
An analysis of The HKIAC Rules 2018: Catching up with The SIAC

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INTRODUCTION:

As international commercial arbitration continues to gain traction as the dispute resolution mechanism of choice in Asia, institutions administering such arbitrations compete with each other to provide the most efficient and cost effective path to resolving complex commercial disputes.

To this end, the Hong Kong International Arbitration Centre (the “**HKIAC**”) recently announced the new version of its Administered Arbitration Rules (the “**2018 HKIAC Rules**”), which came into force on 1 November 2018. The 2018 HKIAC Rules introduce a raft of useful amendments including: (i) rules facilitating the speedy and efficient resolution of complex arbitrations; (ii) a procedure for an early determination of points of law or fact to dispose of frivolous claims at the onset; (iii) shorter time limits for passing awards and speeding up emergency arbitrator procedures; and (iv) rules governing third party funding.

This note analyzes the impact of these amendments and compares them to the Singapore rules currently in force.

IMPLICATIONS FOR PARTIES ADOPTING THE RULES

Parties who have adopted to resolve their disputes through arbitrations administered by the HKIAC in their arbitration agreements should be aware that the 2018 HKIAC Rules will apply only to all arbitrations commenced on or after 1 November 2018.

The new rules will apply only where the arbitration agreement specifically uses the language “the HKIAC Administered Arbitration Rules in force” in the arbitration agreement, and thereafter, when the Notice of Arbitration is submitted, as opposed to the date when the contract is concluded.

The amendments introduced by the 2018 HKIAC Rules are user friendly and reflect international best practices. Some changes introduced are similar to the additions made by the Singapore International Arbitration Centre (the “**SIAC**”) to their own rules as issued in 2016 (the “**2016 SIAC Rules**”), while others are entirely new.

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The amendments to the 2018 HKIAC Rules are analyzed below.

1. Enhanced procedures for multi party and multi contract cases

The 2018 HKIAC Rules expand a party's right to commence a single arbitration under multiple contracts with separate arbitration agreements even if the parties are not bound by each of the arbitration agreements. This is premised on having a common question of law or fact, the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions, and all arbitration agreements concerned are compatible.

An arbitral tribunal sitting in multiple arbitrations involving "*a common question of law or fact*" will be expressly allowed to conduct those arbitrations "*at the same time*", "*one immediately after another*", or suspend any of them until the determination of any other of them. This may be particularly useful in situations where consolidation of arbitrations is not possible or desirable.

The provisions relating to multi party and multi contract cases are notable in that they provide for concurrent arbitrations to be conducted simultaneously, or expressly allows the determination of one dispute to be halted till the determination of a related dispute, thereby avoiding multiplicity of proceedings and potentially conflicting awards, ***without consolidation*** (emphasis supplied). The provisions go beyond what is allowed in the 2016 SIAC Rules currently in force. The concern with this provision of course is that a party involved in a related, concurrent, yet different, dispute may end up with significantly delayed relief while awaiting the resolution of a related dispute to which it is not a party. A party to such a suspended arbitration may be left with no recourse to an alternative and quick relief.

Consequently, the application of this newly introduced provision by a duly constituted tribunal must be selective and judicious.

2. Early Determination Procedure

A significant amendment is the express power for a tribunal to determine certain issues at an early stage of the arbitration. This procedure applies to a point of law or fact that is manifestly without merit or manifestly outside of the tribunal's jurisdiction, or assuming the point is correct, it would not result in an award in favour of the party that submitted such point.

Requests for early determination must be made as promptly as possible after the relevant points are submitted. The tribunal has 30 days to decide whether to allow the request and, if so, another 60 days to decide on the request.

This provision, other than a potential 90 day time frame for deciding on the request, is similar to Rule 29 of the 2016 SIAC Rules. The addition of a provision of this nature was long overdue as it helps avoid costly and often lengthy disputes, patently without merit and which ought to be disposed *in limine*.

3. Emergency Arbitrator Procedures

The 2018 HKIAC Rules shorten all time limits under the emergency arbitrator procedures. In addition, they allow a claimant to apply for the appointment of an emergency arbitrator prior to commencement of the arbitration, provided that the claimant commences arbitration within seven days thereafter.

In deciding an application for emergency relief, an emergency arbitrator will apply the test a tribunal applies for interim measures under Article 23 of the 2018 HKIAC Rules.

This provision was also necessary to guarantee the rights of parties seeking to

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protect assets, disposable material and other sensitive material constituting the subject matter of a dispute. Schedule 1 of the 2016 SIAC Rules grants similar rights to parties in an arbitration. It is heartening to see institutionalized arbitration providing protection of this nature as such relief, earlier available only through courts, which is necessary to protect the sanctity of arbitration. A dispute resolution proceeding with no provision or recourse to protect the subject matter of a dispute or to provide for emergency relief often has limited practical utility.

4. Deadline for delivery awards

Once the proceedings are declared closed, tribunals will have to inform the parties of the anticipated time of delivery of an award. Importantly, tribunals will have to render awards within three months from the date when the tribunal *declares the entire proceedings or the relevant phase thereof closed*. The time limit can only be extended by agreement of the parties or, in appropriate circumstances, by HKIAC.

This provision is also a welcome addition as strict timelines relating to the submission of an award by the tribunal guarantees speedy relief. Rule 32 of the 2016 SIAC Rules has a similar yet tougher deadline. The practical application of this rule however has been inconsistent. Tribunals often do not declare proceedings “closed” till several months after the final submissions and awards are consequently delayed. While the addition of this provision in both the HKIAC and the SIAC Rules is laudable, a mechanism is needed to ensure that proceedings are declared closed, thereby triggering the time limit, sufficiently early. Otherwise the entire purpose of this provision is lost.

Some of the other amendments introduced include:

5. Party paying defaulting party’s share

of advance on costs can request award for reimbursement

If a party fails to pay its share of an advance for costs and the other party pays that share, the paying party can request the tribunal to make an award for reimbursement. This should help to reduce or mitigate situations where a respondent shifts the burden of bearing an advance on the claimant. Alternatively, the amounts may be recovered by the Party making the payment through a costs application at the end of the arbitration, which is the procedure followed by the SIAC under Rule 37 of the 2016 SIAC Rules.

6. Third Party Funding

In line with the relevant amendments to the Arbitration Ordinance in June 2017 and consistent with relevant Singapore law in March 2017 permitting third party funding, the 2018 HKIAC Rules allow for such funding. The rules however also provide that a funded party is required to disclose promptly the existence of a funding agreement, the identity of the funder, and any subsequent changes to such information. A funded party will be permitted to disclose arbitration-related information to its existing and potential funder.

7. Alternative means of dispute settlement

The 2018 HKIAC Rules clarify that if parties wish to pursue alternative means of settling their dispute (e.g., mediation) during the arbitration, a party may request the suspension of the arbitration. The arbitration shall resume at the request of any party.

Attempting to settle the dispute after commencing the arbitration has the advantage that, if the parties reach a settlement, they can request the tribunal to record it in the form of an award. Such an award on agreed terms is enforceable as any other final award.

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8. Appointment of Arbitrators

The 2018 HKIAC Rules will be accompanied by a new *Practice Note* setting out the HKIAC's general practice of appointing arbitrators. The HKIAC normally appoints arbitrators from its panel or list of arbitrators published on its website.

When appointing arbitrators, the HKIAC takes into account a wide range of factors, such as the amount, nature, and complexity of the dispute, the governing law of the contract, and availability and proposed fees of the arbitrator. Where the parties are of different nationalities, HKIAC will generally appoint a sole or presiding arbitrator of neutral nationality; however, in cases involving at least one mainland Chinese party, the HKIAC may still appoint a holder of a Hong Kong passport.

ACTIONS TO CONSIDER

To ensure that parties avail themselves of the best options for resolving disputes pursuant to the newly issued rules, we recommend the following steps:

- a. When negotiating or drafting an arbitration clause, seek legal advice on relevant issues such as the appropriate seat and arbitration rules, whether any third parties should be able to benefit from the arbitration clause, and in which jurisdictions enforcement may be required.
- b. Adopt compatible arbitration clauses in all agreements arising under the same transaction or a series of transactions so that consolidation of arbitrations, joinder of third parties to arbitration, and commencing a single arbitration under multiple contracts is possible.