rule 22 - Possibility to move the default seat of arbitration away from Singapore

Under the current framework, Rule 22.1 provides for Singapore to be the default juridical seat and Rule 22.3 provides for Singapore to be the default venue for hearings and meetings.
Insofar as Rule 22.1 is concerned, the option to agree a different juridical seat exists under the Rules and Singapore connected parties sometimes do agree to adopt the Rules but with a London seat. It can cause problems as there are some tensions between the Rules as they presently exist and the arbitration law so chosen.

As for Rule 22.3, it bears noting that most other arbitral rules do not stipulate the physical venue for the arbitration. An express provision can however be helpful as it promotes certainty and avoids the need to consider the venue in each case. Further, the current Rule does preserve the parties' right to choose a different venue or for the Tribunal to direct a different venue in appropriate circumstances.

PROPOSAL FOR CONSULTATION: Feedback and/or comments are invited on (a) whether the SCMA should move away from having Singapore as the default juridical seat and why such a change is desirable; (b) whether it is desirable to retain the current Rule 22.3.

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Rule 25 - Conferring the Tribunal overriding discretion over the conduct of the proceedings

Under the current framework, Rule 25 confers a wide discretion upon the Tribunal to ensure the just, expeditious, economical and final determination of the dispute. However, the discretion of the Tribunal to decide on procedural and evidential matters is subject to parties' agreement. In order to promote efficiency and to ensure that maritime arbitration remains economical for the parties, a balance needs to be struck between party autonomy and control of the proceedings by the Tribunal. The proposed amendments are intended to address the concerns of parties (other than lawyers) who fund dispute resolution and who have commented on unnecessary delay and cost in maritime arbitration, which could have been avoided with more robust direction from the relevant tribunal. The amendments that are being considered should not be misconstrued to be an attempt to facilitate or promote institution like control over the process or to fundamentally change the practice and approach of maritime arbitrators. It is hoped that with this amendment, it would encourage Tribunals to make directions which avoid or minimize delays and unnecessary costs, always mindful of their duties with regard to natural justice.

PROPOSAL FOR CONSULTATION: The proposed amendment first imposes an express duty upon the Tribunal to ensure the just, expeditious, economical and final determination of the dispute (as opposed to empowering the Tribunal with a discretion to achieve those same objectives). It also seeks to empower the Tribunal with the widest discretion, whilst having regard to the parties' agreement, not to be bound by it. The proposal will enable the Tribunal to ultimately decide what procedure to adopt in discharging its duty set out in Rule 25.1.

Further, in order to enable the Tribunal to discharge its duty under Rule 25.1, a more comprehensive Questionnaire (Schedule A of the Rules) is also being proposed. Feedback and/or comments on the Questionnaire are also being sought.

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Rule 27 - Change in Party Representatives to be subject to approval and may be withheld

Currently, Rule 27 provides that any party may be represented by person(s) of their choice subject to proof of authority as the Tribunal may require. The Rule is however silent on procedural requirements for any subsequent changes to a party's authorised representatives, in particular, late changes which may potentially impede or prejudice the arbitral process or embarrass the Tribunal in its constitution.

PROPOSAL FOR CONSULTATION: The amended Rule 27.3 includes the need for any change in party representative(s) to be subject to the Tribunal's approval and confers upon the Tribunal the power to withhold any such change where it is satisfied that such change might prejudice the conduct of the proceedings or enforceability of any Award

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Rule 28 - Removal of mandatory obligation to hold hearings

Under the current framework, Rule 28.1 imposes a mandatory obligation upon the Tribunal to hold a hearing (by some means) in every case, in the absence of parties' agreement to proceed on a documents-only basis. This Rule, in its current form, reflects an excessive implementation of Article 24.1 of the Model Law which deals with "Hearings and Written Proceedings" which only requires a hearing to be held at an appropriate stage of the proceedings if so requested by a party. This Rule is often exploited by the savvy respondent without any real defence, intent only on delay and often with the objective of thwarting a meritorious claim by an impecunious claimant, which cannot pre-fund the hearing in whatever form it might be arranged.

PROPOSAL FOR CONSULTATION: There are two possible approaches to this amendment. First, where the parties agree upon adopting the Rules, that the Tribunal shall decide, without requiring the parties' agreement; and even in the face of a request by either party to hold one, to decide whether to hold a hearing or not. Alternatively, if the parties agree or if any one requests that a hearing should take place, then a hearing will be required.

Consultees are invited to share their views on the possible technical/legal objections to the utmost discretion being conferred upon the Tribunal in relation to holding hearings; and the desirability of being able to achieve determination of cases expeditiously without a hearing on a documents-only basis.

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Rule 34 - Decision making by Tribunal

Under the current framework, Rule 34 provides that any direction, order, decision or Award of the Tribunal shall be made by a majority. This invariably requires the appointment of a third Arbitrator before the Tribunal is fully constituted.

PROPOSAL FOR CONSULTATION: The possible amendments are twofold. First, it expressly provides that the decision of the Presiding Arbitrator shall prevail where there is neither unanimity nor a majority. Second, the amendment also seeks to empower the 2 Arbitrators, already appointed, to make decisions, orders and Award(s) and to proceed with the reference until they cannot agree on a matter. There are two conflicting considerations here. First, in these circumstances the parties have agreed to arbitration by a three arbitrator tribunal; and this Rule will create a deviation from that agreement. Secondly, a decision on obvious matters does not require a third arbitrator and the avoidance of that additional cost results in efficiency savings, which are available in other maritime arbitration forums. Consultees are invited to provide their views with regard to these matters in light of their experience of maritime arbitration in general as well as SCMA arbitration in particular.

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Rule 34 - Decision making by Tribunal

Further, the current framework results in many emails being exchanged between Tribunal members during the course of a reference, on obvious and trivial procedural matters (and time spent and charged for).

PROPOSAL FOR CONSULTATION: Feedback and/or comments are sought on whether such exchanges between Tribunal members relating to procedural and other trivial issues can be avoided by the introduction of a new sub-Rule to empower the Presiding Arbitrator to make such procedural rulings, subject to revision only if the other arbitrators object to the ruling made. Again, the proposal involves consideration of the balance between a saving on costs and efficiency resulting from the Presiding Arbitrator taking sole charge of procedural rulings; and the risk of the Presiding Arbitrator erring when making such rulings (which may be mitigated if the Presiding Arbitrator consults before making a ruling). Consultees are invited to note that the proposal provides that the Presiding Arbitrator "shall" make procedural rulings alone and not "may" do so..

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Rule 46 - Increasing the limits of Small Claims to US$400,000

Presently, the limit of small claims under Rule 46.1 is set at US$150,000 (excluding interest and costs). Arbitrations under $150,000 were considered inefficient as the costs of arbitration would very quickly rise to, or even exceed, the full value of the dispute.

PROPOSAL FOR CONSULTATION: The amendment will increase the current limit of US$150,000 to US$400,000. The SCMA is of the view that an amount around US$300,000 but under US$400,000 would be an attractive limit and could become an attractive feature of SCMA arbitration. Corresponding adjustments would have to be made to the flat fee payable to the arbitrator.

Rule 46.1, in its current form, mandatorily applies to all claims and/or counter claim where the aggregate amount is less than US$150,000 excluding interest and costs.

PROPOSAL FOR CONSULTATION: Feedback and/or comments are invited on the possibility of empowering the Chairman of the SCMA to direct, upon the application of any party, subject to fulfilment of either the conditions in the draft Rule 46.1.a or b, that the Small Claims Procedure shall apply in the determination of the reference.

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Rule 46 - Increasing the limits of Small Claims to US$400,000

Presently, Rule 46.4 provides for the abridgement of time limits from 30 days to 14 days (although it may become unnecessary if the time limits in the proposed amendment at Rule 8 are adopted).
Proposal for consultation: Feedback and/or comments are sought on whether any further abridgment of time would be desirable.

Under the current framework, Rule 46.10 provides that no reason is required to be given for an Award made under the Small Claims Procedure.

PROPOSAL FOR CONSULTATION: Feedback and/or comments are sought on whether it is necessary for brief reason(s) to be given for an Award if the jurisdiction is to be substantially increased from US$150,000 to US$400,000.

Presently, Rule 46.13 provides that the Tribunal may order all or part of the legal and other costs to be paid by one party to the other provided such costs shall not exceed US$7,000 or US$10,000 in total where there is a counterclaim.

PROPOSAL FOR CONSULTATION: Given that the revised quantum limit represents an approximate 2.7x increase, feedback and/or comments are invited on whether different limits or bases to fix (i.e. simple limit) or ascertain (i.e. sliding scale, fixed ranges, etc) the fees and recoverable costs should be introduced.

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Rule 48 - Directing bunker disputes of sums not exceeding S$100,000 to be resolved under the SBC Terms

Presently, Rule 48 provides that the parties may, by agreement, refer any and all disputes arising out of or in connection with contracts for sale and/or supply of bunkers, to be resolved under Singapore Bunker Claims Procedure ("SBC Terms").

PROPOSAL FOR CONSULTATION: The amendment empowers the Registrar, upon the application of a party or if the parties agree, to direct a dispute where the value of the claim and counterclaim does not exceed US$100,000, to be resolved under SBC Terms..

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Other proposals for consideration - Possible structural amendments

Listed below are various features of modern day arbitration which can today be found in various arbitral rules but have yet to find its way into the Rules. They are as follows:

- Emergency arbitrators;
- Emergency appointment procedures;
- Summary or early dismissal of claims and defences;
- Expedited procedure (general and not just for small claims);
- Long stop limits within which a Tribunal must render its award;
- Practice and disclosure in relation to Third Party Funding in maritime cases;
- Consolidation;
- Scrutiny of awards;
- The extent to which the SCMA should produce Guidelines, Checklists, Templates and Precedents;
- Whether the SCMA could and should devise, adopt and implement a regime to control/limit costs which is specifically suited to maritime arbitration?
- Compulsory mediation under a generally applicable rule or an opt-in or opt-out process.

VIEWS SOUGHT: The broad thrust of the request for responses will be to elicit whether there is an appetite or need for any of those structures in maritime arbitration and the exposition of reasons why, if it be the case that is so. It ought also to be noted that items (a), (b), and (h) to (k), would require government or party funded service providers or additional staff at the SCMA to provide and administer the additional services required.

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How to participate effectively in the Consultation Process?

Moving with times, all responses to the Public Consultation exercise will be **only be in Electronic Form**.

Three documents that you will need to respond effectively are:

1. The **Public Consultation Document** which can be accessed in any one of three ways:
   a) Through the SCMA Website - https://www.scma.org.sg/rules#consul
   b) In a user-friendly and electronic MS Form (We will be sending out the emails to all relevant stakeholders) - https://forms.office.com/Pages/ResponsePage.aspx?id=Qnc4CY_UoU-QjAzAupN1z6-9Y90yPC9MoXB-f84ppUJUOTRNRE4zNTJDOU8wSkw5UTBSMTRJVkJVWC4u
   c) The same form can also be accessed through scanning this QR Code –
2. The **SCMA Procedure Committee Report** which can be found at https://www.scma.org.sg/rules#commitee. This report presents the "**draft** new rules", along with **detailed commentaries** on ALL the possible changes to rules.
3. The **current SCMA Rules (3rd Ed),** which can be found at https://www.scma.org.sg/rules#3rd
4. A recording of the webinar explaining the background to the possible rule changes can be found at :https://www.youtube.com/watch?v=Ntsb362SdQ0

We look forward to your response.

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