

## Better, Faster, Cheaper: Revised Arbitration Rules in Hong Kong

### ***The Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2013 align the jurisdiction with international best practices.***

The HKIAC has updated its popular rules for administered arbitration. The 2013 Rules, which come into force on 1 November 2013, address arbitrator remuneration and appointment, multi-party and multi-contract situations, expedited procedures as well as emergency arbitrators. With these changes, parties in complex cross-border disputes will likely continue to choose Hong Kong as a cost-effective, state of the art jurisdiction for international arbitrations.

### **Background**

The Hong Kong International Arbitration Centre (HKIAC) introduced its first set of rules for administered arbitration in 2008. The 2008 Rules soon proved to be a popular choice as the procedural rules adopted by parties conducting international arbitrations in Hong Kong, and have remained so over the past five years.

In 2012 the HKIAC commenced a review of the 2008 Rules, consulting the Hong Kong arbitration community broadly, with a view to assessing the changes desirable to ensure that the HKIAC's rules continue to represent current best practices in international arbitration. That exercise resulted in the publication, earlier this year, of a revised version of the rules (the 2013 Rules).

The 2013 Rules will apply to all arbitrations administered by the HKIAC where the Notice of Arbitration is submitted on or after 1 November 2013.

The 2013 Rules contain various welcome updates and revisions, based on users' experiences over the past five years. These will inevitably require more administration by the HKIAC, but the HKIAC has nevertheless stressed that it intends to retain its signature "light touch" approach, based on party autonomy and cost-effective administration framework.

The key updates and revisions, addressed below in this Client Alert:

- Streamline the arbitrator remuneration and appointment process
- Address multi-party and multi-contract situations
- Enhance the existing expedited procedure

- Introduce the concept of Emergency Arbitrators

The HKIAC intends these updates and revisions to improve the efficiency and cost-effectiveness of the international arbitrations it administers in Hong Kong and to bring its practices and procedures in line with global best practices for administering international arbitrations.

## **Arbitrator Remuneration and Appointment**

Two of the most important considerations for users of arbitration are (i) controlling the cost and expense of the process, and (ii) reducing the length of the process.

In relation to costs, the HKIAC's approach has traditionally been to provide parties with a choice of methods by which their tribunal's fees will be determined; either as a percentage of the amount in dispute, or alternatively on the basis of an hourly rate. This choice is unique to the HKIAC among arbitral institutions, and allows parties to choose the method they believe will be most cost-effective for them in a particular case. The 2013 Rules have retained this approach, but have introduced two new features designed to control costs.

First, the agreed hourly rates will be subject, for the first time, to a fee cap established by the 2013 Rules. Initially, the cap will be HK\$6,500 (approximately US\$830) per hour. Whilst (honouring the concept of party autonomy) the parties can agree to pay above the capped rate (and the HKIAC can also fix the hourly rate of an arbitrator "in exceptional circumstances" in the event that the parties cannot agree), in practice such an agreement likely will be rare, and the cap will operate as an effective control on the level of costs incurred by a party in relation to the fees of the tribunal.

Secondly, the 2013 Rules introduce standard terms of appointment to which all arbitrators appointed in accordance with the 2013 Rules must agree (subject to variations agreed by all parties or made by the HKIAC).

As well as leading to savings in terms of costs, both of these new features are expected to speed up the arbitral process by simplifying the appointment process, ensuring that the arbitral tribunal can be constituted quickly, and the arbitration commenced, without the need for extensive and potentially difficult debates over fees and the other proposed terms of the arbitrators' appointment.

Further, establishing standard terms and a fee cap will also help parties avoid the conundrum they can face in the appointment process — no party wishes to be seen as 'difficult' in relation to an arbitrator's terms of appointment, or their proposed fees, when that same arbitrator will subsequently sit and determine the substantive dispute. The detailed provisions of the 2013 Rules will minimise the possibility of such issues arising.

## **Multi-Party and Multi-Contract Situations**

Commercial transactions are increasingly complex, often involving many parties and many inter-related contracts, especially when transactions are cross-border. Arbitration is particularly well suited to deal with the complex disputes that arise when things go wrong in such cross-border relationships. In recognition of this, in the 2013 Rules, the HKIAC has:

- Expanded the existing provisions in the rules on joinder
- Introduced new provisions on consolidation

- Made express provision for single arbitrations under multiple contracts.

These provisions are intended to maximise the ability of the HKIAC and/or tribunals appointed under the 2013 Rules to handle multi-party and multi-contract disputes.

### **Joinder of a Party**

Provisions enabling a tribunal to join one or more third persons to an arbitration as a party existed prior to the introduction of the 2013 Rules. However, the powers of the tribunal to order joinder have been significantly enhanced under the 2013 Rules. Further, the HKIAC is now empowered to order joinder prior to the constitution of the arbitral tribunal.

Under the previous provisions, joinder could only be sought by the existing parties to the arbitration and required the written consent of the relevant parties (*i.e.*, the party seeking joinder and the party to be joined; any other party to the arbitration having no say in the matter). Under the 2013 Rules:

- All parties will be consulted before the tribunal will exercise its joinder powers (but the written consent of the relevant parties is no longer required).
- A non-party can seek to be joined to an existing dispute.

Upon receiving a request for joinder, the tribunal may join an additional party to the existing arbitration so long as the additional party is bound by a valid arbitration agreement under the 2013 Rules.

Further, the HKIAC itself can now join an additional party to an arbitration where the request for joinder is received before the tribunal is constituted. Objections to the HKIAC's actions in this regard are to be raised with the tribunal once it has been confirmed.

### **Consolidation**

Previously, the rules did not contain provisions dealing with consolidation (*i.e.*, folding two ongoing arbitrations into one). The 2013 Rules now expressly allow the HKIAC to consolidate two or more arbitrations that are pending under the 2013 Rules. Where arbitrations are consolidated they will generally be consolidated into the arbitration that commenced first (unless all parties agree otherwise, or the HKIAC decides otherwise, taking into account the circumstances of the case).

Consolidation of pending arbitrations is possible in any of the following three circumstances:

- The parties agree.
- All of the claims in the arbitrations are made under the same arbitration agreement.
- In claims made under more than one arbitration agreement, a common question of fact or law arises in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions, and the HKIAC finds the arbitration agreements to be 'compatible'.

In deciding whether to consolidate, the HKIAC will consider the circumstances of the case, including whether arbitrators have been designated or confirmed in more than one of the arbitrations (and if so, whether the same or different arbitrators have been confirmed).

The provisions on consolidation only apply to arbitration agreements concluded after 1 November 2013 (*i.e.*, the date the 2013 Rules come into force), unless otherwise agreed by the parties.

### **Consequential Matters on Joinder and Consolidation**

Where an additional party is joined to the arbitration before the tribunal is confirmed, or where the HKIAC decides to consolidate two or more arbitrations:

- All parties will be deemed to have waived their rights to designate an arbitrator and the HKIAC may revoke the appointment of any arbitrators already designated or confirmed. In these circumstances, the HKIAC will appoint the arbitral tribunal.
- The revocation of the appointment of an arbitrator is without prejudice to the validity of any act done or order made by the arbitrators before their appointment was revoked, and the right for the arbitrator to be paid.

The 2013 Rules expressly provide that parties waive any objection, on the basis of any decision to join an additional party to the arbitration or to consolidate, to the validity and/or enforcement of any award made by the arbitral tribunal in the arbitration/consolidated proceedings, in so far as such waiver can validly be made.

### **Single Arbitration Under Multiple Contracts**

The 2013 Rules introduce a new provision expressly enabling claims arising out of or in connection with more than one contract to be made in a single arbitration, provided all of the following:

- All parties to the arbitration are bound by each arbitration agreement.
- A common question of law or fact arises under each arbitration agreement.
- The rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions.
- The arbitration agreements under which those claims are made are compatible.

This provision will apply only to arbitration agreements concluded after the 2013 Rules come into force, *i.e.*, 1 November 2013.

### **Expedited Procedures**

The HKIAC's expedited procedures have been revised and enhanced in the 2013 Rules to enable a dispute to be determined swiftly in appropriate cases.

The key changes to the process are as follows:

- The applicable monetary threshold for the application of the expedited procedures has been significantly raised to HK\$ 25 million (approximately US\$3.2 million) from the previous figure of US\$250,000.
- In addition, the proceedings might still be conducted on an expedited bases even where this monetary threshold is exceeded, if (i) both parties agree or (ii) in cases of exceptional urgency.

- The expedited procedures will no longer apply automatically, but the HKIAC can order the expedited procedures to apply upon the application of a party.

In expedited cases, there is a presumption that cases will be heard by a sole arbitrator and on a documents only basis. Save in exceptional circumstances, the award must be rendered within six months of the transmission of the file to the tribunal.

## **Emergency Arbitrators**

The 2013 Rules introduce an Emergency Arbitrator procedure, enabling a party to apply for urgent interim or conservatory relief prior to the constitution of the arbitral tribunal.

This mirrors similar processes for interim relief introduced into the rules recently promulgated by various other arbitral institutions (for example, the Singapore International Arbitration Centre). Prior to the coming into force of the 2013 Rules, a party to an arbitration being administered under the HKIAC's rules who wished to seek urgent relief prior to the institution of the arbitral tribunal was required to seek that relief from the Hong Kong Court.

The new Emergency Arbitrator provisions in the 2013 Rules supplement (and do not replace) the current law, enabling a party arbitrating under the 2013 Rules to choose to bring an application for urgent relief to an Emergency Arbitrator or, instead, to approach a competent judicial authority on the matter.

The introduction of procedures for the appointment of Emergency Arbitrators under the 2013 Rules, therefore, enables parties to obtain quick interim relief before the constitution of the tribunal, without needing to go to court.

If the HKIAC determines it should accept the application to appoint an Emergency Arbitrator, the HKIAC will seek to appoint an Emergency Arbitrator within two days after receipt of the application. The Emergency Arbitrator is required to make a decision on the application within 15 days from the date on which the HKIAC transmitted the file to the Emergency Arbitrator (although this time can be extended).

Any decision of an Emergency Arbitrator (an Emergency Decision) is stated to have the same effect as an interim measure granted pursuant to Article 23 of the 2013 Rules, and to be binding on the parties when rendered. By agreeing to arbitrate under the 2013 Rules the parties undertake to comply with any Emergency Decision without delay.

To facilitate the implementation of this provision, the Arbitration Ordinance has been amended with effect from 19 July 2013 to provide that emergency relief granted by an Emergency Arbitrator whether inside or outside Hong Kong is enforceable in the same manner as an order made by the Court that has the same effect. As a result, parties can enlist the aid of the Hong Kong courts to enforce decisions of Emergency Arbitrators, if necessary.

## **Conclusion**

The inclusion in the 2013 Rules of the updated, revised and new provisions described in this Client Alert are intended to enable parties to an HKIAC arbitration better to control costs; to streamline and speed up the arbitration process; to provide an efficient process for arbitrations in multi-party and multi-contract scenarios; and allow parties to seek relief from an arbitrator on an urgent basis before an arbitral tribunal is formed.

The 2013 Rules reflect the HKIAC's continuing efforts to maintain its position as a leading arbitral institution in Asia, enabling parties to arbitrate in Hong Kong using rules which are considered "state of the art", representing current best practice in international arbitration.

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If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

**Simon D. Powell**  
[simon.powell@lw.com](mailto:simon.powell@lw.com)  
+852.2912.2500  
Hong Kong

**Chi Ho Kwan**  
[chiho.kwan@lw.com](mailto:chiho.kwan@lw.com)  
+852.2912.2632  
Hong Kong

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