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Adoption of new HKIAC arbitration rules

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The Hong Kong International Arbitration Centre (HKIAC) announced on 18 October 2018 that it updated its Administered Arbitration Rules, which had entered into effect on 1 November 2018. A copy of the 2018 rules can be obtained here. Hogan Lovells lawyers James Kwan and James Ng were involved in the revision process leading up to the adoption of the new 2018 rules. This client alert summarizes the most important changes between the 2013 rules and 2018 rules.

These changes will solidify Hong Kong's status as a hub for arbitration in the region and globally, especially in terms of innovation, efficiency, and economy of the arbitral proceedings. The 2018 rules will reinforce the HKIAC as a leading global institution and provider of arbitration services.

Executive summary of changes

- Provisions on third-party funding
- Express mention of early determination procedures
- Expanded grounds for commencing a single arbitration under multiple contracts
- Express mention of concurrent proceedings
- Improvement of the emergency arbitrator procedures
- Promotion of the use of alternative dispute resolution
- Establishment of an award deadline
- Use of technology in appropriate cases

Provisions on third-party funding

The introduction of provisions on third-party funding in the 2018 rules reflects the legislative changes that allow for third-party funding in Hong Kong, once the third-party funding code of conduct is in place. This represents the greatest potential to change arbitration in Hong Kong, as it allows the sharing of financial burdens and risk. The 2013 rules did not address the possibility of third-party funding, given the uncertain state in the law.[1] The 2018 rules provide some regulation of such funding by requiring disclosure of third-party funding to the parties, the arbitral tribunal and the HKIAC, along with the funder's identity (Art. 44.1). In addition, the arbitral tribunal may take such a funding arrangement into consideration when awarding costs (Art. 34.4). This reflects judicial authority in England and Wales.[2]

Express mention of early determination procedures

The 2018 rules provide for early determination procedures, which resembles recent moves in this direction by other arbitral institutions. The 2013 rules do not provide for such procedures explicitly, although it is debatable as to whether arbitrators already had this power implicitly as part of its case management mandate.

These new procedures allow an arbitral tribunal to decide on one or more points of law or fact that are manifestly "without merit" or manifestly "outside the arbitral tribunal's jurisdiction", or where "no award could be rendered in favor" of a party even if it submitted such points of law or facts that are assumed to be correct (Art. 43.1). In order to use such procedures, a party must make a request and proposal for these procedures with a statement of facts and supporting arguments as soon as possible after submission of the point(s), and the other parties must be given an opportunity to comment on the request (Arts. 43.4, 43.5). The arbitral tribunal has 30 days from the date of filing the request to decide whether to proceed, and 60 days from that point to reach a decision in the form of an order or award, subject to extensions agreed to by the parties or the HKIAC (Arts. 43.5, 43.6).

Such summary procedures can make arbitral proceedings more efficient and economical. However, they also raise potential due process concerns that remain to be definitively tested by a national court.

Expanded grounds for commencing a single arbitration under multiple contracts

The 2018 rules now allow a party to commence a single arbitration relating to multiple contracts as long as they share a question of law or fact, the relief sought relates to the same transaction or series of transactions, and the claims arbitration agreements are compatible (Art. 29). This differs from the 2013 rules in that it drops the requirement for each agreement to bind all of the arbitral parties. This means that commencing a single arbitration under multiple contracts now shares one of the same tests for consolidation. This change removes the need for claimants to start separate arbitrations and then later try to consolidate them in cases where not all agreements have identical parties, which will help with efficiency of the proceedings.

Express mention of concurrent proceedings

The 2018 rules expressly provide for concurrent arbitral proceedings before the same arbitral tribunal to achieve the underlying objectives of the 2018 rules for time and cost efficient arbitrations, which includes the simultaneous or consecutive handling of arbitrations, as well as the suspension of those arbitrations (Art. 30.1). The 2018 rules require "the same arbitral tribunal [to be] constituted in each arbitration" and "a common question of law or fact [to arise] in all the arbitrations." The 2013 rules are silent with regard to concurrent proceedings.

Undoubtedly, this change aims to remove the inefficiencies associated with parallel proceedings. This change should give confidence to arbitrators when managing related arbitrations. Concurrent proceedings may be conducted in situations where consolidation is not possible or desirable.

Improvement of the emergency arbitrator procedures

As a type of urgent conservatory measure, both the 2013 and 2018 rules allow for an emergency arbitrator procedure concurrent with or following the commencement of arbitration, but before the formation of the arbitral tribunal. However, the 2018 rules now allow for a party to apply for the appointment of an emergency arbitrator before an arbitration is filed, although it will need to do so within seven days (para. 21 of Sch. 4).

Under the 2018 rules, HKIAC will now seek to appoint an emergency arbitrator within a day (para. 4 of Sch. 4), whereas the 2013 rules allowed for two days. The 2018 rules clarify that the emergency procedures will terminate where the applicant fails to file a notice of arbitration within seven days of the request for an emergency arbitrator procedure, subject to an extension from the emergency arbitrator (para. 21 of Sch. 4). Furthermore, the emergency arbitrator now has 14 days to render an emergency decision (para. 12 of Sch. 4), as opposed to 15 days under the 2013 rules.

The shortening of the timelines for the HKIAC and the emergency arbitrator to act is welcomed, given the urgent nature of these types of procedures. Likewise, the introduction of a requirement to file a notice of arbitration within seven days of requesting an emergency arbitrator procedure helps emphasize the temporary nature of these procedures and helps to avoid potential abuse of the process.

Promotion of the use of alternative dispute resolution

The 2018 rules allow the parties to agree to attempt resolution through other settlement methods such as mediation after the arbitration has started (Art. 13.8). In the presence of such agreement and at the request of a party, the HKIAC, the arbitral tribunal or the emergency arbitrator may suspend or restart the arbitral proceedings in accordance with terms they deem appropriate. It assists with the enforcement of a consent award if the mediation results in settlement of the dispute. This provision is helpful to attract users (especially those from mainland China) where alternative dispute resolution methods are common and the preservation of the relationship is important.

Establishment of an award deadline

The 2018 rules introduced a deadline for the arbitral tribunal to render an award, whereas the 2013 rules lacked such a deadline outside of the expedited procedure. The 2018 rules require the arbitral tribunal to not only tell the parties when they can expect delivery of the award, but to also render the award within three months from the close of the proceedings, subject to extensions by party agreement or by the HKIAC in appropriate circumstances (Art. 31.2).

This provision helps to ensure that the parties receive the award in a timely manner so that they can move on with their business. It reflects the attempts of other institutions such as the International Chamber of Commerce (ICC) to make the arbitral tribunal and the institution accountable for an efficient arbitral process.

Use of technology in appropriate cases

The 2018 rules are the first set of arbitral rules in Asia that expressly mentions the use of technology. Under these rules, the effective use of technology is an express factor for the arbitral tribunal to consider when determining suitable procedures for the conduct of an arbitration (Art. 13.1). The rules also provide an online repository option for delivering documents, whereas arbitrations under the 2013 rules did not have this option. The 2018 rules leave it up to the parties to agree on which secured online repository service to use (Art. 3.1(e)).

Conclusion

The HKIAC has a global reputation for transparency and independence. Its arbitral rules can be easily assimilated, and it has extremely capable staff to administer the proceedings. The 2018 rules reflect international best practice and contains innovations that promote the efficiency and

economy of arbitral proceedings, therefore strengthening Hong Kong's and the HKIAC's position as a leader of international arbitration.[1]

[1] See *Unruh v. Seeberger*
, [2007] 2 HKC 609; *Cannonway Consultants Ltd v. Kenworth Engineering Limited*, [1995] 1 HKC 179.
[2] See *Essar Oilfields Services Limited v. Norscot Rig Management Pvt Limited*, [2016] EWHC 2361 (Comm); International Chamber of Commerce, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, Oct. 30, 2017, para. 24.

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