

Hong Kong International Arbitration Centre Small Claims Procedures and 'Documents Only' Procedures

A complaint frequently made about arbitration in Hong Kong is that it does not provide a cost-effective way of resolving disputes involving relatively small sums. The Hong Kong International Arbitration Centre ("HKIAC") has addressed this by introducing two new procedures which should be of particular interest to the shipping and trading communities in Hong Kong and the region.

A new "Small Claims" procedure is available in cases where the claim is no more than US\$50,000, and a new 'Documents Only' procedure can be used where it has been decided that there is no need for an oral hearing. Both procedures are based on virtually identical procedures established by the London Maritime Arbitrators Association.

The HKIAC Small Claims Procedure

The HKIAC Small Claims procedure has been designed primarily to deal with low value shipping disputes, for example, small claims for outstanding charterhire in cases where there are no complex issues, and witnesses are not expected to give oral evidence. The procedure is equally suitable for use in non-marine disputes such as small quality or quantity claims arising from commodities trading. One prominent Hong Kong arbitrator has indicated to the writer that he would be prepared to use the Small Claims procedure to deal with this kind of dispute. In bigger cases of either type, the procedure could be used where only a single issue is at stake.

The procedure is obviously only available where the parties have agreed to it, but this can be achieved either by inserting a clause into the relevant contract referring small claims to arbitration under the new rules (it is understood that a standard clause is currently being prepared by the HKIAC's Maritime Arbitration Group), or by the parties simply agreeing to its use after the dispute has actually arisen.

The Procedure

The Small Claims procedure is simple and straightforward:

- Parties appoint a sole arbitrator.

- Within 14 days, claimant sends out a letter of claim comprising its entire case, i.e. statement of claim and relevant documents, such as witness statements, expert's report, legal submissions, etc.
- If the parties cannot agree on a sole arbitrator, the HKIAC may be asked to consider the letter of claim and make an appointment.
- Within 28 days, respondent delivers its letter of defence and counterclaim, again comprising its entire case.
- Within 21 days, claimant delivers its letter of reply and defence to counterclaim.
- Within 14 days, respondent delivers letter of reply to defence to counterclaim.
- Within one month from any hearing, or from receiving all relevant documents and submissions, arbitrator makes an award.

This uncomplicated procedure is complemented by a number of equally straightforward principles:

- Limited power to extend time for service of pleadings. Pleadings served late are inadmissible.
- No discovery of documents, but if a party has not produced a relevant document, this can be ordered. Adverse inferences can be drawn if the document is still not produced.
- No hearing, other than in exceptional circumstances. In such exceptional circumstances, the hearing should not take more than one day.
- No right of appeal to the courts.

Clause 9 of the procedure gives the arbitrator, again in "exceptional cases", the liberty to depart from or vary the procedure at his entire discretion. Experience in London suggests that, this power is rarely, if ever, expressly invoked, but instead is used to give the arbitrator a degree of flexibility. As one experienced arbitrator has said:

"One is frequently dealing with commercial people who have to travel on business. Case handlers become ill. Their wives have babies. Shipowners and charterers running their business cannot always find the necessary time to drop everything else for an arbitration over an incident which occurred perhaps months earlier. You have to decide whether they are swinging the lead or are genuine. It is not always possible to follow the procedure to the letter."

Cost of the Small Claims Procedure

The Small Claims procedure radically limits the fees payable to the arbitrator, and the costs recoverable by a successful party:

- The claimant must pay the arbitrator a fixed "small claims fee" of HK\$15,000. This covers the arbitrator's appointment fee, the costs of dealing with interlocutory exchanges, a hearing limited to one day, the preparation of the award, and the assessment of any costs. Expenses are charged extra.
- If there is a counterclaim, and it exceeds the amount of the claim, the respondent must pay an additional fee of HK\$7,500.
- HKIAC charges HK\$1,500 to appoint an arbitrator.
- The arbitrator has power to direct which party must bear ultimate responsibility for the small claims fee and the tribunal's expenses, and for the legal costs incurred by the successful party.
- The arbitrator may assess the recoverable costs. This is to be done on a "commercial basis", but the amount may not exceed HK\$30,000.

The HKIAC 'Documents' Only Procedure

The HKIAC "Documents Only" procedure is available where the parties have agreed, or where an existing arbitration tribunal has directed, that no oral hearing is needed. The procedure is again intended to encourage speed and economy:

- Claimant to deliver Claims submissions and supporting documents within 28 days.
- Defence and Counterclaim submissions within 28 days afterwards.
- Claimant's Reply to Defence and Counterclaim within 28 days afterwards.
- Respondent's final submissions within 21 days afterwards.
- Award.

Promoting Hong Kong

These new procedures have been introduced as part of the HKIAC's campaign to promote Hong Kong as an international commercial and maritime arbitration centre. By simplifying arbitral procedures, and limiting the cost, the new rules encourage parties to go to arbitration to resolve their disputes. If they catch on, and there is no reason why they should not, they provide a quick, cheap and user-friendly alternative to litigation and other more traditional forms of arbitration.

HKIAC Small Claims Procedure (Effective 4 July 2003)

1. Introduction

These provisions shall be known as the HKIAC Small Claims Procedure. The procedure is suitable for use in arbitrations where neither the claim nor any counterclaim exceeds the sum of US\$ 50,000. It is not suitable for use where there are complex issues or where there is likely to be examination of witnesses, but may be suitable for handling larger claims where there is a single issue at stake.

2. Appointment of Arbitrator

- (a) If a dispute has arisen and the parties have agreed that it should be referred to arbitration under the Small Claims Procedure, then, unless a sole arbitrator has already been agreed on, either party may start the arbitration by giving notice to the other requiring him to join in appointing a sole arbitrator. If within fourteen days the parties have agreed on a sole arbitrator and the intended arbitrator has accepted the appointment, the Claimant shall within a further fourteen days send to the Respondent (with copies to the arbitrator) a letter of claim accompanied by copies of all relevant documents including experts' reports and shall further send to the arbitrator a remittance in his favour for the small claims fee as defined in paragraph 3(b).
- (b) If the parties have not within fourteen days agreed on a sole arbitrator, either party may apply in writing to the Hong Kong International Arbitration Centre (HKIAC), for the appointment of a sole arbitrator. Such application shall be copied to the other party and shall be accompanied by a copy of the letter of claim together with copies of all said relevant documents and a remittance for the said small claims fee plus HK\$ 1,500 where applicable in favour of the HKIAC. Where appropriate a party applying to the HKIAC should provide a concise explanation of the issues which are likely to arise and an indication as to whether any particular expertise on the part of the arbitrator is required. The HKIAC, having considered the nature of the dispute shall appoint an appropriate arbitrator and shall give notice to the parties. The HKIAC shall send to the arbitrator the letter of claim and the documents together with the said small claims fee, and shall retain the balance in respect of administrative expenses.

3. The Arbitrator's fee

- (a) The fixed fee includes the appointment fee, interlocutories, a hearing not exceeding one day (if required by the arbitrator pursuant to paragraph 5(g)), the writing of the Award and the assessment of costs (if any). It does not include expenses, such as the hire of an arbitration room, which shall in the first instance be paid by the Claimant on demand.
- (b) The Small Claims fee shall be HK\$ 15,000 or such standard fee as shall be fixed from time to time by the Council of the HKIAC. Payment of the Small Claims fee shall be a condition precedent to the valid commencement of proceedings under the Small Claims Procedure.
- (c) In the event of the Respondents putting forward a counterclaim which exceeds the amount of the claim an additional fixed fee in the amount of HK\$7,500 is payable by the Respondents. Such fee is to be paid within fourteen days of service of defence and counterclaim submissions failing which the arbitrator may, at his discretion, stay the counterclaim and proceed with the original claim.
- (d) If the case is settled amicably before an award has been written, the arbitrator may retain out of the Small Claims fee a sum sufficient to compensate him for services thus far rendered and any balance shall be repaid.

4. Right of Appeal Excluded

The right of appeal to the Courts is excluded under this procedure. By adopting the Small Claims Procedure the parties shall be deemed to have agreed to waive all rights of appeal.

5. Procedure

- (a) A letter of defence and details of counterclaim (if any) accompanied in each case by copies of all relevant documents including any experts' reports shall be delivered to the Claimant within twenty-eight days from receipt of the letter of claim or from the date of appointment of the arbitrator, whichever shall be the later.
- (b) Letter of reply and defence to counterclaim (if any) shall be delivered to the Respondent within a further twenty-one days. The arbitrator shall be entitled to refuse to admit evidence submitted at the stage of reply and defence to counterclaim (if any) if it should properly have been served with the letter of claim.

- (c) Where there is a counterclaim, the Respondent shall deliver a letter of reply to defence to counterclaim (if he wishes to do so) with a further fourteen days.
- (d) Any extension to the above time limits must be applied for before expiry of the existing time limit. If a party fails to serve its pleading within the time limit set, the arbitrator, on the application of the other party or of his own motion, will notify the defaulting party that unless the outstanding communication is received within a fixed period (maximum 14 days) he will proceed to the award on the basis of the submissions and documents before him to the exclusion of all others. Any pleading submitted by the defaulting party subsequent to expiry of the time limit set by the arbitrator's notice shall not be admissible. The time allowed by the arbitrator's notice, added to any extension of time previously allowed in respect of the same pleading shall not in total exceed 28 days.
- (e) Following service of the letter of reply, or, where there is a counterclaim, following service of the letter of reply to defence to counterclaim, the arbitrator may declare to the parties that pleadings have closed. No further pleadings shall be considered by the arbitrator following such a declaration.
- (f) Copies of all the above letters and documents shall be sent to the arbitrator and to the other party, or if the other party is acting through a solicitor or representative, to that solicitor or representative.
- (g) There shall be no hearing unless, in exceptional circumstances, the arbitrator requires this.
- (h) In the case of an oral hearing the arbitrator shall have the power to allocate the time available (which shall be limited to one working day) between the parties in such manner that each party has a reasonable opportunity in which to present his case.
- (i) All communications or notifications under this procedure may be by letter, telex, telefax or e-mail.

6. Disclosure of Documents

- (a) There shall be no Discovery, but, if in the opinion of the arbitrator a party has failed to produce any relevant document(s), he may order the production of such document(s) and may indicate to the party to whom the order is directed that, if without adequate explanation he fails to produce the document(s), the arbitrator may proceed on the assumption that the contents of the document(s) do not favour that

party's case.

- (b) The expression 'relevant documents' includes all documents relevant to the dispute, whether or not favourable to the party holding them. It includes witness statements, experts' reports and the like on which he intends to rely, but does not include documents which are not legally disclosable.

7. The Award

The arbitrator will make every effort to publish the award within one month, in a 'Documents Only' case, from the date when the arbitrator has received all relevant documents and submissions, or, where there is an oral hearing, from the close of the hearing.

8. Costs

The power of an arbitrator to award costs has been retained as an important feature of Hong Kong arbitration. Such assessment shall be on a commercial basis having regard to the nature of the reference. Unless the parties otherwise agree, the amount which one party may be ordered to pay to the other in respect of legal costs (including disbursements) shall be assessed at a sum in the arbitrator's discretion up to HK\$ 30,000, or such other maximum figure as shall be fixed from time to time by the Council of the HKIAC. A party seeking to have its costs assessed must provide a breakdown of such costs. The successful party will normally be awarded the Small Claims fee (including the fee of HK\$ 1,500 payable to the HKIAC in cases where the HKIAC is requested to appoint an arbitrator) in addition to any legal costs which he has incurred, provided always that any award of costs shall be in the sole discretion of the arbitrator.

9. General

The arbitrator may in exceptional cases depart from or vary the above provisions at his entire discretion, save that he shall not be entitled to vary the maximum figure which can be awarded under the Small Claims Procedure in respect of legal costs.

HKIAC 'Documents Only' Procedure

1. Introduction

These provisions shall be known as the HKIAC 'Documents Only' Procedure.

2. General

- a) If it is determined by the tribunal or agreed by the parties that the dispute is to be decided without an oral hearing the procedure set out in paragraph 3 below is recommended for adoption by agreement.
- b) When this procedure (or any modification) has been agreed, the tribunal should be so informed. The tribunal must be promptly advised if, at a later stage, the parties or either of them wish to apply for an oral hearing.
- c) The exchange of submission, etc., will take place directly between the parties unless the case is being handled by others (e.g. by lawyers) on their behalf.
- d) Copies of all submissions, comments and documents must be supplied simultaneously to the tribunal, and all communications with the tribunal must be copied to the other party.
- e) All documents relied on must be legibly copied and translations supplied as necessary.

3. Procedure

- a) Within 28 days of agreement by the parties to adopt the procedure or of the order of the tribunal, the claimants shall send to the respondents, with copies to the tribunal, their written claim submissions, together with copies of supporting documents.
- b) Within 28 days of the service of the claim submissions, the respondents shall send to the claimants, with copies to the tribunal, their written submissions (including those relating to any counterclaim) together with copies of the documents relied on additional to those already provided by the claimants.
- c) If there is no counterclaim, the claimants' final submissions (if any) on the claim shall be provided to the respondents and the tribunal within 21 days after receipt of the respondents' submissions and documents.
- d) If there is a counter claim:
 - i) The claimants shall furnish submissions and any additional documents relative to the counterclaim within 28 days after receipt of the respondents' submissions and

documents.

- ii) The respondents' final submissions (if any) on the counterclaim shall be provided within 21 days after receipt of the claimants' submissions and additional documents (if any).
- e) The tribunal will then give notice to the parties of its intention to proceed to its award and will so proceed unless either party within seven days requests, and is thereafter granted, leave to serve further submissions.

Effective Date: 1st January 2000