Kluwer Arbitration Blog

New Procedures for HKIAC Administered UNCITRAL Arbitration

James Rogers (Norton Rose Fulbright LLP) and Matthew Townsend (Fangda Partners) · Tuesday, February 3rd, 2015

The HKIAC has recently updated its *2005 Procedures for the Administration of Arbitration under the UNCITRAL Arbitration Rules* (the 2005 Procedures). This is one of several measures the HKIAC has taken in recent years to refine and improve its arbitration offerings. The new procedures incorporate both innovations in HKIAC practice and recent revisions to the UNCITRAL Rules themselves.

Hybrid clauses providing for institutionally administered UNCITRAL arbitration

Parties agreeing the application of institutional arbitral rules to their arbitrations are free to agree variations to those rules. Sophisticated arbitration users will bear this in mind when drafting their arbitration agreements. Common variations include: the prescription of a different mechanism for the appointment of arbitrators; more explicit language about confidentiality; and the adoption of additional rules such as the IBA Rules on the Taking of Evidence in International Arbitration to govern the procedure. This process reflects the fact that arbitration is a 'creature of contract', the parties being free to agree any procedure that suits their circumstances, including by variation of institutional arbitral rules.

Furthermore, some institutional arbitral rules expressly recognise that parties may wish to engage an institution to administer an arbitration under procedures promulgated by another organisation. In other words, a 'hybrid' procedure may be conducted in accordance with one set of arbitral rules (commonly the UNCITRAL Rules) but administered by another institution.

For parties choosing the latter option, the UNCITRAL Arbitration Rules are a popular choice. These provisions, first brought into force in 1976 and subsequently revised in 2010 and 2013, are used predominantly in *ad hoc* arbitrations. They therefore allow for a highly flexible and efficient process. As the HKIAC's own procedures recognise, parties adopting this compromise likely "seek the formality and convenience of an administered arbitration while maintaining the flexibility afforded by the UNCITRAL Arbitration Rules".

The HKIAC and hybrid arrangements

The HKIAC itself has a history, dating back to the mid-1980s, of administered arbitrations in accordance with the UNCITRAL Rules, while its *Procedures for the Administration of International Arbitration* date back to 1986.

With effect from 1 January 2015, the 2005 Procedures have been replaced by *Procedures for the Administration of Arbitration under the UNCITRAL Arbitration Rules* (the 2015 Procedures). Key amendments made by the 2015 Procedures are discussed below.

a. New references to UNCITRAL and to Investor-state arbitration

The 2015 Procedures are intended to allow the HKIAC to administer arbitrations under any of the 1976, 2010 and 2013 UNCITRAL Rules. This is reflected in the *Introduction* to the Procedures. By contrast, the 2005 Procedures could be interpreted as applying only to the1976 version of the UNCITRAL Rules.

Reflecting the growth of investor-State arbitration in Asia and internationally, the 2015 Procedures also make clear that they can apply to investor-State arbitrations administered by the HKIAC under the UNCITRAL Rules (see articles 1.1 and 1.4-1.5). The 2005 Procedures, which were introduced when such arbitrations were less common, make no such reference.

b. Interpretation

The new provisions include an interpretation section, allowing the HKIAC the power, *inter alia*, to interpret all provisions of the 2015 Procedures, to amend time limits, and to issue practice notes to supplement or amend the procedures (articles 5.1, 5.2 and 5.6). This strengthens the role of HKIAC, whose powers under article 10 of the 2005 Procedures were more advisory.

c. Submissions and communications

The 2005 Procedures required the HKIAC to interpose itself between the parties and the arbitral tribunal, accepting and distributing all communications and notices in the course of the arbitration (article 9). The 2015 Procedures, like the current HKIAC Administered Arbitration Rules 2013 (the 2013 Rules), allow for direct communications between the parties and the tribunal, saving time and costs for all involved (article 8).

The 2005 Procedures were silent on the process for filing the notice of arbitration and the response thereto. The 2015 Procedures, by contrast, make express provision for these initial submissions (articles 6 and 7). In line with the new provisions as to communications, the responsibility for serving such documents upon the other party or parties now lies with the submitting party (articles 6.3, 6.6 and 7.2).

d. New fee provisions

Unlike the 2005 Procedures, the 2015 Procedures make express provision for payment of a registration fee, which is to be paid by the claimant when submitting the notice of arbitration (article 6.4).

This provision traces closely the equivalent provision in article 4.4 of the 2013 Rules. It clarifies that the HKIAC may choose not to continue with the arbitration if the fee is not paid (Schedule 1, para 1.2).

The 2015 Procedures also modify the scope of the HKIAC's administration fees. These fees were previously itemised by reference to the different administrative tasks the institution carried out, including: determination of the number of arbitrators; appointment of an arbitrator; and other

general administrative assistance. An aggregate sum is now charged for all of these functions, in accordance with the HKIAC's fee schedule.

Additionally, under the 2015 Procedures the HKIAC is no longer responsible for arranging hearing rooms, transcription, translation and interpretation services.

e. Challenges

With regard to the HKIAC's determination of any challenges to arbitral appointments, the 2015 Procedures incorporate the HKIAC practice note on the Challenge of an Arbitrator 2013 (article 10). The 2005 Procedures were silent on the procedure for challenging arbitrators.

The 2015 Procedures also introduce a new provision in respect of jurisdictional objections, allowing the HKIAC a prima facie power to proceed when facing such an objection before the constitution of the arbitral tribunal (article 11). This was not spelt out in the 2005 Procedures.

A welcome addition – and a word of caution

Parties should always take care when drafting hybrid clauses. For instance the UNCITRAL Rules are commonly adopted in *ad hoc* (or non-administered) arbitration. Accordingly, their use can invite jurisdictional challenges in seats such as China, where *ad hoc* proceedings are not permitted under local law. This is the case even where the arbitration agreement in question provides for administration by an arbitral institution.

Recently, a client of the authors successfully defended a challenge to a hybrid CIETAC/UNCITRAL arrangement. Such an arrangement is plainly permissible under Chinese law, due to the administrative function to be played by CIETAC. However, this challenge nonetheless resulted in the suspension of the underlying arbitration proceedings for almost two years.

This was an extreme example. Moreover, by defining the administrative role of the HKIAC, the 2015 Procedures minimise any uncertainty inherent in a hybrid procedure. They are, therefore, a welcome update to the HKIAC's existing practice. While they appear to have been introduced primarily for the purpose of allowing the HKIAC to administer arbitrations under the 1976, 2010 and 2013 versions of the UNCITRAL Rules, the additional amendments clarifying the HKIAC's role should not be ignored. The 2015 Procedures help streamline the arbitral process, bringing it more into line with that provided for in the 2013 HKIAC Administered Arbitration Rules.

This entry was posted on Tuesday, February 3rd, 2015 at 4:46 pm and is filed under HKIAC, UNCITRAL Arbitration Rules
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.