

**Hong Kong International Arbitration Centre
Administrated Arbitration Rules**

COMMENTS FROM HONG KONG BAR ASSOCIATION

A. Background

1. This set of rules to be coming into effect on 01.03.2008 (“the Rules”) has been adopted by the Council of Hong Kong International Arbitration Centre (“HKIAC Council”) for parties who seek formality and convenience of an administrated arbitration.
2. The Hong Kong Bar Association (“HKBA”) has been invited to comment.
3. Subject to the comments set out below, the HKBA welcomes and supports the introduction of the Rules. The comments below are only intended to highlight particular points which HKBA suggests might benefit from further consideration.

B. The Approach

4. It is described that the Rules are based on the UNCITRAL Arbitration Rules and inspired by the ‘light touch’ administered approach of the Swiss International Rules of Arbitration.
5. HKBA’s view is that this approach, as compared to the Procedures for the Administration of International Arbitration that will be superseded when the Rules come into effect, is a good improvement from the user-friendly and party autonomy perspectives and also provides the flexibility in administrative charges, catering from cases from both domestic and international settings.
6. In the paragraphs below, HKBA will confine the comments on the Rules, and not on the schedule of fees.

C. General Rules

7. Article 1.1 of the Rules is meant to provide for wide embracing options for parties choosing the Rules. A provision of “...*words to the same effect*” is also inserted. Given the current in use of a number of other rules of HKIAC, namely, the HKIAC Securities Arbitration Rules, the HKIAC Domestic Arbitration Rules, Short Form Arbitration Rules and Electronic Transaction Arbitration Rules, etc., it may sometimes be confusing for some users who are less familiar with arbitration but intend to ask for certain administrative services only from HKIAC. This can be further clarified via Article 1.1 or in the user guide to the Rules or during subsequent promotion of the Rules.
8. Articles 2.1 & 2.2 are modeled on the UNCITRAL Arbitration Rules. In the recommendation of the UNCITRAL Working Group II Note by the Secretariat¹, it has been suggested that the words “*physically*” and “*mailing*” in Article 2.1 should be deleted to avoid any ambiguity concerning the possibility of delivery of notices by electronic means. HKBA is of the view that this can help providing for communication of notices by electronic means, for the benefits of users and, as such, should likewise be adopted.

D. Commencement of the Arbitration

9. On Article 4.3, in relation to the content that “*shall*” to be included in to Notice of Arbitration, it may better reflect the practice and retain the flexibility, with some suggested changes to the wording of some sub-paragraphs, which are detailed as follows:-
“...
(b) *The names, addresses, telephone and fax numbers, and/or e-mail or other contact addresses of the parties and/or of their counsel;*
(c) *A copy of the arbitration clause or identification of the separate arbitration agreement that is invoked;*
(d) *A reference or identification of the contract or other legal instrument(s) out of*

¹ See UNCITRAL documents A/CN.9/614, para. 40 and A/CN.9/619, para. 47.

or in relation to which the dispute arises;
...”

10. On Article 4.8, following the above, sub-paragraph (a) is suggested to be re-worded as follows:
“(a) *The names, address, telephone and fax numbers, and/or e-mail or other contact address of the Respondent and/or of their counsel...*”
11. On Article 4.10, for clarity, sub-paragraph (c) should also cover reference to any counterclaim or set-off as noted in Articles 4.11.
12. On Article 4.15, as the manner of communication among the parties and the arbitral tribunal is dealt with under Article 2, it is suggested that the words “*in writing*” should be deleted.
13. It is noticed that Article 5 does not have a counterpart articles in the UNCITRAL Arbitration Rules. However, such consolidation or participation powers are with certain support from the international arbitration communities². The HKBA is of the view that, when properly used, they can help saving time and costs in arbitration. Also, complex issues, such as those on confidentiality, may get involved and to be decided. To this end, HKIAC may like to consider issuing some guidance documents on how the HKIAC Secretariat or arbitral tribunals in Hong Kong should proceed on when faced with such application.

E. Arbitrators and The Arbitral Tribunal

14. Article 6.1 deals with the situation where the parties have not agreed upon the number of arbitrators. At present, section 8 of the Arbitration Ordinance (Cap.341) contains a deeming provision that the reference shall be to a single arbitrator in domestic arbitration. It seems that, as the law currently stands, the operation of Article 6.1 is limited to international arbitration agreements but this may not be the impression that one who is not familiar with arbitration gets by reading the Article alone. As such, it may help clarify the scope of Article 6 in

² See UNCITRAL documents A/CN.9/WG.II/WP.145/Add.1, para. 2.

this context.

15. On Articles 6 to 10, the HKBA welcomes the process of consultation before appointment but wonders whether the Rules can become more user friendly if the statutory procedure under rule 10 of the Arbitration (Appointment Of Arbitrators And Umpires) Rules (Cap.341B) is also contained, in relation to the parties' submission on reasons on the numbers of arbitrators to be appointed. Along the same approach, parties may also welcome a likewise procedure in relation to the parties' submission on the arbitrator to be appointed.
16. Also, on Article 7.1, it may be clearer in wordings by replacing "...*two or more parties have agreed...*" with "...*the parties have agreed...*"
17. As to disclosure under 11.2, it may be clearer in wordings by adding "without delay" following the words "*disclose*" in the first and fourth lines of the paragraph.
18. On Article 11.6, the words "...*the other party...*" should better read "...*all other parties...*" to cater for multiparty arbitration.
19. On Article 12, in some cases where an arbitrator needs to be replaced, it is considered that it may sometimes be more costs and time effective and, hence, in the interests of the parties to have the arbitration proceeded on with the 'truncated' tribunal³. Hence, there should be consideration to allow the parties or the tribunal the option to proceed on with the arbitration, in addition to a mandatory replacement in all cases.

F. Arbitral Proceedings

20. On Article 14.1, the words "...*right to be heard*" are used as opposed to "...*opportunity for presenting their case*" in the UNCITRAL Arbitration Rules. The international sediment on this aspect seems to be moving away from a "full opportunity" for the parties to present their cases towards a

³ See, for example, UNCITRAL documents A/CN.9/619, para. 109.

reasonable one⁴. To reflect this, it may be better to use wordings like “...*opportunity to be heard*” instead.

21. On Article 15.4, we suggest considering the replacement of “...*deemed to be made...*” by “...*deemed to have been made...*” for the same rationale adopted by the UNCITRAL Secretariat⁵, i.e. to avoid the uncertainty as to the jurisdiction of courts regarding the award if it was signed in a place other than the seat of arbitration and to make it more consistent with the wording used in Article 31 of the UNCITRAL Model Law.
22. On Articles 20.1 & 20.2, it may be re-worded to make it clear that the arbitral tribunal has the power to raise and decide upon issues regarding the existence and scope of its own jurisdiction, in line with Article 16 of the UNCITRAL Model Law. A version drafted by the UNCITRAL Secretariat in more user-friendly wordings is: “*The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*”⁶ The HKBA is of the view that drafting alone this approach should be considered.
23. On Article 23.5, the HKBA is not sure whether the first sentence is necessary or proper to include.
24. On Article 24, it may be worthwhile to give definition or guidance, whether within the Rules of by other means, on what is interim measure with reference to its functions and what factors are to be taken into consideration in deciding on whether to grant or discharge interim measures or not.
25. On Article 26, it may be clearer in expression for the users with the

⁴ See, for example, UNCITRAL documents A/CN.9/614, para. 77.

⁵ See, for example, UNCITRAL documents A/CN.9/WG.II/WP.145/Add.1, para.10.

⁶ See UNCITRAL documents A/CN.9/WG.II/WP.145/Add.1, para.17.

following changes in wordings:

“26.1 If, within the period of time set by the arbitral tribunal, the Claimant has failed to communicate its Statement of Claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless the Respondent has submitted a counter-claim. If, within the period of time set by the arbitral tribunal, the Respondent has failed to communicate its Statement of Defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

...

26.3 If one of the parties, duly invited by the arbitral tribunal to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.”

G. The Award

26. On Article 34.1, it is suggested that the words “...or omissions” be added following “...or any errors...”.
27. On Article 36.1, it is suggested the word “reasonable” should be added reference to costs or expenses, to better reflect the position on this subject.

H. Other Provisions

28. On Article 38, the HKBA is of the view that such an expedited procedure can be of benefits to the parties. Again, for guidance, HKIAC may consider issuing guidelines on how the decision of HKIAC Secretariat is made on this subject.
29. On Article 39, this seems to be reflecting what the statutory provisions at section 2B of the Arbitration Ordinance (Cap.341) provide and it deals with the situation where the same arbitrator is to be acting as the mediator as well in the matter. The HKBA sees the benefits of such an arrangement and the support of it via party autonomy. However, improvement to the Rules can be considered for integrating a mediation process, before a separate mediator, at the parties’ option into the Rules.

With such an arrangement, the adverse implications under Article 39.5 can be avoided and the parties may participate in the mediation more freely and willingly.

Hong Kong Bar Association
20 February 2008