

(1) Costs of Conducting Arbitral Proceedings in Hong Kong

(2) The objective of facilitating the Fair and Speedy Resolution of Disputes

and

(3) Simplified Procedures for Arbitral Proceedings

I. Introduction

Following requests for information by Members at the first meeting of the Bills Committee of the Legislative Council held on 28 July 2009, this paper addresses the following matters:

- (a) the costs of conducting arbitral proceedings in Hong Kong;
- (b) the ways in which the provisions of the Arbitration Bill could facilitate the fair and speedy resolution of disputes; and
- (c) the reasons for not including simplified procedures for arbitral proceedings in the Arbitration Bill.

II. Cost of conducting arbitral proceedings in Hong Kong

2. One or both parties to an arbitration must pay for the arbitrator's fees, administration fees to be paid to arbitration institutions, the use of hearing rooms and services provided by expert witnesses (if applicable).

3. Arbitrators' fees in Hong Kong are subject to the regulation by free market forces. According to the Hong Kong International Arbitration Centre ("HKIAC"), arbitrators' fees range from HK\$2,000 to HK\$6,000 per hour¹. Information obtained from senior arbitration practitioners is that rates in Hong Kong and London are similar and Singapore rates are not lagging far behind.

4. With the introduction of the HKIAC Administered Arbitration Rules, parties can now have more control over the costs of arbitration. Under the Schedule of Fees and of Arbitration (effective from 1st

¹ The Chief Justice's Working Party on Civil Justice Reform, *Interim Report and Consultative Paper*, para 50.

September 2008), the administrative fees and arbitrators' fees payable are calculated in accordance with the charts (**Annex I**). Once the parties choose to adopt the HKIAC Schedule of Fees, fees would be fixed by the HKIAC taking into account the circumstances of the case.

5. To facilitate the comparison of arbitrators' fees in Hong Kong and other jurisdictions, the respective arbitrator/institution fees of the International Court of Arbitration of the International Chamber of Commerce ("ICC") and Singapore International Arbitration Center ("SIAC") are extracted from their rules/fees schedule (**Annex II**). The fees charged by the HKIAC are very competitive when compared to those charged by ICC and SIAC.

6. The full day's rate for an arbitration hearing room located at HKIAC is HK \$7,500. For comparison, daily rate for a hearing room (with an area of 95 to 98 sq. m.) at Maxwell Chambers of SIAC is S\$ 1,500 (about the same as Hong Kong).

7. Turning to expert witnesses, there is great diversity in the fees charged, which depend on their profession, the degree of their involvement and the complexity of the case. It would be difficult to pin down a figure. We understand that in construction cases, the professional rate depends on the professional seniority of the witness and the hourly rates tend to be between HK\$2,500 to 4,500.

III. Ways in Which the Provisions of the Arbitration Bill Could Facilitate the Fair and Speedy Resolution of Disputes

8. Given that the time required for arbitration very much depends on the complexity of the issues in dispute, the cooperation of the parties and the schedules of the arbitrators and lawyers, it is very difficult to quantify the length of time required. HKIAC's experience is that a number of arbitrations can be completed within one year or so. For those cases that are conducted on document-only basis (e.g. some marine time arbitrations), they may be completed within 2 - 3 months if the parties are cooperative. Those cases involving complex legal or technical issues (i.e. some international commercial or construction arbitrations), in-person hearings would be needed and this could last longer. Many of these arbitrations can be completed within 1 – 2 years.

9. Compared with litigation, finality of arbitral award and ease of enforcement (in particular international enforcement) go a long way to saving the parties' overall time in the dispute resolution process.

Furthermore, relevant industrial expertise of arbitrators will contribute to speedy resolution of disputes involving technical issues or matters calling for special expertise.

10. With the Bill giving more extensive power to arbitral tribunal and by adopting the UNCITRAL Model Law as the basis for an unitary arbitration regime, the Administration is of the view that the Bill would contribute to enhancing the user-friendliness, efficiency and effectiveness of arbitrations in Hong Kong. This would also make arbitration be less costly and more speedy.

11. It is anticipated that in the long term, because of the reduced intervention by the court due to the decreasing number of domestic arbitration cases after the transitional period of 6 years period during which the automatic opting-in system will operate, time and costs will be saved for parties who choose to conduct arbitration proceedings in Hong Kong.

12. Achieving fair and speedy resolution of disputes and avoiding unnecessary costs are the stated objectives of the Bill (Clause 3 of the Bill). Furthermore, Article 5 of the Model Law (as given effect by clause 12 of the Bill) provides that “in matters governed by this Law, no court shall intervene except where so provided in this Law.” This provision is echoed in clause 3(2)(b) of the Bill. In this context it must be borne in mind that appeals on interlocutory matters inevitably slow the arbitration process and add to expenses.

13. The guiding principle adopted by the Bill is that in general minor procedural proceedings in the court should not be subject to appeal, whereas proceedings which determine substantive rights or might do so may be subject to appeal.

14. Certain Model Law provisions specifically provide that there will be no appeal from the court or other authority specified in Article 6: Article 11(3), (4) and (5) (appointment of arbitrators); Article 13(3) (procedure for challenging an arbitrator); Article 14 (decision on the termination of the mandate of the arbitrator) and Article 16(3) (decision on the competence of arbitral tribunal). All these Articles of the Model Law have been given effect in the Bill.

15. Other provisions that are added to the Model Law also specifically provide that there will be no appeal from the court: clause 16(3) (court direction that the proceedings ought to be heard in open

court), clause 17 (court direction on reporting restrictions of proceedings), clause 20(6) (order for security for the satisfaction of any arbitral award where admiralty proceedings were stayed) and clause 75(3) (court decision on taxation of costs of arbitral proceedings). Generally, these provisions govern relatively minor procedural proceedings and should not be subject to any appeal.

16. The cutting down of the opportunities for appeal in relatively minor procedural proceedings in the court should also mean that arbitration should be less costly and more speedy with the enactment of the Bill.

IV. Simplified Procedures for Arbitral Proceedings

17. Article 19² is considered to be the most important provision of the Model Law and has therefore been referred to as the “*Magna Carta* of arbitral procedures”. Such importance arises from the establishment of procedural autonomy by granting the parties maximum freedom in the choice of their procedural rule.

18. The approach of granting the parties the greatest possible discretion when choosing the procedural rules for the arbitration is essential for a model law that is intended to be adopted on a universal basis. This is due to the fact that, especially in procedural matters, there are great differences between the various legal systems worldwide. This was also acknowledged by the UNCITRAL Secretariat’s commentary, which held that Article 19, in conjunction with the other provisions on the arbitral procedure, provided “*a liberal framework ... to suit the great variety of needs and circumstances of international cases, unimpeded by local peculiarities and traditional standards which may be found in existing domestic law of the place*”³.

19. Article 19 of the Model Law was considered to be sufficient in itself to vest the necessary procedural authority upon the arbitral tribunal and there is no need for a detailed list of procedural matters along

² Article 19 of the Model Law provides as follows:

“(1) *Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*”

³ Report of the Secretary-General: *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, 19 March 1985 (A/CN.9/264) para.1. This quotation and the discussion in this paragraph of the paper are extracted from Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Jurisdictions*, 2nd ed., (Sweet & Maxwell, London, 2005), at paras 5-014 to 5-015.

the lines of section 34 of the English Arbitration Act 1996⁴.

20. Most arbitration rules contain indicative procedures and time limits whilst ultimately leaving determination of detailed procedures to the arbitration tribunal. The parties may include suitable provisions in their arbitration clause and they may agree to adopt a fast track procedure specifically operated by an arbitral institution. Simplified (sometimes known as fast-track) procedures are designed to enable an arbitration to proceed quickly, given the specific nature of the contract and disputes that are likely to arise. Such procedures are more effective if the arbitration is administered by an institution.

21. Consideration may be given to setting out simplified procedures in the arbitration clause. Indeed Article 32(1) of the ICC Rules⁵ enables the parties to shorten time limits provided for in the Rules, while Article 32(2) enables the Court to extend those shortened time limits when necessary. For these reasons, simplified procedures are either found as part of an arbitration agreement or in the rules of arbitration institution. The UNCITRAL Model Law does not provide for simplified or fast track procedures. It is rare for such procedures to find their way into national legislation as the objective of such legislation in all cases is to provide a general legislative framework for arbitration, leaving details rules to be established by the parties, the arbitral tribunals and the arbitration institutions.

22. Moreover, most mainstream arbitral institutions appear to have decided against the specific development of a fast track set of rules. At present, neither HKIAC, London Court of International Arbitration (LCIA) nor the ICC has a specific fast track procedure, although the HKIAC does have a 'documents only procedure'⁶ which by its nature, is intended to be simplified or fast track⁷.

23. ICC also sounded out caution against the inclusion of fast

⁴ Hong Kong Institute of Arbitrators, 30 April 2003, *Report of Committee on Hong Kong Arbitration Law*, para. 27.5.

⁵ International Court of Arbitration of the International Chamber of Commerce (January 1998) *Rules of Arbitration*.

⁶ The HKIAC 'Documents Only Procedure' is available where the parties have agreed, or where an existing arbitration tribunal has directed, that no oral hearing is needed. The procedure is also intended to encourage speed and economy by requiring the exchange of submissions and documents between the claimant and the respondent to be completed within 77 days (or 105 days if there is a counterclaim). The tribunal will then proceed to its award. (Please see HKIAC information at: http://www.hkiac.org/show_content.php?article_id=245 [last accessed on 10 September 2009])

⁷ Hon. Mr Justice Ma (ed.) (2003) *Arbitration in Hong Kong: A Practical Guide*, Thomson, para 22-21.

track procedure in the arbitration clause. It is stated that:

“[E]xperience shows that in practice it is difficult at the time of drafting the clause to predict with a reasonable degree of certainty the nature of disputes and the procedures that will be suitable for those disputes. Also, disagreements can arise later as to the interpretation or application of fast-track clauses. Careful thought should therefore be given before such provisions are included in an arbitration agreement. Once a dispute has arisen, the parties could at that time agree upon a fast-track procedure, if appropriate”⁸.

24. In the light of the above, the parties should have the autonomy to agree on the arbitral procedure to be followed. Clause 47 of the Bill provides that Article 19(1) of the Model Law has effect in Hong Kong. The Administration is of the view that instead of including specific simplified or fast track procedures in the Arbitration Bill, the parties should be free to enter into an agreement at suitable time to adopt such procedures for the arbitral proceedings as they think appropriate. Arbitration institutions may, depending on the perceived needs of the parties engaging their services, develop simplified procedures which may be invoked with the agreement of the parties to a dispute.

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⁸ International Chamber of Commerce (2007) *Techniques for Controlling Time and Costs in Arbitration*, para 6.

HKIAC Schedule of Administrative Fees of Arbitration and Arbitrators' Fees

SUM IN DISPUTE (in USD)	A. ADMINISTRATIVE FEES(*) (in USD)		B. ARBITRATOR'S FEES (**)(PER ARBITRATOR) (in USD)			
			Minimum		Maximum	
up to 50,000	1,500		2,000		14.00% of amount in dispute	
from 50,001 to 100,000	1,500 + 0.70% of amt. over 50,000		2,000 + 2.50% of amt. over 50,000		7,000 + 10.00% of amt. over 50,000	
from 100,001 to 500,000	1,850 + 0.60% of amt. over 100,000		3,250 + 1.00% of amt. over 100,000		12,000 + 5.00% of amt. over 100,000	
from 500,001 to 1,000,000	4,250 + 0.40% of amt. over 500,000		7,250 + 0.70% of amt. over 500,000		32,000 + 2.60% of amt. over 500,000	
from 1,000,001 to 2,000,000	6,250 + 0.20% of amt. over 1,000,000		10,750 + 0.40% of amt. over 1,000,000		45,000 + 1.40% of amt. over 1,000,000	
from 2,000,001 to 5,000,000	8,250 + 0.12% of amt. over 2,000,000		14,750 + 0.25% of amt. over 2,000,000		59,000 + 0.70% of amt. over 2,000,000	
from 5,000,001 to 10,000,000	11,850 + 0.06% of amt. over 5,000,000		22,250 + 0.075% of amt. over 5,000,000		80,000 + 0.40% of amt. over 5,000,000	
from 10,000,001 to 50,000,000	14,850 + 0.03% of amt. over 10,000,000		26,000 + 0.05% of amt. over 10,000,000		100,000 + 0.20% of amt. over 10,000,000	
from 50,000,001 to 80,000,000	26,850		45,000 + 0.025% of amt. over 50,000,000		180,000 + 0.14% of amt. over 50,000,000	
from 80,000,001 to 100,000,000	26,850		53,500 + 0.012% of amt. over 80,000,000		222,000 + 0.12% of amt. over 80,000,000	
over 100,000,000	26,850		55,000 + 0.01% of amt. over 100,000,000		246,000 + 0.06% of amt. over 100,000,000	

* indicates the resulting administrative fee payable in USD after the appropriate calculations have been made.

**indicates the resulting range of fees payable per arbitrator after the appropriate calculations have been made.

ICC Scales of Administrative Expenses and Arbitrators Fees

SUM In DISPUTE (In US Dollars)	A. ADMINISTRATIVE EXPENSES (*) (In US Dollars)		B. ARBITRATOR'S FEES (*) (In US Dollars)	
	Minimum	Maximum	Minimum	Maximum
up to 50 000	2 500	2 500	2 500	17,00% of amount in dispute
from 50 001 to 100 000	2 500 + 4.30% of amt. over 50 000	2 500 + 2.50% of amt. over 50 000	2 500 + 2.50% of amt. over 50 000	8 500 + 12.80% of amt. over 50 000
from 100 001 to 200 000	4 650 + 2.30% of amt. over 100 000	3 750 + 1.35% of amt. over 100 000	3 750 + 1.35% of amt. over 100 000	14 900 + 7.25% of amt. over 100 000
from 200 001 to 500 000	6 950 + 1.90% of amt. over 200 000	5 100 + 1.29% of amt. over 200 000	5 100 + 1.29% of amt. over 200 000	22 150 + 6.45% of amt. over 200 000
from 500 001 to 1 000 000	12 650 + 1.37% of amt. over 500 000	8 970 + 0.90% of amt. over 500 000	8 970 + 0.90% of amt. over 500 000	41 500 + 3.80% of amt. over 500 000
from 1 000 001 to 2 000 000	19 500 + 0.86% of amt. over 1 000 000	13 470 + 0.65% of amt. over 1 000 000	13 470 + 0.65% of amt. over 1 000 000	60 500 + 3.40% of amt. over 1 000 000
from 2 000 001 to 5 000 000	28 100 + 0.41% of amt. over 2 000 000	19 970 + 0.35% of amt. over 2 000 000	19 970 + 0.35% of amt. over 2 000 000	94 500 + 1.30% of amt. over 2 000 000
from 5 000 001 to 10 000 000	40 400 + 0.22% of amt. over 5 000 000	30 470 + 0.12% of amt. over 5 000 000	30 470 + 0.12% of amt. over 5 000 000	133 500 + 0.85% of amt. over 5 000 000
from 10 000 001 to 30 000 000	51 400 + 0.09% of amt. over 10 000 000	36 470 + 0.06% of amt. over 10 000 000	36 470 + 0.06% of amt. over 10 000 000	176 000 + 0.225% of amt. over 10 000 000
from 30 000 001 to 50 000 000	69 400 + 0.08% of amt. over 30 000 000	48 470 + 0.056% of amt. over 30 000 000	48 470 + 0.056% of amt. over 30 000 000	221 000 + 0.215% of amt. over 30 000 000
from 50 000 001 to 80 000 000	85 400 + 0.01% of amt. over 50 000 000	59 670 + 0.031% of amt. over 50 000 000	59 670 + 0.031% of amt. over 50 000 000	264 000 + 0.152% of amt. over 50 000 000
from 80 000 001 to 100 000 000	88 800	68 970 + 0.02% of amt. over 80 000 000	68 970 + 0.02% of amt. over 80 000 000	309 600 + 0.112% of amt. over 80 000 000
over 100 000 000	88 800	72 970 + 0.01% of amt. over 100 000 000	72 970 + 0.01% of amt. over 100 000 000	332 000 + 0.056% of amt. over 100 000 000

*indicates the resulting administrative expenses in US\$ when the proper calculations have been made.

**indicates the resulting range of fees in US\$ when the proper calculations have been made.

SIAC Administration Fees and Arbitrators' Fees

Fees: Administration Fees

The administration fees apply to all arbitrations governed by the arbitration rules of the SIAC or submitted or referred to the SIAC for arbitration.

The administration fee *does not* include the following:

- Fees and expenses of the Tribunal
- Usage **cost of facilities and support services** for and in connection with the hearing (e.g. hearing rooms and equipment, transcription and interpretation services etc)
- SIAC's out-of-pocket expenses

This schedule of administration fees is effective as of 1 July 2007. All sums stated are in Singapore dollars.

Case Filing Fee

Case Filing Fee+
1,000

+ A filing fee is applicable to all cases administered by the SIAC; it is a one-time, non-refundable filing fee.

Administration Fees

Claim or Counterclaim	Administration Fees
Up to 50,000	2,750
50,001 to 100,000	2,750 + 2% excess over 50,000
100,001 to 500,000	3,750 + 1% excess over 100,000
500,001 to 1,000,000	7,750 + 0.75% excess over 500,000
1,000,001 to 2,000,000	11,500 + 0.5% excess over 1,000,000
2,000,001 to 5,000,000	16,500 + 0.25% excess over 2,000,000
5,000,001 to 10,000,000	24,000 + 0.125% excess over 5,000,000
10,000,001 to 50,000,000	30,250 + 0.075% excess over 10,000,000
Above 50,000,000	60,250 (maximum)

Fees: Arbitrator's Fees

The arbitrator's schedule of fees is effective as of 1 July 2007. The fee calculated in accordance with the schedule is the amount payable to one arbitrator. All sums stated are in Singapore dollars.

Sum in Dispute	Arbitrator's Fees*
Up to 50,000	5,000
50,001 to 100,000	5,000 + 12% excess over 50,000
100,001 to 500,000	11,000 + 5.5% excess over 100,000
500,001 to 1,000,000	33,000 + 4.00% excess over 500,000
1,000,001 to 2,000,000	53,000 + 2.00% excess over 1,000,000
2,000,001 to 5,000,000	73,000 + 1.00% excess over 2,000,000
5,000,001 to 10,000,000	103,000 + 0.5% excess over 5,000,000
10,000,001 to 50,000,000	128,000 + 0.25% excess over 10,000,000
50,000,001 to 80,000,000	228,000 + 0.10% excess over 50,000,000
80,000,001 to 100,000,000	258,000 + 0.075% excess over 80,000,000
Over 100,000,000	273,000 + 0.06% excess over 100,000,000

** Pursuant to Rule 30.1 of the SIAC Rules (3rd Edition, 2007), the Registrar of SIAC may review the prescribed maximum fee in exceptional circumstances.*