

New Arbitration Rules of the Hong Kong International Arbitration Centre Come Into Force

November 1, 2018

On 1 November 2018, the 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules (the “2018 HKIAC Rules”) come into force. The 2018 HKIAC Rules, which replace the 2013 HKIAC Rules, are the product of a lengthy public consultation process. They take account of market developments and are intended to provide greater flexibility for users. These Rules generally apply by default to any arbitration commenced on or after 1 November 2018, where the parties have agreed to apply the HKIAC Rules to their disputes or to refer their disputes to the HKIAC without specifying the rules that should apply. The key changes are summarized below.

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Early Determination Procedure. Parties in international arbitration routinely seek the early determination of various issues, such as questions regarding the arbitral tribunal’s jurisdiction, matters of contractual interpretation, or discrete points of law or fact. Historically, arbitrators have been reluctant to dispose of issues at this stage, perhaps due to concerns that it might be perceived to infringe upon a party’s due process rights. However, the potential of early determination to narrow the issues in dispute, increase the prospects of settlement, or even to provide a full answer to claims, has led to a gradual increase in the demand for such rulings.

In recognition of this trend, Article 43 of the 2018 HKIAC Rules introduces a new procedure for the early determination of points of law or fact and sets out standards for when such a procedure may be appropriate. Under the new Rules, an arbitral tribunal may decide any point of law or fact using the early determination procedure on the basis that it is “manifestly without merit”, “manifestly outside the arbitral tribunal’s jurisdiction”, or that, even if it were assumed to be correct, the point under consideration would not result in an award in favor of the party that submitted it. Requests under this procedure must be made as promptly as possible after the relevant points are submitted. The arbitral tribunal must decide whether to proceed with a request for early determination within 30 days of the filing of the request, and if the request proceeds, determine it within 60 days.

In addition to these new options for early determination, parties retain the ability to request a tribunal to make a *preliminary* determination of one or more issues of law or

fact. Unlike early determination, preliminary determination may involve some contested facts or legal arguments but is more limited than a full hearing on the merits. Arbitrators may find a preliminary determination worthwhile if it finally resolves a substantial part or all of the case.

Concurrent Proceedings. The 2013 HKIAC Rules empowered the HKIAC to consolidate two or more pending arbitrations. The 2018 HKIAC Rules not only maintain the HKIAC's power to consolidate arbitrations, but also expressly confer a new power on arbitral tribunals to choose how to conduct multiple arbitrations that share both the same tribunal and a common question of law or fact (Article 30). In such cases, the tribunal may conduct the arbitrations concurrently, consecutively, or even suspend any of the arbitrations while the others are being determined. Concurrent proceedings may provide an alternative in situations where consolidation is not possible or desirable.

Third-Party Funding. Recent legislative developments in Hong Kong have enabled third-party funding in arbitration (see our client update "[Hong Kong and Singapore Permit Third-Party Funding in International Arbitration](#)"). The 2018 HKIAC Rules include new provisions to reflect these changes, requiring a funded party to disclose the existence of any funding arrangements and the identity of the funder (Article 44), and expressly permitting a funded party to disclose information related to the arbitration to its funder (Article 45.3(e)). The 2018 HKIAC Rules also allow an arbitral tribunal to take into account any third-party funding arrangement in fixing and apportioning the costs of the arbitration (Article 34.4).

Emergency Arbitration. Emergency arbitration enables a party to seek urgent interim relief from an arbitrator prior to the constitution of an arbitral tribunal. The 2018 HKIAC Rules make three key changes to its emergency arbitration procedure. First, unlike the 2013 HKIAC Rules, where parties could apply for emergency relief only concurrently with or after the commencement of arbitral proceedings, the 2018 HKIAC Rules enable a party to apply for the appointment of an emergency arbitrator before the commencement of an arbitration, provided that the arbitration is commenced within seven days.

Second, the 2018 HKIAC Rules provide greater certainty regarding the test for emergency relief by expressly stipulating the use of the same test that is employed for deciding interim measures during the arbitration itself. The test specifies a non-exhaustive list of factors that may be taken into account, such as whether the measures are required to maintain or restore the status quo pending determination of the dispute, or to prevent the risk of irreparable harm.

Third, the time limits for emergency arbitrations have been shortened and the emergency arbitrator's total fees are now subject to a cap. The HKIAC now has just 24

hours to appoint or replace emergency arbitrators, compared to two days under the 2013 HKIAC Rules. The emergency arbitrator also must issue a decision within 14 days from the day he or she receives the case file, compared to 15 days under the 2013 HKIAC Rules.

Other Changes

- **Use of technology.** Article 13.1 of the 2018 HKIAC Rules directs that when determining how an arbitration is to be conducted, arbitral tribunals consider how technology can be effectively used to avoid unnecessary delay or expense. Similarly, Article 3.1(e) allows written communications to be submitted by uploading them to a secured online repository, reflecting industry practice for the transmission of large files. The HKIAC has also indicated that it is willing to provide such repositories.
- **Expanded provision on single arbitration under multiple contracts.** The 2018 HKIAC Rules broaden the scope of the provision on a single arbitration under multiple contracts. The revised Article 29 allows a party to commence a single arbitration under several arbitration agreements, even if the parties to the arbitration are not bound by all of the arbitration agreements. However, any such arbitration would still be still open to jurisdictional objections, which will be decided by the arbitral tribunal or, if the tribunal has not yet been constituted, the HKIAC.
- **Alternative means of dispute settlement.** Where parties agree to pursue alternative means of resolving their dispute after arbitral proceedings have begun, Article 13.8 of the 2018 HKIAC Rules now allows any party to apply to suspend the arbitration, and to request to resume proceedings at any time during or after the alternative process.
- **Time for delivery of award.** The 2018 HKIAC Rules also introduce a requirement for the arbitral tribunal to notify the parties and the HKIAC of the anticipated date of their final award after the closure of arbitral proceedings (Article 31.2). The final award must be issued within three months from the closure of the proceedings, unless extended by the HKIAC or by party agreement.

Practice Note on the appointment of arbitrators. The 2018 HKIAC Rules are accompanied by a Practice Note on Appointment of Arbitrators (the “Practice Note”), which also comes into force on 1 November 2018. The Practice Note outlines the HKIAC’s process for appointing arbitrators and includes a non-exhaustive list of the many factors that it takes into account when appointing arbitrators. The Practice Note also expresses the HKIAC’s commitment to promoting diversity in arbitrator appointments by considering for appointment, wherever possible, “qualified female candidates and qualified candidates of any age, ethnic group, legal or cultural background.”

Conclusion. The 2018 HKIAC Rules enhance the efficiency of HKIAC arbitrations and provide more flexibility for users of the Rules to tailor proceedings to their specific dispute.

The new early determination and concurrent proceedings provisions, in particular, strengthen the case management powers of arbitral tribunals. The new early determination procedure is similar to the summary procedures found in the arbitration rules of other commercial arbitral institutions, such as the Singapore International Arbitration Centre and the Stockholm Chamber of Commerce. The 2018 HKIAC Rules adopt the same extremely high “manifest” bar required for the early determination of points of law or fact. This test will be unlikely to dissuade genuine claims, while also discouraging frivolous claims and encouraging parties to focus their attention on the core issues. The concurrent proceedings provision can also promote the expeditious conduct of arbitrations by preventing the duplication of claims across arbitrations.

Parties to arbitration agreements selecting the HKIAC Rules should be familiar with these changes. They may have a significant impact on the conduct of arbitrations under the HKIAC Rules, including strategic considerations to be addressed when a dispute is brewing or has crystallized.

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Please do not hesitate to contact us with any questions.

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