

Hong Kong Arbitration Week Recap: 2018 HKIAC Rules and How They May Help in Resolving IPP Project Disputes

Kluwer Arbitration Blog

November 2, 2018

Kyongsoon Park and Benson Lim (Associate Editor) (Hogan Lovells)

Please refer to this post as: Kyongsoon Park and Benson Lim (Associate Editor), 'Hong Kong Arbitration Week Recap: 2018 HKIAC Rules and How They May Help in Resolving IPP Project Disputes', Kluwer Arbitration Blog, November 2 2018, <http://arbitrationblog.kluwerarbitration.com/2018/11/02/hong-kong-arbitration-week-recap-2018-hkiac-rules-and-how-they-may-help-in-resolving-ipp-project-disputes/>

2018 HKIAC Rules Come into Force

1 November 2018 marked 5 years from the date on which the 2013 HKIAC Administered Arbitration Rules came into force. 1 November 2018 was also the day on which the new 2018 HKIAC Administered Arbitration Rules ("**2018 Rules**") came into force.

The 2018 Rules showcased the latest thinking in arbitration and these amendments – made after much public and internal consultation within HKIAC – are in line with HKIAC's constant push to improve HKIAC arbitration users' experience. A succinct summary of the key changes was published on this blog last week.

We discuss our brief views on the likely impact of the changes in the 2018 Rules – specifically from the angle of handling disputes in independent power producer ("**IPP**") projects.

Typical characteristics of disputes in IPP projects

The imbalance of bargaining power often drives a foreign investor to accept unbalanced terms of a host country when negotiating project agreements. In a competitive bidding process, a lot of terms can be non-negotiable in practice. For example, in the some Middle East countries, the construction and operation of a power plant are often procured by a government agency or a state-owned enterprise which may be legally prohibited from adopting a foreign governing law (e.g. English law).

Disputes usually arise over, amongst others, the following issues:

- lower than anticipated revenue for power due to ending of government subsidies or changes in tax laws;
- exchange rate fluctuations because investors tend to pay in hard currency for IPP project costs while revenue may be in a different currency;
- obtaining various consents and permits which can involve multiple parties such as landowners and public agencies;
- parties' obligations with regard to the construction and operation of the underlying infrastructure for the IPP project; or
- different dispute resolution provisions in the power purchase agreement and the construction and operation agreements such as the engineering, procurement and construction and the operation and management agreements.

How 2018 HKIAC Rules may aid resolution of IPP project disputes

On balance, we think the latest amendments in the 2018 HKIAC Rules may help in resolving disputes in IPP projects more effectively. We say so because:

1. IPP projects tend to be document-intensive.

Resolving disputes in IPP projects would likely require a tribunal to consider these project documents in arriving at its determination. The 2018 Rules now recognize a new method of document delivery and provide for documents to be delivered by parties through the use of a secured online repository.

Under the 2018 Rules, parties may agree to use their own repositories or a dedicated repository provided by HKIAC. Using, for example, existing document repositories in an IPP project for the purposes of submitting project documents to an arbitrator will make it more cost-efficient and expedient for parties.

2. IPP projects tend to involve multiple parties across multiple contracts.

Parties would want to have all relevant parties added to any action commenced to resolve a dispute. For example, offtakers are key parties in IPP projects with their payments for power generated being key revenue sources for IPP projects. Whilst offtakers may well be involved in a dispute, they – as with other parties – are not necessarily be signatories to every contract for an IPP Project.

Under the 2018 Rules, the scope of the provisions on single arbitration under multiple contracts has been broadened by allowing a party to commence a single arbitration under several arbitration agreements. This is so even if the parties are not bound by each of the arbitration agreements. Under the 2018 Rules the tribunal may also conduct multiple arbitrations at the same time, one immediately after another, or suspend any of the arbitrations. This is possible if the same tribunal is constituted in each arbitration and a common question of law or fact arises in all the arbitrations. What this means for the parties is that concurrent proceedings may now be conducted where consolidation is not possible or desirable.

3. IPP projects are long-term projects.

Early resolution of disputes as they arise in the course of the IPP project timeline can be helpful. Taking the peculiarity of a long-term project period of the IPP into account (frequently, more than decades), a foreign private party is incentivised to develop an amicable long-term partnership with the host country. In practice, an employer (a state-owned private enterprise) and an EPC contractor (a foreign co-sponsor) would try to settle disputes by themselves and as they arise. If the foreign investor participates in operating and/or maintaining the plant, both parties are more likely to be keen to resolve disputes as early as they can.

The 2018 Rules lend themselves to such quick resolution in two ways.

First, there is greater clarity in the emergency arbitrator procedure under the 2018 Rules. The clarifications include the timing of filing an application for emergency relief, the test for issuing such relief being that applied in deciding on interim relief applications, and the maximum fees payable. Time limits have been shortened. These updates will make the emergency arbitrator procedure more attractive when parties need resort to emergency relief in the course of the long project period.

Second, the early determination procedure is now available under the 2018 Rules. It allows the tribunal to determine a point of law or fact that is manifestly without merit or manifestly outside of the tribunal's jurisdiction, or a point of law or fact that, assuming it is correct, would not result in an award being rendered in favour of the party that submitted such point. This would help put an end to unmeritorious claims at an early stage.

The innovations in the 2018 Rules will be tested before courts and tribunals in the years to come, not just in relation to IPP project disputes, but also other sectors.