

**The Hong Kong Bar Association's Comments to the HKIAC Domestic Arbitration Rules
2011**

A. General

1. This set of rules to be coming into effect in 2011 ("the 2011 Rules") is to amend and replace the Domestic Arbitration Rules (1993), for the use by parties seeking to use a set of formal and convenient procedures for ad hoc arbitration in Hong Kong. It has been revised also with a view to working with the Arbitration Ordinance (Cap.609) ("the Ordinance"), which has become effective in 2011.
2. The Hong Kong Bar Association ("HKBA") has been invited to comment on the 2011 Rules.
3. Subject to the comments set out below, the HKBA welcomes and supports the amendments introduced by the 2011 Rules and the replacement of the 1993 Rules.
4. The 1993 Rules have been widely adopted by domestic users in ad hoc arbitration in Hong Kong, including the HKSAR Government. With the reform of the Arbitration Ordinance, the HKBA believes that the introduction of the 2011 Rules is both necessary and important for providing the required updates to the arbitration procedures to the benefits of users who have been used to arbitrating ad hoc in Hong Kong with the 1993 Rules. The comments below are only intended to highlight particular points which the HKBA believes may benefit further consideration.

B. Interface with Arbitration Ordinance

5. Schedule 2 of the Arbitration Ordinance contains provisions on areas that were previously provided for in the now repealed Arbitration Ordinance (Cap.341), such as defaulting sole arbitrator, empowering court to order consolidation of arbitration proceedings, allowing appeal on a point of law and allowing decision on preliminary question of law, in respect of domestic arbitration. The 2011 Rules deal with this by noting in the preamble that "[t]he adoption of the HKIAC Domestic Arbitration Rules (2011) in an arbitration agreement will not, by itself, have the effect of providing that arbitration under that agreement is a

domestic arbitration for the purpose of Section 100 of the Ordinance". The Arbitration Ordinance however provides both automatic and party-chosen means of the opting-in of such provisions in Schedule 2 of the Arbitration Ordinance.

6. The HKBA notes that this may creates confusion and arguments over whether and which of such provisions have or have not been opted-in when the parties adopt the 2011 Rules. It is suggested that the interface of the 2011 Rules with the opt-in provisions of the Arbitration Ordinance may be clarified further for the benefits of ease of adoption or choice by users who wish and who do not wish to opt-in to some or all of such provisions. The HKBA believes that this may be indeed done in the Rules and, if so, may be also in lines with the other paragraphs in the preamble touching on other sections of the Arbitration Ordinance. Alternatively, this may be in the form of a guidance to the 2011 Rules.

C. **Some of the SubstantiveArticles**

7. Article 1 --- Commencement of Arbitration
 - With reference to the discusson regarding the latest UNCITRAL Arbitraion Rules, consideration may be given to add a sub-article: "The appointment of the Arbitrator shall not be hindered by failure of the Respondent to communicate a response to the notice of arbitration, or by an incomplete or late response to the notice of arbitration.", making this more explicit.
 - To cover the variety of situations, it is suggested that consideration should be given to add "or other legal instructments" after "contractual documents" in Article 1.1 (b).
8. Articles 3 & 4 --- Appointment and Replacement of Arbitrator
 - The use of "justifiable doubts" is notably in lines with the other rules such as the UNCITRAL Arbitration Rules and should be welcome, as compared to the use of "reasonable doubts" in some other rules.

- Article 4.1 currently only allows 15 days for voicing out any challenge and it may in practice require more time to consider and formulate such a challenge.
 - It is suggested that consideration may be given to add "or agreement" after "...according to the rules..." in the last sentence of Article 4.4.
 - Consideration may be given to add: "If a substitute Arbitrator is appointed, the arbitration proceedings shall resume at the stage where the arbitrator who was substituted ceased to perform his or her functions, unless the substitute Arbitrator decides otherwise."
9. Article 6 --- Equal Treatment and Conduct of the Proceedings
- Article 6.1 is welcome. To emphasize this pillar of arbitration further, consideration may be given to add "...in all aspects" to that sentence.
10. Article 9 --- Hearings
- In Article 9.2, "documents only" should read "documents-only", given that no definition on this is provided in the 2011 Rules.
11. Article 10 --- Default of a Party
- The reference as to what the Arbitrator is obliged or empowered to do if the Claimant fails to communicate / submit the statement of claim required under Article 7 in Article 10.1(a) and (d) seems unclear. The same situation is observed in relation to the statement of defense under Article 10.1(b) and (e). In any case, as there is power on the Arbitrator to extend time, consideration to add "subject to Article 15(b)" to Article 10.1(a).
12. Article 13 --- Jurisdiction of the Arbitrator
- Consideration may be given to add "by way of an interim award" to follow "...either as a preliminary question..." in the first sentence of Article 13.3.
 - Article 13.7 seems unnecessary as an article in a set of arbitration rules.
13. Article 20 --- Interpretation of Awards, Correction of Awards and Additional Awards

- Article 20.1(b) allows an interpretation of a specific point or part of the award upon request by a party, but only if so agreed by all the parties. This may create difficulties in practice in getting such an agreement then.

14. Article 23 --- Waiver of Right to Object

- Consideration may be given for the word "and" in the first line of Article 23 to be replaced with "or".

Hong Kong Bar Association

12th December 2011