



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF : LP 19/00/4C
本函檔號 OUR REF : LS/S/29/12-13
電 話 TELEPHONE : 3919 3506

傳真 FAX : 2877 5029
電郵 E-MAIL : bloo@legco.gov.hk

By Fax (2524 2171) and
Email (adr@hkiac.org)

28 June 2013

Ms. Chiann Bao
Secretary-General
Hong Kong International Arbitration Centre
38th Floor Two Exchange Square
8 Connaught Place
Hong Kong

Dear Ms. Bao,

**Arbitration (Appointment of Arbitrators and
Mediators and Decision on Number of Arbitrators) Rules**

To assist my scrutiny of L.N. 115 of 2013 (the new Rules), I would appreciate your clarifications (in both languages) on the following issues **as soon as possible**:

Rule 4

- (a) Under rule 4(2), the Hong Kong International Arbitration Centre (HKIAC) may re-appoint a person to be a member of the Appointment Advisory Board (the Board) but not until *2 years have expired since that person was last a member of it*. The Chinese text renders the italicized words as "在其任期屆滿後的2年後". When will a former member of the Board who has resigned without serving the full term of his first appointment become eligible for re-appointment under rule 4(2)? Will he become so eligible:
- (i) two years after the expiry of the term of his first appointment (which he has not served in full); or

- (ii) two years after he has ceased to be a member of the Board upon his resignation?

Rule 5

- (b) Rule 5 of the Arbitration (Appointment of Arbitrators and Umpires) Rules (Cap. 609 sub. leg. B) (the existing Rules) provides that HKIAC shall consult with at least 3 "available members" of the Board. Rule 5 of the new Rules requires HKIAC to consult with at least 3 members of the Board "*with whom the HKIAC is able to communicate*". Please explain why the italicized language is used in the new Rules. Are those words redundant, since HKIAC will not in any event be in a position to consult with any members of the Board with whom it cannot communicate?

Rule 7

- (c) Rule 7(1)(b) of the existing Rules refers to "the availability" of arbitrators, whereas the same paragraph in the new Rules reads "*whether the arbitrators who possess the required qualifications would be available to accept the appointment*". Is there any reason for making such change in the new Rules?
- (d) Rule 7(1)(c) of the existing Rules refers merely to "the identity of the parties", but the new Rules refer to "*the identity and nationality of the parties*". It is noted that Form 1 in the existing Rules already requests the parties to provide their nationality. Please explain why the parties' nationality is a relevant factor to be taken into account by HKIAC in appointing an arbitrator under section 24 of the Arbitration Ordinance (Cap. 609) (the Ordinance).
- (e) Under rule 7(2) of the existing Rules, if the other party or parties do not provide any information or reasons why no arbitrator should be appointed, HKIAC "may" proceed to make an appointment. Rule 7(4) of the new Rules, however, requires that in such circumstances HKIAC "must" proceed to appoint an arbitrator. Is there any reason for making such a change in the new rule 7(4)?
- (f) It is further noted that under rule 9(3) of the new Rules, if no reasons are given by the other party or parties, HKIAC "may" proceed to decide on the number of arbitrators. Please explain the discrepancy between rules 7(4) and 9(3) of the new Rules.

Rule 9

- (g) Rule 9(e) of the existing Rules refers to "the availability of appropriate arbitrators", while rule 9(1)(e) of the new Rules is concerned with "*whether there are any appropriate arbitrators*". Please advise what is meant by "appropriate arbitrators" and the reason for changing the language in the new Rules?
- (h) Rule 10(2) of the existing Rules provides that where a party fails or refuses to supply further information as requested by HKIAC, HKIAC "may" make a decision on the basis of the information it has. Under rule 9(6) of the new Rules, HKIAC "must" do so in such circumstances. What is the reason for the change?

Rule 11

- (i) While rule 7(2) of the new Rules provides that in response to a request for the appointment of an arbitrator the other party or parties may give to HKIAC "*any written information*" they consider relevant, rule 11(2) allows "*any information*" the other party or parties consider relevant to be given to HKIAC in response to an application for the appointment of a mediator. Please explain why rule 11(2) does not require the relevant information to be "written".

Rule 13

- (j) Under rule 13(1) of the new Rules, HKIAC may charge \$8,000 for making any appointment or decision under sections 23(3), 24 or 32(1) of the Ordinance. According to the LegCo Brief (File Ref.: LP 19/00/4C) issued by HKIAC on 21 June 2013, the new fee is based on the estimated costs of sample cases handled by HKIAC from January to May 2012. Rule 13(2) further provides that HKIAC may charge a "*reasonable fee*" that exceeds \$8,000 but does not exceed \$15,000 "*for the recovery of expenditure incurred or likely to be incurred by it in the exercise of [its aforementioned] functions*". Your letter to the Panel on Administration of Justice and Legal Services dated 12 October 2012 suggests that rule 13(2) is intended to allow HKIAC to vary the \$8,000 fee "*in response to any significant increases in the costs of the exercise of its statutory functions and any notable increases in prevailing market rates*".

- (i) What is the maximum amount of fee payable for a request or application under the new Rules: \$8,000, \$15,000 or \$23,000?
- (ii) In what circumstances would HKIAC's fee exceed \$8,000 without undermining the object mentioned in section 3(1) of the Ordinance, i.e. *"to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense"*?

Rule 15

- (k) Rule 15 of the new Rules provides that a member of the Board established under rule 3 of the existing Rules, whose appointment has continued to have effect by virtue of section 4 of Schedule 3 to the Ordinance, is to be a member of the Board established under rule 3 of the new Rules on the commencement of that rule (i.e. on 2 December 2013) until the expiry of the term of that appointment. However, section 4 of Schedule 3 to the Ordinance seems to apply only to appointments made *before* the commencement of the Ordinance (i.e. before 1 June 2011). Is it also necessary for rule 15 of the new Rules to provide for the status of a member who has been or is to be appointed to the Board under the existing Rules between 1 June 2011 and 1 December 2013?

Chinese text

- (l) In the existing Rules (rules 6(1) and 8(1) and paragraph 8 of Forms 1 and 2), the terms "certify", "certifying" and "certificate" are rendered consistently as "核證". Under the new Rules, however, "certifying" is rendered as "證明" (rules 6(2)(c), 8(2)(c) and 10(2)(c)), whereas "certification" and "certify" are rendered as "核證" (paragraph 8 of Forms 1, 2 and 3). Please explain the discrepancy between the two Chinese renditions in the new Rules.
- (m) Why is "contention" rendered as "論據" in rule 10(1) of the existing Rules, but as "主張" in rule 9(2) of the new Rules?

Public consultation

- (n) Please confirm whether (and if so, when) HKIAC has consulted the public (including the persons and organizations referred to in rule 3(3)) on the new Rules. What are their views on the new Rules?

Yours sincerely,



(Mr Bonny LOO)
Assistant Legal Adviser

cc. DoJ (Attn.: Mr LEE Tin-yan, ASG(Atg) (By Fax: 3543 0350)
Mr Manuel NG, GC (By Fax: 2845 2215))

LA