

The HKIAC Council Approves The 2018 Administered Arbitration Rules

October 22, 2018

On October 12, 2018, the Council of the Hong Kong International Arbitration Centre (“HKIAC”) approved the text of the 2018 HKIAC Administered Arbitration Rules (the “Rules”). Pursuant to Article 1.4 of the Rules, they come into force on November 1, 2018 and “unless the parties have agreed otherwise, shall apply to all arbitrations [...] in which the Notice of Arbitration is submitted on or after that date.”

The Rules replace the earlier, 2013 version and codify prevailing best practices in international commercial arbitration, including with respect to the four following issues:

- *Third-Party Funding.* The 2017 amendments to the Hong Kong Arbitration Ordinance previously abolished the common law doctrines of champerty and maintenance in the case of arbitration, allowing parties with no legitimate interest in the proceedings to fund them in return for a share in any award or settlement. Consistent with those amendments, the Rules now require disclosure of “any funding agreement and the identity of any third party funder.” See Articles 4.3(i), 5.1(g) and 44 of the Rules. Furthermore, pursuant to Article 34.4 of the Rules the arbitral tribunal “may” take into account the existence of a funding arrangement when determining “all or part of the costs of the arbitration.” An arbitral tribunal constituted under the Rules will therefore have the authority to permit a successful funded party to recover from the unsuccessful party the financial contribution of the third-party funder to the arbitration, including any uplift fees that the funder might charge.¹

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¹ See *Essar Oilfield Services Limited v. Norscot Rig Management Pvt Limited*, [2016] EWHC 2361 (Comm) (15 September 2016), in which the English Court ordered the unsuccessful party in the underlying arbitration (seated in London and conducted under the Arbitration Rules of the International Chamber of Commerce (“ICC”)) to pay the costs of third-party funding incurred by the successful party. See also Article 35 of the 2017 Investment Arbitration Rules of the Singapore International Arbitration Center (“SIAC”), which, in similar fashion, provides: “The Tribunal may take into account any third-party funding arrangements in ordering in its Award that all or a part of the legal or other costs of a Party be paid by another Party.”



- *Single Arbitration Under Multiple Contracts.* Article 29 of the Rules allows the commencement of a single arbitration under multiple contracts even where not all parties to the arbitration are bound by each arbitration agreement giving rise to the arbitration. The provision is conditioned on there being common questions of law or fact, the relief claimed being in respect of or arising out of the same transaction or series of related transactions, and the arbitration agreements being compatible. Pursuant to Article 29, it should be more feasible in principle to commence one single arbitration under multiple, related contracts, with a concomitant enhancement of procedural efficiency.
- *Concurrent Proceedings.* Article 30 of the Rules allows “the same arbitral tribunal” to hear multiple proceedings “at the same time, or one immediately after another,” or to “suspend any of those arbitrations until after the determination of any other of them” where “a common question of law or fact arises.” This provision, too, is intended to further efficiency and reduce the risks of a race to judgment and inconsistent awards in parallel arbitration proceedings.
- *Time Limit For The Rendering Of The Award.* Pursuant to Article 31.2 of the Rules, the arbitral tribunal is required to inform the HKIAC and the parties of the “anticipated date by which an award will be communicated to the parties.” Under the Rules, that “anticipated date” “shall be no later than three months” from the closure of the proceedings under Article 31.1. The three-month time limit may be extended by agreement of the parties or by the HKIAC.

Among the most relevant amendments in the Rules is also the introduction of an Early Determination Procedure which will allow the arbitral tribunal to dispose of one or more issues in a preliminary or separate phase of the proceedings in a summary fashion. We touch upon this particular amendment in more detail below.

1. Summary Disposition Procedures In International Arbitration: Background

In recent years, international arbitration users have expressed increased dissatisfaction with the time and cost associated with arbitral proceedings as compared with certain state courts. The duration and expense of arbitral proceedings are indeed frequently invoked as the two “worst features” of arbitration.² Against this background, summary disposition procedures are intended to reduce excessive time and cost in international arbitration in a manner not unlike their use in certain state court litigation systems. Typically, these procedures allow arbitral tribunals to partially or fully dispose of claims or defenses on a summary basis. Resorting to these procedures can often shorten the length of arbitrations and reduce the parties’ costs and legal fees. The availability of such procedures can also be seen to increase the disincentive against the pursuit of frivolous claims.

Some observers, however, have questioned the propriety of allowing summary disposition procedures in international arbitration. The debate today revolves primarily around whether, absent an express agreement between the parties, the default rule in international arbitration should be that summary disposition procedures are allowed. It is argued that, when not expressly contemplated in the arbitration agreement or the otherwise applicable arbitration rules, these procedures contradict the parties’ agreement to arbitrate and their right to a fair hearing, thereby making the resulting award vulnerable to challenges on grounds of procedural irregularity or breach of due process. Indeed, most arbitration rules specifically enshrine the parties’ right to present their case and their entitlement, if requested, to an oral hearing. Thus, a concern arises that if an arbitral tribunal unduly abridged a party’s ability to present its case, that party might have grounds to challenge the enforceability of any ensuing award on that basis. Furthermore, it is argued, such summary procedures are inherently prone to abuse, by giving rise to additional

² See Queen Mary University, 2018 International Arbitration Survey: The Evolution of International Arbitration, pp. 2-3.

unnecessary rounds of written and even oral submissions – often referred to in U.S. litigation as “motion practice” – which might result in additional and unnecessary time and cost.

Against this background, the most recent trend in international arbitration has been to address users’ concerns regarding efficiency and to offer them procedures for the summary disposition of claims or defenses. Certain arbitral institutions have amended their rules to include specific provisions on these procedures.³ Others have issued guidelines clarifying that an arbitral tribunal is empowered to apply summary disposition procedures as part of its overall authority over case management.⁴

2. Summary Disposition Under The Rules

Article 43 of the Rules introduces an Early Determination Procedure (“EDP”) pursuant to which the arbitral tribunal may, “at the request of any party and after consulting with all other parties”:

[D]ecide one or more points of law or fact by way of early determination procedure, on the basis that: (a) such points of law or fact are manifestly without merit; or (b) such points of law or fact are manifestly outside the arbitral tribunal’s jurisdiction; or (c) even if such points of law or fact are submitted by another party and are assumed to be correct, no award could be rendered in favour of that party.”

Pursuant to Article 43.3 of the Rules, a request by a party for an EDP “shall be made as promptly as possible after the relevant points of law or fact are submitted”. The same provision provides that the request shall mandatorily include (i) a statement of the facts and legal arguments that support it, (ii) a proposal of the form of EDP to be adopted, and (iii) comments on how the proposed form of EDP “would achieve the objectives stated in Articles 13.1

and 13.5,” i.e., that the arbitration be conducted “to avoid unnecessary delay or expense” and to “ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case.”

Within 30 days after the date of filing of an EDP request, pursuant to Article 43.5 of the Rules the arbitral tribunal “shall issue a decision either dismissing the request or allowing the request to proceed by fixing the early determination procedure in the form it considers appropriate.”

If the arbitral tribunal allows the EDP request to proceed, it “shall make its order or award, which may be in summary form, on the relevant points of law or fact [...] within 60 days from the date of its decision to proceed.” Both this time limit and the 30-day time limit to decide whether the application may proceed may be extended by agreement of the parties or, where appropriate, by the HKIAC. Pursuant to Article 43.7 of the Rules, pending the determination of the request the arbitral tribunal may decide whether and to what extent the arbitration shall proceed.

Notably, by way of exception to the general principle set forth in Article 1.4 of the Rules, pursuant to which the Rules apply to arbitrations instituted after November 1, 2018, Article 1.5 of the Rules provides that the EDP provisions shall apply to proceedings in which the underlying arbitration agreement was executed after November 1, 2018 (unless the parties agree otherwise).

In sum, the EDP will permit an arbitral tribunal constituted under the Rules to render an award potentially within a mere 90 days from the filing of an EDP request, which can be filed as soon as the arbitral tribunal is constituted. Depending on the applicable *lex arbitri*, there may be little or no scope for the dissatisfied party to obtain annulment of a resulting award merely on the basis that the arbitral tribunal indeed carried out an early and summary

paragraph 59. The Note states that an ICC tribunal is empowered to decide an application “for the expeditious determination of manifestly unmeritorious claims or defenses” as part of its case management powers (Article 22 of the ICC Rules).

³ See Rule 41(5) of the Arbitration Rules of the International Centre for Settlement of Investment Disputes; Rule 29 of the SIAC Arbitration Rules; Article 39 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

⁴ Note to Parties and Arbitral Tribunals on the Conduct of Arbitration, ICC, 30 October 2017,

determination. By the same reasoning, an award rendered in an EDP is not likely to be refused cross-border enforcement pursuant to the 1958 New York Convention, to which the PRC and, thereby, Hong Kong are bound, including in particular its Article V.1.b (lack of proper notice of the proceedings or inability otherwise to present one's case).

Accordingly, a contracting party or prospective litigant who considers that the EDP would be beneficial to it, particularly as claimant in arbitral proceedings, might well proactively seek agreement of its counterparty to the HKIAC Rules post-November 1, 2018 or, as the case may be, seek amendment of their existing pre-November 1, 2018 HKIAC arbitration agreement to include the EDP. By the same token, parties who contemplate entering into an HKIAC arbitration agreement post-November 1, 2018 and are disinclined toward the EDP mechanism should be aware of their ability to opt out from the EDP provisions in the Rules or consider alternative arbitration rules which do not provide for summary disposition procedures.

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