

**Lesson 7 - Arbitration**  
**Wednesday, 3 October 2018**



**Introduction to the HKIAC Administered Arbitration Rules  
("Hong Kong Rules")**

**Andrea Roth**  
**Bär & Karrer AG**



- HKIAC = **Hong Kong International Arbitration Centre**
- HKIAC is an arbitral institution – not an arbitral tribunal
- Arbitration, mediation and domain name disputes
- Founded in 1985
- Third most preferred and used arbitral institution worldwide and most favored arbitral institution outside of Europe (Queen Mary, University of London and White & Case's 2015 International Arbitration Survey)
- Statistics: total of 297 new arbitration cases filed in 2017
- 2018 version of the Hong Kong Rules in force as from **1 Nov 2018**
- For more information: [www.hkiac.org](http://www.hkiac.org)

*? When do the 2018 Hong Kong Rules apply?*

# Model Clause



VIS MOOT  
SCHOOL SWITZERLAND

*"Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.*

*The law of this arbitration clause shall be ... (Hong Kong law). \**

*The seat of arbitration shall be ... (Hong Kong).*

*The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language)." \*\**

Note:

\* Optional. This provision should be included particularly where the law of the substantive contract and the law of the seat are different. The law of the arbitration clause potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause. It does not replace the law governing the substantive contract.

\*\* Optional

## What is Special About the Hong Kong Rules?



VIS MOOT  
SCHOOL SWITZERLAND

- Parties can agree to receive written communication by uploading the communication to a secured online repository (new Article 3.1(c))
- Fees for the arbitral tribunal (Article 10): parties can choose between fees based on
  - hourly rates (currently max. HKD 6'500/hour); or
  - the amount in dispute (max. HKD 12'574'000)
  - If parties fail to agree on method, fees are based on hourly rate
- Rules contain various mechanism for complex arbitration proceedings (joinder, consolidation etc.)
- Third party funding must be disclosed (new Article 44)

*? Why is there a disclosure obligation of third party funding?*

# Commencement of the Arbitration (Articles 4-5)

## **Notice of Arbitration (Article 4)**

- Arbitration is deemed to commence on the date on which HKIAC receives Notice of Arbitration (Article 4.2)
- Claimant must communicate Notice of Arbitration to HKIAC and respondent (Article 4.1)
- Payment of registration fee: currently HKD 8'000

## **Answer to Notice (Article 5)**

- Respondent must communicate Answer to HKIAC and claimant within 30 days from receipt of the Notice (Article 5.1)

*? What is the content of the Notice of Arbitration?*

*? What happens if claimant does not pay the registration fee?*

# Commencement of the Arbitration (Articles 4-5)

## **Transmission of the case file to the arbitral tribunal (Article 5.4)**

- The arbitral tribunal has been constituted
- Required deposit for the costs of arbitration has been paid, unless otherwise determined by HKIAC (see Article 41)

*? Who must pay the deposit for costs?*

*? What happens in case of failure to pay?*

# The Arbitral Tribunal (Articles 6-12)

*? Who can be appointed as arbitrator?*

## **Constitution of the arbitral tribunal**

- Number of arbitrators (Article 6)
- Designation of a sole arbitrator (Article 7)
- Designation of three arbitrators (Article 8)

## **Confirmation of arbitrators (Article 9)**

- Every designated arbitrator is subject to conformation by HKIAC

## **Qualification of the arbitral tribunal (Article 11)**

- Arbitrators must be impartial and independent (Article 11.1)
- General rule: sole arbitrator or presiding arbitrator shall not have same nationality as any party (Article 11.2)

## **Challenge of the arbitral tribunal (Article 11)**

- For reasons of any alleged lack of impartiality or independence or in the absence of qualifications agreed by the parties (Article 11.6)
- HKIAC decides on the challenge (Article 11.9)

## **Replacement of an arbitrator (Article 12)**

*? The presiding arbitrator dies one week after the evidentiary hearing. What next?*



## Conduct of the arbitration (Article 13)

- Large discretion of the arbitral tribunal subject to the Hong Kong Rules
- Right to be heard and equal treatment of the parties (Article 13.1)
- Provisional Timetable (Article 13.2)
- Suspension of arbitration in order to pursue alternative means of dispute settlement (new Article 13.8)

## Place of arbitration (Article 14)

- Absent an agreement between the parties: Hong Kong

? *The parties chose Zurich as the seat of arbitration. What is the effect thereof?*

## Language (Article 15)

- Absent an agreement between the parties: determined by the arbitral tribunal



### **Statement of Claim (Article 16)**

*? What happens if claimant fails to submit its Statement of Claim?*

### **Statement of Defense (Article 17)**

*? What happens if respondent fails to submit its Statement of Defense?*

### **Further written statements, if any (Article 20)**

*? When must the plea of lack of jurisdiction be raised?*

## **Evidence**

- Each party bears the burden of proving the facts relied on to support its claim or defence (Article 22.1)
- The arbitral tribunal may order the production of documents (Article 22.3)
- The arbitral tribunal may appoint one or more experts to determine specific issues (Article 25)

## **Hearing**

- The arbitral tribunal decides whether to hold hearings or not (Article 22.4)

## **Closure of proceedings (Article 31)**

- The arbitral tribunal informs HKIAC and the parties of anticipated date by which award will be communicated (new Article 31.2)

## Decisions of the Arbitral Tribunal (Articles 33-40)

- Every award and every other decision of the arbitral tribunal requires a majority ruling of its members (Article 33.1)
  - If the arbitrators cannot form a majority, the presiding arbitrator shall decide
- The award must be in writing and state the reasons on which it is based (Articles 35.2 and 35.4)
- By agreeing on the Rules the parties waive their rights to any form of recourse in so far such waiver can validly be made (Article 35.2)
- HKIAC affixes its seal to the award and communicates it to the parties (Article 35.6)

## **Prior to the constitution of the arbitral tribunal (Schedule 4)**

- Emergency arbitrator procedure (Article 23.1)
- Application can also be filed before submission of Notice of Arbitration (Schedule 4 new para. 1)
- Emergency arbitrator is appointed within 24 hours (Schedule 4 para. 4)
- Decision shall be made within 14 days (Schedule 4 para. 12)

## **After the constitution of the arbitral tribunal (Article 23)**

- The arbitral tribunal may, at the request of either party, order any interim measures it deems necessary or appropriate (Article 23.2)
- Article 23 does not prevent the parties from applying to any competent state authority for interim measures (Article 23.9)

*? Can a party request security for costs of the arbitration as interim measure?*

## **Joinder of additional parties (Article 27)**

- Additional party must be prima facie bound by an arbitration agreement under the Rules (Article 27.1)
- Request for Joinder can be filed by the parties and the additional part (Articles 27.3 and 27.9)

## **Consolidation of arbitrations (Article 28)**

- HKIAC has power to consolidate two or more pending arbitrations (Article 28.1) where:
  - The parties agree to consolidate; or
  - All claims are made under the same arbitration agreement; or
  - A common questions of law or fact arises in all of the arbitrations, the claims are in respect of the same transaction or a series of related transactions and the arbitration agreements are compatible

## **Single arbitration under multiple contracts (Article 29)**

- Under the following conditions:
  - A common questions of law or fact arises under each arbitration agreement; and
  - the claims are in respect of the same transaction or a series of related transactions; and
  - the arbitration agreements are compatible

## **Concurrent proceedings (new Article 30)**

- The arbitral tribunal may conduct two or more arbitrations at the same time, or one immediately after another, or suspend any of those arbitrations
- Conditions: the same arbitral tribunal is constituted in each arbitration and a common question of law or fact arises in all the arbitrations

## **Expedited procedure (Article 42)**

- A party may apply to KHIAC for expedited procedure where:
  - The amount in dispute is less than HKD 25 million; or
  - The parties agree on expedited procedure; or
  - There is a case of exceptional urgency
- In general conducted by sole arbitrator
- Shortened proceedings (Article 42.2): in general only one round of submissions and no hearing; award should be rendered within six months

## **Early determination procedure (new Article 43)**

- The arbitral tribunal can determine a point of law or fact in summary fashion under certain conditions, e.g. such point is manifestly without merit (Article 43.1)
- Decision should be rendered within 60 days (Article 43.6)