

Arbitration in Hong Kong: The new rules

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The Hong Kong International Arbitration Centre (“HKIAC”) has recently introduced several new provisions to the 2013 HKIAC Administered Arbitration Rules (the “HKIAC 2013 Rules”) which came into force on 1 November 2018 (the “HKIAC 2018 Rules”). The HKIAC 2018 Rules provide the arbitral tribunal and the parties with mechanisms to resolve disputes through a more efficient, cost-effective and procedurally certain process.

The key changes in the HKIAC 2018 Rules, along with a brief comparison of the position under the Singapore International Arbitration Centre (“SIAC”) Rules 2016 (“SIAC 2016 Rules”), are as follows:

1. Refined Emergency Arbitrator Procedure

A party may now apply for emergency relief prior to the commencement of an arbitration (“Commencement”), up to 7 days (or as extended by the EA) prior to Commencement. The EA will apply the same test for interim measures under Article 23 when considering the application. The HKIAC must appoint an EA within 24 hours and the EA must give its decision within 14 days.

The SIAC 2016 Rules provide for an application for emergency interim relief to be filed concurrently with or following the filing of a Notice of Arbitration, but prior to the constitution of the tribunal. The SIAC must appoint an EA within 1 day of receipt of such application and payment of the administration fee and deposits, and the EA must render its interim order or Award within 14 days from appointment.

2. Early Determination Procedure

The arbitral tribunal can now determine in a summary way: (a) whether a point of law or facts submitted is (i) manifestly without merit or (ii) manifestly outside the tribunal’s jurisdiction; or (b) that no award could be rendered to the party submitting the point, even if assumed to be correct. This is a powerful mechanism to prevent parties from running hopeless points, e.g. for tactical reasons. Requests must be made as promptly as possible after the points are submitted. The tribunal must decide within 30 days whether to permit the request and, if so, to render its determination within 60 days thereafter.

The SIAC 2016 Rules, on the other hand, provide for the early dismissal of “claims and defences” on the basis that the claim or defence is manifestly without legal merit; or that the claim or defence is manifestly outside the jurisdiction of the tribunal. The tribunal shall make its order or award, with reasons, within 60 days of filing the application.

3. Enhanced provisions for a single arbitration under multiple contracts and concurrent proceedings

A party may now commence a single arbitration under several arbitration agreements, even where the parties to the arbitration are not bound by each of the arbitration agreements. This avoids multiple arbitrations and provides for more effective resolution of complex disputes commonly arising from the same transaction. The validity of the commencement of the arbitration shall be decided by the tribunal, or the HKIAC (if the tribunal has yet to be constituted). The arbitral tribunal may also conduct concurrent or consecutive proceedings where a common question of law or facts arises in all arbitrations but consolidation is not possible or desirable.

The SIAC 2016 Rules allow for the consolidation of multiple proceedings provided that one of the following criteria is satisfied (i) all parties have agreed to the consolidation; (ii) all the claims are made under the same arbitration agreement; or (iii) the arbitration agreements are ‘compatible’, and the disputes arise out of the same legal relationship(s) or contract(s), or out of contracts consisting of a principal and ancillary contract(s); or that the disputes arise out of the same transaction or series of transactions.

The SIAC also announced a revolutionary cross-institution consolidation protocol in December 2017, which would allow related disputes subject to different institutional proceedings and rules to be resolved in a single proceeding. This protocol aims to promote consistency in the decision-making process, and facilitate the efficient and expeditious resolution of disputes that might otherwise be decided in a piecemeal manner in different fora.

4. Time Limit for Delivery of Awards

The arbitral tribunal is now required to notify the parties and the HKIAC at close of proceedings when an award can be expected, which must be done within the next three months. This time limit may be extended by the HKIAC or parties' agreement.

The SIAC 2016 Rules do not establish a general award deadline. Under the SIAC 2016 Rules, a draft award must be submitted to the SIAC Registrar within 45 days of the close of proceedings. The Registrar may, as soon as practicable thereafter, suggest modifications to the form of the award and draw the tribunal's attention to points of substance. No award shall be made by a tribunal until it has been approved by the Registrar as to its form.

5. Third Party Funding

Under the HKIAC 2018 Rules, a funded party must disclose the existence of a funding agreement and the funder's identity, and may disclose arbitration-related information to existing or potential funders. The arbitral tribunal may take the funding arrangement into account when determining the arbitration costs.

Whilst there is no express provision in the SIAC 2016 Rules on third party funding, the SIAC issued a Practice Note on 31 March 2017 that provides guidance on disclosure by arbitrators regarding any relationship (whether direct or indirect) with an external funder, as well as disputant parties' disclosure regarding the involvement of an external funder in arbitration proceedings. The arbitral tribunal may take the funding arrangement into account when determining the arbitration costs.

6. Alternative Means of Dispute Settlement

If, during the course of the arbitration, the parties are inclined to explore alternative means of resolving their disputes, a party may request the tribunal or the HKIAC to suspend the arbitration proceedings. Such proceedings shall resume upon the request of a party, and if the parties are able to reach a settlement, they may request the tribunal to record it in the form of an award.

The SIAC 2016 Rules do not expressly provide for the suspension of ongoing proceedings in favour of alternative dispute resolution mechanisms. However, parties can adopt the Singapore Arb-Med-Arb Protocol ("AMA Protocol") under the SIAC-SIMC (Singapore International Mediation Centre) at any time, even after the dispute arises or after other dispute resolution processes are underway. Once parties agree to the AMA Protocol, commencement of mediation is automatic, whereas mediation typically requires the consent of both parties. As with the HKIAC 2018 Rules, if parties are able to reach a settlement, they may request the arbitral tribunal to issue a consent award.

7. Use of Technology

Arbitral tribunals are encouraged to consider the effective use of technology as a factor when determining suitable procedures for the conduct of an arbitration. Parties may also agree to deliver documents through a secured online repository. This will be particularly cost-effective and expedient for disputes which are documents intensive.

The SIAC 2016 Rules do not expressly mention the use of technology.

For the full break down please [click here](#).

Modern arbitral institutions such as the HKIAC and the SIAC play a prominent role in thought-leadership in shaping the future of international arbitration. The HKIAC 2018 Rules are a welcome addition to the arbitration landscape as they provide improved procedural efficiency and flexibility. With the SIAC and other arbitral institutions vying for dominance in the region, we should expect further developments in the near future.

You should take note of the HKIAC 2018 Rules if you have arbitration agreements that refer to the HKIAC Administrative Rules in force when the Notice of Arbitration is submitted. The full text of the HKIAC 2018 Rules is available at www.hkiac.org.

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