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Paper for the House Committee meeting on 28 June 2019

Report of Subcommittee on Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) (Amendment) Rules 2019

Purpose

This paper reports on the deliberations of the Subcommittee on Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) (Amendment) Rules 2019 ("the Subcommittee").

Background

2. The Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) (Amendment) Rules 2019 ("the Rules") are made by the Hong Kong International Arbitration Centre ("HKIAC") under section 13(3) of the Arbitration Ordinance (Cap. 609) with the approval of the Chief Justice.

3. According to HKIAC, the proposed amendments are intended to reduce costs of a party to seek an appointment or a decision of HKIAC in low-value arbitrations seated in Hong Kong and to streamline the process for HKIAC to exercise its functions under Cap. 609. The proposed amendments will enhance the attractiveness of Hong Kong as a seat of arbitration and further strengthen Hong Kong's status as the leading centre for international legal and dispute resolution services.

Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) (Amendment) Rules 2019 (L.N. 76 of 2019)

4. The Rules were published in the Gazette on 17 May 2019 and tabled before the Legislative Council at the Council meeting of 22 May 2019 for negative vetting. It amends the Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) Rules (Cap. 609C) to the effect that:

- (a) HKIAC may, if it considers reasonable in any particular case, waive its fees of \$8,000 for exercising any of its functions as the default appointing authority under the relevant provisions of Cap. 609;
- (b) except any time limits agreed by the parties to an arbitration agreement, or to arbitral proceedings, HKIAC may, if the circumstances of any particular case so justify, amend any of the time limits provided in Cap. 609C, whether the time limit has expired;
- (c) a party is required to deliver the specified documents in rules 6, 8 and 10 of Cap. 609C in accordance with section 10 of Cap. 609. Under section 10 of Cap. 609, a written communication is deemed to have been received if it is delivered to the addressee personally, or if it is delivered at his place of business, habitual residence or mailing address etc.; and
- (d) HKIAC has the discretion to proceed to make the appointment of an arbitrator or make a decision on the number of arbitrators after the respective time limits in rules 7(4) and 9(6) of Cap. 609C have expired.

5. In response to the Legal Service Division ("LSD")'s enquiries, HKIAC has clarified that concerning the proposed amendment to waive its fees in appropriate cases, it had consulted relevant stakeholders and individuals within HKIAC's governing bodies, i.e. the HKIAC Finance & Administration Committee and the HKIAC Council. The proposal was eventually approved by the two bodies. As the other proposed amendments are technical in nature, no consultation was conducted.

The Subcommittee

6. The House Committee agreed on 24 May 2019 that a subcommittee should be formed to study the Rules. The membership list of the Subcommittee is in the **Appendix**. Under the chairmanship of Dr Hon Priscilla LEUNG Mei-fun, the Subcommittee has held two meetings and examined the Rules with HKIAC at the second meeting.

7. The scrutiny period of the Rules has been extended to the Council meeting of 10 July 2019 by a resolution passed at the Council meeting of 5 June 2019.

Deliberations of the Subcommittee

8. The Subcommittee in general supports the proposed amendments in the Rules. The deliberations of the Subcommittee are summarized in the ensuing paragraphs.

9. Some members are interested to know how the discretionary waiver of \$8,000 for exercising any of HKIAC's functions as the default appointing authority could benefit Hong Kong as an international arbitration centre. HKIAC explains that under the current mechanism it has no choice but to charge \$8,000 for each request for a decision on the number of arbitrators, appointment of an arbitrator, or appointment of a mediator, irrespective of the amount in dispute, and including where more than one decision is required in one case. To grant HKIAC a discretionary power to waive its fees for exercising any of its functions under the relevant provision of Cap. 609 would provide a stronger incentive for parties to opt for Hong Kong as the seat of arbitration.

10. Pointing out that maritime businesses, including maritime insurance, vessel leasing, shipping finance and maritime arbitration are a growing sector being promoted by the Government, some members ask how the Rules may benefit maritime arbitration in Hong Kong. HKIAC advises that it normally receives 250 to 300 new arbitration cases each year and maritime arbitration cases amounted to 15.1% of those cases in 2018. The feedback obtained by HKIAC was that the current fees charged for appointing arbitrators in maritime cases in Hong Kong are higher than the leading competitors in maritime arbitration, i.e. London. Therefore, the discretionary waiver of \$8,000 will help HKIAC keep its fees competitive and attract more parties to opt for Hong Kong's arbitration services for maritime disputes.

11. The Subcommittee notes that one of the legislative amendments seeks to grant HKIAC the express power to amend any of the time limits for the parties to provide comments or information before HKIAC proceeds to appoint arbitrators or to make a decision, whether the time limit has expired. Some members ask about the current practice and the rationale behind the proposed amendment.

12. In response, HKIAC advises that as the parties to an arbitration may have practical reasons to request an extension of the time limits to provide comments or information, HKIAC considers it advisable to amend the time limits and confirms that has been an internal practice. Nevertheless, the Rules will grant the express power for HKIAC to do so. As regards a member's concern whether the time limits may be amended easily and hence abused, HKIAC explains that it is only seeking to do so if the circumstances of any particular

case so justify. Furthermore, HKIAC will respect the time limits mutually agreed on by the parties.

13. Some members enquire about the reasons for the legislative amendment in paragraph 4(c) above. HKIAC explains that section 10 of Cap. 609 deals with the manner of delivery and timing of receipt of written communications in arbitral proceedings. However, Cap. 609C currently includes provisions that are at odds with section 10 of Cap. 609. Therefore, a legislative amendment is required to remove the inconsistency between the subsidiary legislation with the main Ordinance.

14. The Subcommittee notes that the purpose of the legislative amendment in paragraph 4(d) above is to give HKIAC the discretion whether or not to proceed to make the appointment of an arbitrator or make a decision on the number of arbitrators after the respective time limits in those rules have expired. While there may be cases in which one party may have genuine reasons to ask for suspending the appointment of an arbitrator, some members are concerned whether this will be abused so that a case will be held in abeyance indefinitely. In reply, HKIAC advises that it would normally put in place a time limit of about one to three months to check with the parties on the status of any case held in abeyance.

15. The Subcommittee is informed that HKIAC will publish a guideline or practice note with respect to the kinds of cases in which it will consider waiving fees and that will be measured primarily according to the amount in dispute in a particular case. HKIAC has studied the applications it received under Cap. 609 between 2015 and 2018 to determine the appropriate threshold in terms of making a meaningful contribution to users, but also ensuring that the impact on HKIAC would not be of concern, financially speaking. It has determined that the appropriate threshold for waiving fees is cases under HK\$2.5 million.

16. Members of the Subcommittee note HKIAC's responses to the submission made by the Hong Kong Institute of Architect regarding the Rules and raise no further views.

Recommendation

17. The Subcommittee has completed scrutiny and raised no objection to the Rules, and will not make any amendment.

Advice sought

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

Council Business Division 4
Legislative Council Secretariat
26 June 2019

**Subcommittee on Arbitration (Appointment of Arbitrators and Mediators
and Decision on Number of Arbitrators) (Amendment) Rules 2019**

Membership list

Chairman Dr Hon Priscilla LEUNG Mei-fun, SBS, JP

Members Hon Hon Dennis KWOK Wing-hang
Hon Alvin YEUNG
Hon Holden CHOW Ho-ding
Hon Tony TSE Wai-chuen, BBS

(Total : 5 members)

Clerk Mr Lemuel WOO

Legal adviser Mr Alvin CHUI