

立法會

Legislative Council

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Paper for the House Committee meeting on 18 October 2013

Report of the Subcommittee on Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) Rules

Purpose

This paper reports on the deliberations of the Subcommittee on Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) Rules.

Background

2. The Arbitration Ordinance (Cap. 609) ("the Ordinance"), which was enacted in November 2010, repeals the previous Arbitration Ordinance (Cap. 341) and reforms the law relating to arbitration by unifying the existing domestic and international regimes of arbitration under Cap. 341. The Ordinance came into operation on 1 June 2011. By virtue of section 110 of the Ordinance¹, the Arbitration (Appointment of Arbitrators and Umpires) Rules originally made under Cap. 341 (now Cap. 609 sub. leg. B with necessary modifications) ("the existing Rules") continue to be in force and have the like effect for all purposes as if made under the Ordinance. The existing Rules provide for the establishment of an Appointment Advisory Board, and prescribe the procedures for applying to the Hong Kong International Arbitration Centre ("the HKIAC") for the appointment of an arbitrator or umpire and a decision as to the number of arbitrators under an arbitration agreement.

¹ Under section 110 of the Ordinance, any subsidiary legislation made under Cap. 341 and in force at the commencement of the Ordinance, so far as it is not inconsistent with the Ordinance, continues in force and has the like effect for all purposes as if made under the Ordinance.

3. The Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) Rules (L.N. 115) ("the Rules") are made by the HKIAC under section 13(3) of the Ordinance with the prior approval of the Chief Justice. It repeals the existing Rules and substitutes them with a new set of Rules to make provisions to facilitate the HKIAC's performance of the following functions:

- (a) the default appointment by the HKIAC of an arbitrator under section 24 of the Ordinance²;
- (b) the decision by the HKIAC on the number of arbitrators under section 23(3) of the Ordinance³; and
- (c) the default appointment by the HKIAC of a mediator under section 32(1) of the Ordinance⁴.

4. The provisions in the Rules are substantially the same as those in the existing Rules except the changes set out in paragraphs 5 to 8 below.

Appointment of arbitrator

5. The procedure for applying to the HKIAC for the appointment of an arbitrator provided in Part 3 of the Rules is substantially the same as that under Part III of the existing Rules, except that:

- (a) the parties' nationality is now specified explicitly under the new rule 7(1)(c) as a relevant factor to be taken into account by the HKIAC in appointing a suitable person to be an arbitrator;
- (b) it is now specified in the new rule 7(2) that any information given by the other party or parties to the HKIAC in response to a request for the appointment of an arbitrator must be in written form; and
- (c) the parties and their solicitors/advisers may now also provide their email addresses in the new Form 1.

² Section 24 provides, among other things, that if a party fails to appoint an arbitrator, HKIAC must make the necessary appointment upon a request to do so from any party.

³ Section 23(3) provides that if the parties fail to agree on the number of arbitrators, the number of arbitrators is to be either 1 or 3 as decided by HKIAC in the particular case.

⁴ Section 32(1) stipulates that if an arbitration agreement provides for the appointment of a mediator by a person who is not one of the parties and that person refuses or fails to make the appointment, HKIAC may, on the application of any party, appoint a mediator.

Number of arbitrators

6. The new procedure for seeking a decision by the HKIAC on the number of arbitrators under Part 4 of the Rules is substantially the same as that under Part IV of the existing Rules, except that:

- (a) the new rule 9(7) now specifically requires the HKIAC to notify the parties when it has made a decision; and
- (b) the parties and their solicitors/advisers may also provide their email addresses in the new Form 2.

Appointment of mediator

7. The Rules include a new Part 5 to prescribe the procedure and the form (Form 3 in the Schedule) for applying to the HKIAC for the appointment of a mediator under section 32(1) of the Ordinance. The procedure for applying to the HKIAC for the appointment of a mediator, including the factors to be taken into account by the HKIAC in making such appointment, is similar to that for requesting the HKIAC to appoint an arbitrator under Part 3.

Fees

8. Under the existing Rules, the fee for applying to the HKIAC for the appointment of an arbitrator or a decision on the number of arbitrators is \$4,000. Rule 13(1) of the Rules provides that the HKIAC may charge \$8,000⁵ for making any appointment or decision referred to in paragraph 3 above. The new fee is based on the estimated costs of sample cases handled by the HKIAC from January to May 2012. Rule 13(2) of the Rules further provides that the 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 making the above appointment or decision.

9. The Rules will come into operation on 2 December 2013.

The Subcommittee

10. At the House Committee meeting held on 5 July 2013, Members agreed that a subcommittee should be formed to study the Rules in detail. The membership list of the Subcommittee is in **Appendix I**.

⁵ Section 29(1A) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that where an Ordinance confers a power on a person to make subsidiary legislation, the subsidiary legislation may impose a fee or charge for anything in it or the Ordinance.

11. Under the chairmanship of Hon Dennis KWOK, the Subcommittee has held two meetings, including one meeting with deputations and the Administration. The list of organizations which have provided views to the Subcommittee is in **Appendix II**.

12. A motion was moved by Hon Dennis KWOK, on behalf of the Subcommittee, at the Council meeting of 9 October 2013 to extend the scrutiny period of the Rules from the Council meeting of 16 October 2013 to that of 6 November 2013.

Deliberations of the Subcommittee

Appointment of mediator

13. The Subcommittee notes that in the course of an arbitration, parties to an arbitration may apply for the appointment of a mediator by the HKIAC. Concern was raised about the protection of the interests of parties to an arbitration when the mediator so appointed is subsequently appointed as an arbitrator for the same case.

14. The HKIAC has advised that as mediators are required to conclude the mediation within a prescribed period of time, for some particular cases, parties to an arbitration may employ mediation services with a view to expediting the settlement of the dispute. Whenever mediation is adopted, the parties undertake, either by stipulation in the contract or by agreement, that the mediation must proceed in accordance with the Mediation Rules of the HKIAC and that failure by any mediators to abide by the Mediation Rules will lead to serious consequences, such as disqualification of the mediator concerned. The Subcommittee further notes that under section 33(4) of the Ordinance, if confidential information is obtained by an arbitrator from a party during the mediation proceedings conducted by the arbitrator as a mediator, and those mediation proceedings terminate without reaching a settlement acceptable to the parties, the arbitrator must, before resuming the arbitral proceedings, disclose to all other parties as much of that information as the arbitrator considers is material to the arbitral proceedings.

Number of arbitrators

15. On the question of the circumstances in which the number of arbitrators to be appointed is one or three in a particular case, the HKIAC has advised that it normally appoints one arbitrator if the parties to an arbitration request the HKIAC to make the appointment. In the case of the appointment of three arbitrators, it is customary for each of the parties to the arbitration to appoint one arbitrator and for the third arbitrator, who shall be the chairman, to be appointed

either by agreement between the party-appointed arbitrators or by an independent third party or in default by the HKIAC as provided in the Ordinance.

Fees

16. Noting that rule 13(2) of the Rules empowers the HKIAC to increase its fee from time to time up to a ceiling of \$15,000 without requiring the new fee to be subject to scrutiny by the Legislative Council ("LegCo") or published in the Gazette, questions were raised as to the circumstances in which the HKIAC will raise its fee above \$8,000 as provided under rule 13(2), and whether any future revision of fees will be published in the Gazette and subject to scrutiny by LegCo.

17. The Subcommittee notes that the HKIAC has been unable to locate any example from existing legislative provisions which similarly allow fees or charges specified in primary or subsidiary legislation to be varied administratively without requiring the new amounts to be subject to positive or negative vetting by LegCo or published in the Gazette. The HKIAC has advised that the HKIAC will charge more than \$8,000 only if there are significant increases in the costs of exercising its statutory functions, and that the policy intent of rule 13(2) is not to tailor a fee each time the HKIAC exercises its statutory function(s) but rather to review the costs periodically to ensure that the HKIAC is not making a significant loss in the overall performance of its statutory functions. The HKIAC has further advised that as the fee payable to it under rule 13(2) of the Rules must be a reasonable fee for the recovery of expenditure incurred or likely to be incurred by it and in no circumstances would such fee exceed \$15,000, the variation of the fees will not undermine 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". The HKIAC does not foresee the need to raise the \$15,000 ceiling of the fees in the near future. If there is a need to further raise the \$15,000 ceiling, the HKIAC will publish a new set of rules/amendments for scrutiny by LegCo.

18. Members note that to facilitate the parties' understanding of the arbitration proceedings, the HKIAC has undertaken to introduce a set of guidelines for the Rules.

Proposed amendments to the Rules

19. Members note that the Administration will move amendments to rule 13(2) of the Rules to better reflect the policy intent of that rule, and to rules 4(2), 6(2)(c), 8(2)(c), 10(2)(c) and 15 to improve their drafting. The proposed amendments to the Rules are in **Appendix III**. Members did not raise any query to the proposed amendments to the Rules.

Promoting Hong Kong as a legal and arbitration services centre in the Asia Pacific region

20. Hon Dennis KWOK has pointed out that Hong Kong is losing out to main competitor Singapore as the Asian International Dispute Resolution Centre. The Singaporean government puts in far more resources and effort into promoting its arbitration capabilities and institutions, and the Hong Kong Government's effort in this area is seriously lacking behind on this front. The Hong Kong arbitration sector deserves and needs more support. To tie in with the Government's policy to promote Hong Kong as a legal and arbitration services centre in the Asia Pacific region, the Administration is urged to provide more support to the arbitration sector.

21. The Administration has advised that the introduction of the Rules is aimed at bringing the existing Rules up-to-date and on a par with the international practice. Under the Government's Professional Services Development Assistance Scheme, the HKIAC has been able to implement a two-year project on arbitration which received a positive response from the stakeholders on the Mainland.

22. Responding to members' concern that there may not be sufficient supply of interpreters of various languages and dialects to provide assistance in arbitration proceedings, the HKIAC has advised that it has been able to identify the required interpreters from the pool of interpreters shared by the Judiciary and other government agencies. The Law Society of Hong Kong has also advised that the procurement of interpretation services for the conduct of arbitration in Hong Kong has not been a cause for concern. Hong Kong has been able to attract many experienced foreign arbitrators and legal professionals from across the globe, as evidenced by the wide variety of nationalities and jurisdictions represented by the arbitrators on the HKIAC Panel of Arbitrators.

Advice sought

23. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 4
Legislative Council Secretariat
16 October 2013

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

Membership List

Chairman Hon Dennis KWOK

Members Hon TAM Yiu-chung, GBS, JP
Hon Ronny TONG Ka-wah, SC
Hon Cyd HO Sau-lan
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP
Hon SIN Chung-kai, SBS, JP
Ir Dr Hon LO Wai-kwok, BBS, MH, JP
Hon Tony TSE Wai-chuen

Total : 8 Members

Clerk Mary SO

Legal Adviser Bonny LOO

Appendix II

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

Deputations that have provided views to the Subcommittee

1. Hong Kong International Arbitration Centre
2. Hong Kong Bar Association
3. The Council of Mediation Development
4. The Council of SOCIAL Development
5. The Law Society of Hong Kong
6. The Hong Kong Shipowners Association Ltd
7. Hong Kong Construction Association
8. The Hong Kong Institution of Engineers

Council Business Division 4
Legislative Council Secretariat
16 October 2013

Interpretation and General Clauses Ordinance

Resolution of the Legislative Council

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

Resolution made and passed by the Legislative Council under section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) on 2013.

Resolved that the Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) Rules, published in the Gazette as Legal Notice No. 115 of 2013 and laid on the table of the Legislative Council on 3 July 2013, be amended as set out in the Schedule.

Schedule

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

1. Rule 4 amended (appointments to Appointment Advisory Board)

Rule 4(2), Chinese text—

Repeal

“任期屆滿後”

Substitute

“離任之日起計”.

2. Rule 6 amended (procedure for requesting for appointment of arbitrator)

Rule 6(2)(c), Chinese text—

Repeal

“證明”

Substitute

“核證”.

3. Rule 8 amended (procedure for seeking decision on number of arbitrators)

Rule 8(2)(c), Chinese text—

Repeal

“證明”

Substitute

“核證”。

4. Rule 10 amended (procedure for applying for appointment of mediator)

Rule 10(2)(c), Chinese text—

Repeal

“證明”

Substitute

“核證”。

5. Rule 13 amended (fees)

(1) Rule 13(2)—

Repeal

“charge, for the exercise of any of the functions referred to in subrule (1), a fee (*determined fee*) of an amount”

Substitute

“from time to time vary the fee referred to in subrule (1), and the fee so varied (*determined fee*) must be a fee”.

(2) Rule 13(2)(b), after “functions”—

Add

“referred to in subrule (1)”.

6. Rule 15 amended (transitional)

Rule 15—

Repeal

“has continued to have effect by virtue of section 4 of Schedule 3 to the Ordinance”

Substitute

“was in force immediately before the repeal”.

Clerk to the Legislative Council

2013