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HKIAC Practice Note on Consolidation: The Latest Step Towards Successfully Managing Complex Disputes

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The Hong Kong International Arbitration Centre (the “HKIAC”) has recently published a new Practice Note on Consolidation of Arbitrations (the “Practice Note”), which came into force on 1 January 2016. It is applicable to cases where a party submits a request for consolidation under Article 28 of the HKIAC Administered Arbitration Rules 2013 (the “HKIAC Rules”) on or after 1 January 2016. The Practice Note supplements the existing consolidation provisions of Art. 28 by describing the required content that a party must include in a request for consolidation, and by providing guidance regarding the comments that parties and arbitrators may provide on the request. This concise Practice Note is a welcome addition to the tools provided by the HKIAC to help parties handle complex disputes that involve multiple parties and/or contracts.

Consolidation of Arbitrations under the HKIAC Rules

The HKIAC has been at the forefront of dealing with multi-party and/or multi-contract disputes. Other arbitration institutions that have addressed consolidation in their rules include: the Stockholm Chamber of Commerce (“SCC”), the International Chamber of Commerce (“ICC”), the London Court for International Arbitration (“LCIA”) and the China International Economic and Trade Arbitration Commission (“CIETAC”). In particular, the degree to which consolidation is permitted under the HKIAC Rules is expansive. Article 28 sets out the circumstances under which consolidation can be ordered (Art. 28.1), the relevant factors that the HKIAC may consider when deciding whether to allow consolidation (Art. 28.3), the validity of acts done prior to consolidation (Art. 28.5), and the appointment of the tribunal for consolidated proceedings (Arts. 28.6 and 28.7).

Under Art. 28.1, the HKIAC may consolidate arbitrations at a party’s request if any of the following circumstances exist: (i) the parties agree to consolidate; (ii) all the claims are made under the same arbitration agreement; or (iii) where the claims are made under different arbitration agreements, the HKIAC finds that the arbitrations share a common question of law or fact, the claims arise from the same or series of related transactions, and the arbitration agreements are compatible (incompatible arbitration agreements may include, for example, those specifying different places or rules of arbitration).

In contrast, certain other arbitration institutions that provide for consolidation in their rules require that the parties to the arbitrations must be the same or bound by a single arbitration agreement (for example, Art. 10 of the ICC Rules and Art. 22.1(x) of the LCIA Rules). This is not a requirement under Art. 28 of the HKIAC Rules, which permits consolidation of arbitrations involving different

parties, even when the arbitrations are conducted under multiple arbitration agreements. As a result, Art. 28 covers a wide range of cases that are eligible for consolidation under the HKIAC Rules.

When deciding whether to allow consolidation, the HKIAC may take into account factors such as whether any arbitrators have been designated or confirmed in any of the arbitrations (Art. 28.3). However the existence of different tribunals does not affect the HKIAC's ability to order consolidation. In fact, once the HKIAC decides that multiple arbitrations are to be consolidated, the parties will be deemed to have waived their right to select arbitrators, and the HKIAC will have the power to remove any existing arbitrator and to appoint a new tribunal for the consolidated proceedings (Art. 28.6). This distinctive provision—absent in many other institutional rules—seeks to ensure equal treatment of the parties during the arbitrator appointment process.

Practice Note on Consolidation

The Practice Note addresses several practical issues which were not expressly dealt with in Art. 28 of the HKIAC Rules, including the content of a request for consolidation. In addition to items such as case references, contact details of the parties and affirmations that copies of the request have been served on all parties (paras. 2(a)–(e), (m)), the Practice Note also includes details such as a description of the nature and amount of claims (para. 2(f)), the facts and legal arguments supporting the request for consolidation (paras. 2(g) and (i)), the points at issue in the arbitration (para. 2(h)), any mandatory provisions affecting consolidation (para. 2(j)), and the relief or remedy sought (para. 2(k)). This list largely mirrors the list at Art. 27.4 of the HKIAC Rules, which prescribes the information to be included in a request for joinder of additional parties. In addition, the Practice Note asks the requesting party to comment on the appointment of the tribunal for the consolidated proceedings, as well as to clarify whether it wishes to “preserve the appointment of any arbitrators already designated or confirmed” (para. 2(l)).

The Practice Note also provides the particulars of any comments on the request that other parties or arbitrators may have. These include comments on any content, an answer to the relief or remedy sought in the request for consolidation, and a response to the comments on the constitution of the tribunal (paras. 3(b) and (c)).

These detailed lists in the Practice Note offer practical guidance to parties and arbitrators on the preparation of submissions, thereby reducing uncertainty, improving efficiency, and facilitating the HKIAC's decision-making process in relation to consolidation.

Joinder of Additional Parties and Single Arbitration under Multiple Contracts

In addition to consolidation, the HKIAC Rules contain two other mechanisms for multi-party/contract disputes—joinder of additional parties (Art. 27) and the commencement of a single arbitration under multiple contracts (Art. 29). Both mechanisms are designed to promote procedural efficiency and to reduce unnecessary costs in complex arbitrations.

Art. 27 uses broad and flexible terms on joinder of additional parties. As long as an additional party is *prima facie* bound by the arbitration agreement, it may be joined to the ongoing arbitration. In contrast to other institutional rules that allow only existing parties to request joinder (for example, ICC Art. 7(1)), the HKIAC Rules permit an additional party to intervene in an existing arbitration by submitting a request for joinder (Art. 27.6). In addition, a request for joinder can be made before or after the arbitral tribunal has been constituted (Arts. 27.1 and 27.8); many other

institutional rules cover only one or the other of the two situations (for example, SIAC r.24.1(b) and LCIA 22.1(viii) provide only for post-constitution joinder, and ICC Art. 7(1) allows only pre-constitution joinder unless the parties agree otherwise). Under Art. 27, if the tribunal has already been constituted, it will have the power to join an additional party (Art. 27.1); otherwise, the HKIAC will make the decision (Art. 27.8). In the latter case, where an additional party is joined to the arbitration before the tribunal has been confirmed, the HKIAC may remove any arbitrators already appointed and appoint a new tribunal (Art. 27.11). It is thus clear that the broad language of Art. 27 is more progressive, as it offers the possibility of joinder in a greater range of circumstances as compared to certain other institutional rules.

Under Art. 29, instead of requesting consolidation or joinder, a party may commence a single arbitration under multiple contracts from the outset. Art. 29 states that claims arising out of or in relation to multiple contracts can be brought in a single arbitration, if all the following conditions are met: (i) all parties are bound by each arbitration agreement; (ii) a common question of law or fact arises under each arbitration agreement; (iii) the rights to relief claimed arise from the same or series of related transactions; and (iv) the arbitration agreements are compatible.

Another Step Towards Fairness, Efficiency and Cost-Effectiveness

The HKIAC Rules already offer a powerful collection of mechanisms for handling multi-party/contract disputes. The issuance of the Practice Note further clarifies the consolidation mechanism under Art. 28. This is a welcome development that aptly responds to the growing need for such mechanisms stemming from today's increasingly complex commercial disputes. By making it easier and clearer for parties to use these mechanisms, the Practice Note helps avoid duplication of proceedings, lowers the risk of contradictory outcomes, reduces time and costs, and mitigates the need to draft bespoke joinder and consolidation provisions for arbitration agreements.

Since the introduction of multi-party and multi-contract provisions in November 2013, the HKIAC has dealt with numerous requests for consolidation or joinder and has developed significant expertise in this respect. With these helpful provisions and its experience, the HKIAC has established itself as an attractive venue for parties faced with multi-party/contract disputes.

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