

# HKIAC RULES

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**Ronald Sum**  
**Partner, Head of Dispute Resolution (Asia)**  
**Addleshaw Goddard (Hong Kong) LLP**  
**HKIAC Council Member**  
**HKIAC Appointments Committee Member**  
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# RONALD SUM

- Head of Dispute Resolution Group in Asia of Addleshaw Goddard (Hong Kong) LLP
- FCIArb, FHKIArb, Accredited Mediator
- CAS Arbitrator
- Qualified as a solicitor in Hong Kong, England and Wales and Australia
- Contact: [r.sum@aglaw.com](mailto:r.sum@aglaw.com) / 2253 3012

# Overview

Role of HKIAC

Rules of HKIAC



# Arbitration Ordinance (Cap. 609) ('the Ordinance')

- ▶ Came into effect in June 2011
- ▶ Based on the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law ("Model Law")
- ▶ The international business community and practitioners from civil and common law jurisdictions are familiar with the Model Law
- ▶ Arbitral awards in Hong Kong can be enforced in all state parties to the New York Convention

## Reasons for reform :

- ▶ Unify the dual regimes for domestic and international arbitration
- ▶ More user-friendly
- ▶ Enhance confidentiality
- ▶ Limit court power of intervention

# Role of HKIAC

- ▶ Established in **1985**
- ▶ **World leading arbitral institution** for disputes with an Asian element
  - ▶ Growing demand for dispute settlement mechanisms in Asia
- ▶ HKIAC administered institutional arbitration proceedings

# Achievements of HKIAC

- ▶ Ranked **3rd most preferred seat** (2021 Queen Mary University of London and White & Case survey)
- ▶ One of the most **modern and comprehensive** set of rules on the market
- ▶ **Reputable & experienced** : 318 arbitration cases submitted in 2020
- ▶ Premier location, convenient, one-stop shop etc.,
- ▶ **High timeliness & cost effectiveness** :

2013-2021 avg statistics	<b>HKIAC Administered arbitrations</b>	<b>Mean</b>
Duration (months)	<b>13</b>	16.9
Costs (USD)	<b>64,606</b>	137,332

# Role of HKIAC

## HKIAC Administered Arbitration

### 1. Institutional arbitration

- **Administered by an arbitration institution** (e.g. HKIAC)
  - **203** out of 318 filed arbitrations were HKIAC administered in 2020, **increasing by almost 20%** from 2019
- Proceedings are typically conducted under the **arbitration rules** drafted by the **chosen institution** (e.g. HKIAC Administered Arbitration Rules)
- The rules establish the fundamentals of arbitration, such as :
  - parameters of the procedure
  - submission of the notice of arbitration
  - issuance of the award etc

# Role of HKIAC : Institutional Arbitration

## General Rules :

- ▶ Art. 2 : Interpretation of the Rules (2.14: “Seat” of Arbitration means the place of arbitration as defined in Article 20.1 of the UNCITRAL Model Law...)
- ▶ Arbitration Ordinance (Cap. 606): Unless otherwise agreed by the parties, HKIAC shall perform the functions of the **appointing authority** as set out in the UNCITRAL Rules.
- ▶ Art. 2: HKIAC will **administer** the arbitration as set out in these Procedures and shall be entitled to **charge Administrative Fees** for its services as set out in Schedule 1 attached to these Procedures.



# Role of HKIAC : Institutional Arbitration

Arbitral Proceedings :

- ▶ Art. 4-5 : Commencement of Arbitration (Notice of Arbitration and Answers).
- ▶ Art. 6-9 : Constitution of the Arbitration Tribunal, including the fees, appointment and replacement of arbitrators
- ▶ Art. 3 : HKIAC **will assist the arbitral tribunal** and the parties in fixing the time limits for the arbitration, as well as required otherwise .

# Role of HKIAC : Institutional Arbitration

Costs of arbitration:

- ▶ Sch. 1 and 2 : For an arbitration conducted under these Procedures, arbitrators will be remunerated according to their hourly or daily rates for **all work reasonably carried out in connection with the arbitration**, HKIAC will consult with the arbitral tribunal to establish the rates applicable to the arbitration upon the parties request.
  
- ▶ The vast majority of HKIAC tribunals are paid on an **hourly rate basis**.
  
- ▶ Under the Rules, parties have the option of paying arbitral tribunals' fees by a **maximum hourly rate** of **HK\$6,500** or around US\$830); or
  
- ▶ by reference to an ad valorem fee scale.

# Role of HKIAC : Institutional Arbitration

Emergency costs of arbitration:

- ▶ Costs of emergency arbitration include the **emergency arbitrator's fee** and **HKIAC's administrative fee only** (there being no registration fee for emergency arbitrator appointments).
- ▶ According to the 2018 Rules, the total fees of an emergency arbitrator shall **not exceed HK\$200,000** (approximately US\$25,500)
  - ▶ unless the parties agree or
  - ▶ HKIAC determines otherwise in exceptional circumstances.

# Role of HKIAC : Institutional Arbitration

Awards :

- ▶ Art. 35.5 : The HKIAC shall be supplied an original copy of the award. **Originals of the award** signed by the arbitral tribunal and affixed with an HKIAC seal will be communicated to the parties by the **arbitral tribunal**.
- ▶ Upon request by any party, HKIAC will assist in the **filing or registration** of the arbitral award(s) in countries where such filing or registration is required by law. **Additional fees** for these extra services shall be paid by the **requesting party** to HKIAC.

# Other types of arbitration

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# Ad-hoc arbitration

## Other types of available arbitration

- Solely between arbitrators and the parties.
- Arbitration procedure **envisioned by the parties themselves** under **tribunal supervision**
- At the parties' own discretion, they may choose to **adopt a ready-made set of rules** (e.g. UNCITRAL Rules of Arbitration recommended by the HKIAC) or,
- the proceedings may be conducted in accordance with a **set of bespoke rules** drawn up by the parties specifically for that particular case under the supervision of a tribunal

# Ad-hoc Arbitration

HKIAC is the **default appointing authority** for ad hoc arbitrations seated in Hong Kong.

HKIAC performs the following functions under the Ordinance:

- ▶ **Determine the number of arbitrators** where the parties have not agreed on the number pursuant to S.23(3)
- ▶ **Appoint an arbitrator** where the applicable appointment procedure fails to result in an appointment pursuant to S.24 ; and
- ▶ **Appoint a mediator** where the procedure specified in an arbitration agreement fails to result in an appointment pursuant to S.32(1)

Section 13(3) of the Ordinance authorises HKIAC to issue rules to facilitate its exercise of the functions above.

# Ad-hoc Arbitration

General practices :

The Arbitration (Arbitrators and Mediators and Decision on Number of Arbitrators) Amendment Rules 2019 (CAP. 609C)

- ▶ Rule 13 (2A) : HKIAC charges / waives fees where considered appropriate taking into account the circumstances, unless
  
- ▶ Rule 13 (2A) : Where total amount in dispute is less than HK\$2.5 million, HKIAC will charge a one-off fee of HK\$8,000 for performing all its functions under the Ordinance in an arbitration
  
- ▶ Relevant circumstances to determine total amount in dispute :
  - ▶ Claims, counterclaims, cross claims, set-off defences etc.



# Key Difference in Arbitration Rules

# Key difference in arbitration rules

	ICC	HKIAC	CIETAC
<b>Default No. of Arbitrators</b>	Art 12- Sole arbitrator (unless complex case, in which case 3)	Art 6 - HKIAC's discretion	Art 25 - Three arbitrators
<b>Summary Procedure</b>	Art 30 - Automatic where dispute does not exceed US\$2 million or the parties agree	Art 42 – Party can apply where dispute under HKD25 million, parties agree, or exceptional emergency	Art 56 – Mandatory if dispute below RMB5 million or where one party applies and the other agrees in writing/both parties agree
<b>Timing for Reply of Respondent</b>	Article 5 - Within 30 days from receipt of Request for Arbitration from Secretariat	Article 5 - Within 30 days from receipt of Notice of Arbitration	Article 15/16 – Within 45 days from date of its receipt of the Notice of Arbitration
<b>Timing for Issuing Award</b>	Art 30 - Within 6 months of last signature of Terms of Reference	Art 31.2 – No later than 3 months from when proceedings closed	Art 48 - Within 6 months of formation of tribunal
<b>Failure to issue award within time limits</b>	Reduction of arbitrator's fees: 5-10% for draft awards submitted within 7 months, 10-20% for draft awards within 10 months and 20%+ for draft awards more than ten months after the last substantive hearing/written submission	None. The time limit can be extended by agreement of the parties or by the HKIAC	None. The President of the Arbitration Court may extend the period if considered truly necessary and the reasons are truly justified

# Key difference in arbitration rules

	ICC	HKIAC	CIETAC
<b>Costs Recovery</b>	Arts 38 – Tribunal has discretion and will consider relevant factors	Art 34.2 – Tribunal has discretion	Art 82 – In principle, costs by unsuccessful party, but tribunal’s discretion
<b>Challenge of Arbitrator</b>	Art 14 - Written statement submitted to Secretariat within 30 days from receipt by the party of notification of arbitrator’s appointment	Art 11 – Send notice of challenge within 15 days of confirmation of appointment. Notice shall be communicated to all other parties, the challenged arbitrator and any other members of the tribunal	Art 32 – Challenge in writing 15 days from date the party receives the Notice of Formation of the Arbitral Tribunal
<b>Total Number of Cases Accepted</b>	946, with 2498 parties from 142 countries <b>(2019)</b>	483 (318 being arbitrations), involving parties from 45 jurisdictions <b>(2020)</b>	3,615 (2,876 are domestic arbitration cases), involving parties from 76 jurisdictions <b>(2020)</b>
<b>Total Dispute Amount</b>	US \$52 billion <b>(2019)</b>	US \$8.8 billion <b>(2020)</b>	US \$17.3 billion <b>(2020)</b>

# HKIAC RULES

( HKIAC Administered Arbitration Rules )



香港國際仲裁中心

Hong Kong International  
Arbitration Centre

## 2018 Administered Arbitration Rules (‘2018 rules’)

- ▶ 3rd version of the HKIAC rules adopted since 1st Nov, 2018
- ▶ Subtle yet important changes to **address recent developments** in arbitration
- ▶ Provide **speedier recourse & increased efficiency** for parties seeking emergency relief

# 2018 Rules

## **Notable changes in the 2018 revision of rules :**

- A. Refinements to emergency arbitration procedures;
- B. Addition of the early determination procedure;
- C. Requirement to disclose third party funding;
- D. More encompassing provisions for bringing a single arbitration under multiple contracts, concurrent proceedings and HKIAC's role in joinder applications; and
- E. Setting a deadline for delivery of awards

# Overview : Key Features of the 2018 Rules

1. Choice of payment method for arbitrator fees
2. Comprehensive mechanism for complex arbitration
3. Expedited procedure
4. Early determination procedure
5. Emergency arbitrator : Shorter timeline – appoint emergency arbitrator before file notice
6. Time of delivering award
7. Permit 3rd party funding
8. Online delivery of documents

# Fee schedules : HKIAC Administered

## Applicable Fees to be paid

Item	Fee (HKD)
<b>Registration Fee**</b>	8,000
<b>HKIAC Administrative Fees</b> (pursuant to schedule 1 of the Rules)	Depends
<p><b>Arbitral Tribunal &amp; Tribunal Secretary Fees</b></p> <p><b>EITHER</b> (pursuant to schedule 2 of the Rules)</p> <p>a) subject to paragraph 9.5 of that Schedule, the maximum agreed hourly rate of an arbitrator is HKD 6,500 per hour; and</p> <p>b) where the arbitral tribunal appoints a secretary pursuant to Article 13.4 of the Rules, the maximum hourly rate of the tribunal secretary is HKD 2,500 per hour.</p> <p><b>OR</b> (pursuant to schedule 3 of the Rules)</p> <p>Where the arbitral tribunal appoints a secretary pursuant to Article 13.4 of the Rules, the fees of such secretary shall be charged separately and shall not form part of the arbitral tribunal's fees, unless the parties agree otherwise.</p>	Depends

\*\* to be shared equally between the claimants unless agreed otherwise



# Fee schedules : HKIAC Administered

## Applicable Fees to be paid

Item	Fee (HKD)
<b>Fee for Filing a Challenge to an Arbitrator**</b>	50,000
<b>Fees Applicable to Emergency Arbitrator Procedures</b>	Not exceeding 200,000
Application Deposit**	250,000
<b>Monetary Threshold for Expedited Procedure</b>	Not exceeding 25,000,000

\*\* to be shared equally between the claimants unless agreed otherwise

# Fee schedules : HKIAC Administered

- ▶ The fees of the arbitral tribunal shall be calculated on the basis of the **hourly rate agreed** in accordance with Art.10.2 and paragraph 9 of Schedule 2 of the Rules.
- ▶ Where the parties fail to agree to the rate of an arbitrator, HKIAC may determine the rate, considering the **circumstances of the case**, ie.
  - ▶ the arbitrator's usual hourly rate, complexity of the subject-matter etc.,
- ▶ Where an arbitrator is replaced in accordance with the Rules, HKIAC will determine the fees payable to the replaced arbitrator (if any), having taken into account the circumstances of the case and any invoice indicating the time spent by the arbitrator to date.

# Fee schedules : Ad-hoc Arbitration

Item	Fee (HKD)
Appoint one arbitrator	8,000
Determining the number of arbitrators	8,000
Challenge Registration Fee	50,000

- ▶ At the request of either party (or both parties) in an ad hoc arbitration, HKIAC may:
  - ▶ appoint arbitrator(s) or umpire(s); and/or
  - ▶ determine the number of arbitrators.
  - ▶ decide a challenge to an arbitrator
- ▶ The arbitral tribunal's fees and expenses shall be determined in accordance with the applicable arbitration rules or law.

# Appointment of arbitrators

Sole Arbitrator	Three Arbitrators
Usually appointed <b>by agreement</b> , or by an independent third party.	Customary for each party (or group of parties) to appoint one arbitrator and for the <b>presiding arbitrator</b> to be appointed either by <b>agreement</b> between the party-appointed arbitrators or by an independent third party.
Often favoured in cases with <b>relatively straightforward issues</b> or or involve smaller amounts in dispute	Three arbitrators will generally be used in cases involving <b>complex</b> questions of law or fact or where substantial amounts of money are at stake.

# Appointment of arbitrators

▶ Art. 6, 7, 8 : If the parties are unable to agree on the appointment of an arbitrator, **HKIAC shall decide** whether the case shall be referred to a sole or three arbitrators, taking into account the circumstances of the case.

▶ HKIAC will also make appointments should the parties fail to make use of their opportunity to do so given in accordance with the HKIAC Rules

# Appointment of arbitrators

- ▶ HKIAC maintains both a **Panel** and a **List of Arbitrators**.
  - ▶ Panel - members who have demonstrated particular experience acting as arbitrator
  - ▶ List - members who may have some, but not necessarily extensive, experience acting as arbitrator as well as those who may have not yet achieved their first or multiple appointments, but who nevertheless have significant experience in arbitration to the extent that they would be suitable for appointment
- ▶ In appropriate circumstances, HKIAC may appoint from outside of its panel or list.
- ▶ 2020 : **149** appointed arbitrators
  - ▶ 76 (51%) were from the Panel of Arbitrators
  - ▶ 52 (34.9%) were from the List of Arbitrators
  - ▶ 21 (14.1%) were from neither the Panel nor the List of Arbitrators.

# Emergency arbitrator procedures

- ▶ Applies where there are :
  - ▶ **emergency proceedings**
  - ▶ **interim measures at an early stage** in a dispute
  
- ▶ An emergency arbitrator **must be appointed within 2 days of HKIAC's acceptance of an application for emergency relief**
  
- ▶ A decision on application be made expeditiously as possible by the emergency arbitrator within 15 days from the date which the file is received
  
- ▶ Short deadlines of the procedure are consistent with the urgent nature of the emergency proceedings

# Interim Measures of Protection & Emergency Relief

- ▶ Art. 23. 2 : At the request of either party, the arbitral tribunal may order any interim measures it deems necessary or appropriate.
  
- ▶ Art. 23.3 : An interim measure, whether in the form of an order or award or in another form, is any temporary measure ordered by the arbitral tribunal at any time before it issues the award by which the dispute is finally decided, that a party, for example and without limitation :

- (a) maintain or restore the status quo pending determination of the dispute; or
- (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; or
- (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) preserve evidence that may be relevant and material to the resolution of the dispute.



## Interim Measures of Protection & Emergency Relief

- ▶ Art. 23.4 : When deciding a party's request for an interim measure under Art. 23.2, the arbitral tribunal shall take into account the circumstances of the case. Relevant factors like :
  - a) **harm not adequately reparable** by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
  - b) there is a **reasonable possibility** that the requesting party will **succeed on the merits of the claim**. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
- ▶ Art 23.5 : The arbitral tribunal may **modify, suspend or terminate an interim measure** it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the **arbitral tribunal's own initiative**.

# Awards:

## Form & Effect of the Award :

- ▶ Art. 35.1 : The arbitral tribunal may make a single award or separate awards regarding different issues at different times and in respect of all parties involved in the arbitration in the form of **interim, interlocutory, partial or final awards**. If appropriate, the arbitral tribunal may also issue **interim awards** on costs and any awards pursuant to Art. 41.5.

## Correction of the Award :

- ▶ Art 38.4 :The arbitral tribunal has the power to make any further correction to the award which is necessitated by or consequential on (a) the **interpretation of any point or part of the award** under Article 39; or (b) the **issue of any additional award** under Article 40.

# Types of awards:

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- Partial**
- Made on a specific issue that forms part of the claim, before the final award is made to address all the issues in the dispute.
  - Decides one or more (but not all) of the awards before the tribunal
  - A partial award is final in respect of the claims it addresses.

- Final**
- The award should be simple and concise, confined to the points that need to be decided to reach its final conclusions
    - the claims and defences of the parties
    - the tribunal's conclusions on the issues and its reasoning,
    - tribunal states its decisions on damages, interest, award of costs.

- Interim**
- Can be obtained once a dispute arises to :
    - Preserve the status quo or
    - Prevent the other side from continuing the breach in question pending final resolution of the dispute
  - Takes place in many forms :
    - Preliminary order, procedural order, directions, partial award etc.

# Complex mechanism

▶ Art. 29 : **Claims arising out of or in connection with more than one contract** may be made in a **single arbitration**, provided that:

(a) a common question of law or fact arises under each arbitration agreement giving rise to the arbitration; and

(b) the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions; and

(c) the arbitration agreements under which those claims are made are compatible.

# Complex mechanism

- ▶ Art. 30.1: The arbitral tribunal may, after consulting with the parties, conduct **two or more arbitrations under the Rules**
  - ▶ a) at the same time, or b) one immediately after another, or c) suspend any of those arbitrations until after the determination of any other of them, where:
    - i. the same arbitral tribunal is constituted in each arbitration; and
    - ii. a common question of law or fact arises in all the arbitrations.
- ▶ Art. 30.2 : Proceedings involving multiple contract and arbitrations can be conducted at the discretion of the arbitral tribunal

# Complex mechanism

- ▶ The 318 arbitrations submitted to HKIAC in 2020 involved a total of **891** parties and **434** contracts.
- ▶ **112** arbitrations involved **multiple parties or contracts**.
- ▶ In **25** of those cases, **a single arbitration** was commenced under multiple contracts.

# Other Procedures

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# Expedited procedures (arbitration on an expedited basis)

▶ 'Fast track rules' offer efficiency & swift determination of disputes

▶ Conditions of application :

- 1) Parties mutual agreeance to apply the expedited procedure
- 2) Applicable monetary threshold to be less than HKD \$ 25 million
- 3) **Circumstances of exceptional urgency**

(e.g. separate hearings for discrete issues such as **jurisdiction, splitting the hearing into liability & quantum phases**)



# Expedited procedures (arbitration on an expedited basis)

- ▶ If expedited procedures are applied, it is presumed that the expedited procedure will be heard by a **sole arbitrator**
- ▶ Unless otherwise agreed by the parties, the expedited procedures **do not apply to consolidated proceedings** under Art. 28 or to any arbitration commenced on the basis of multiple contracts under Art. 29
- ▶ Award will be made within 6 months
  - ▶ HKIAC may extend the time limit under exceptional circumstances

# Early determination procedures

- ▶ Significant new procedure introduced in 2018 Rules
  - ▶ Important addition to bring HKIAC Rules in line with leading arbitral institutions
- ▶ Art. 43.1 : Parties can now ask the arbitral tribunal to apply an early determination procedure to decide one or more points of law or fact, on the basis that :
  - a) such points of law or fact are manifestly without merit
  - 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.

# Early determination procedures

- ▶ A request for the early determination procedure must include :
  - ▶ Statement of the facts and legal determination supporting the request
  - ▶ A proposal of the form of early determination procedure to be adopted by the arbitral tribunal, and
  - ▶ Comments on how the proposed form would achieve objectives under Art. 13.1 and 13.5 of the Rules, such as
    - ▶ avoiding unnecessary delay or expense
    - ▶ ensuring equal treatment of the parties
    - ▶ affording the parties a reasonable opportunity to present their case, and
    - ▶ ensuring the fair and efficient conduct of the arbitration

# Other Improvements

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## Third Party Funding:

- ▶ Since the granting of permission in 2019, parties lacking financial resources can consider third party funding in arbitration
  - ▶ Contingency and conditional fee arrangements remain prohibited
  - ▶ Capital requirement : HKD \$20 million
  - ▶ The HK Code contains more detailed provisions in some respects (e.g. conflicts of interest, addressing complaints from funded parties.) compared to the UK code
- ▶ An important part of arbitration landscape in Hong Kong
- ▶ Important addition to bring HKIAC Rules in line with leading arbitral institutions
- ▶ Improving access to justice and solving problems to costs

# Third Party Funding:

▶ Under the 2018 Rules :

- ▶ Art. 44.1 : a party must disclose the existence of a TPF arrangement and the funder's identity
- ▶ Art. 45.3 : funded parties may disclose arbitration-related information to existing or potential funders, and
- ▶ Art. 34.4 : the tribunal may take TPF arrangements into account when determining costs of the arbitration

## Improvements to efficiency

- ▶ Art. 31.2 : Arbitral tribunals are required to issue their awards **within three months from the close of the entire proceedings** or the relevant phase of the proceedings
- ▶ Once proceedings are declared closed, tribunals are also required to inform HKIAC and the parties of the anticipated date of issuance of the award
  - ▶ Provide certainty to parties regarding the expected date of receiving the award,
  - ▶ Impose greater accountability on arbitral tribunals.
- ▶ Art. 3.1: Acknowledgment of the **use of secured online repositories** for written communications among the parties, the arbitral tribunal and/or HKIAC
  - ▶ Recognition of the increasingly electronic nature of document exchanges in international arbitrations.

THANK  
YOU