

Arbitration Rules 2021

The Asian International Arbitration Centre (“AIAC”) launched its latest edition of the AIAC Arbitration Rules (“AIAC Rules”) on 1 August 2021. The AIAC Arbitration Rules 2021 (“2021 Rules”) streamline proceedings and embrace the needs of a fast-evolving disputes climate. The Rules endorse third party funding, facilitate multi party arbitrations, recognise party autonomy in arbitral appointments, and provide clarity in arbitral replacements. Enhancements to emergency arbitration procedures and summary disposal are introduced. Confidentiality is enhanced without compromising on transparency.

The Amalgamation of Different Arbitration Rules

A notable and welcome change is the amalgamation of various sets of arbitration rules into the 2021 Rules.

The AIAC Arbitration Rules and the UNCITRAL Arbitration Rules have been consolidated into a single set of Rules. This eliminates the complication, clutter, and inconsistency that sometimes arises with having 2 sets of Rules.

Additionally, the standalone Fast Track Arbitration Rules has been consolidated into Rule 8 of the 2021 Rules.

The streamlining of the different arbitration rules is user-friendly and eliminates the need to refer to different sets of rules for arbitration proceedings. It ensures coherence and facilitates the reference to arbitration for both newcomers to the arbitration scene as well as experienced users.

Third Party Funding

The 2021 Rules legitimises third party funding in arbitration insofar as the same is not precluded by a relevant law or court order. The Arbitral Tribunal is empowered to make necessary enquiries on the existence of third-party funding arrangements and require disclosure of such arrangements and change of circumstances throughout the course of the arbitral proceedings.

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This provision facilitates access to justice and addresses the legitimacy of obtaining funding for arbitration. This is a step in the right direction and will be a boon particularly to international arbitration with high dollar value claims.

Provision for Multi Party Appointments

Multi party appointments are addressed. This is a notable addition to the 2021 Rules to cater for the growing number of multi-party disputes. Rule 9.7 provides that where two or more arbitrators are to be appointed for even-numbered tribunals, all claimants and respondents shall nominate half the required number of arbitrators and for odd-numbered tribunals, all claimants and respondents shall nominate an equal number of arbitrators who shall thereafter nominate a presiding arbitrator. If no agreement is reached on the joint nomination, the entire Arbitral Tribunal shall be constituted by the Director of the AIAC upon the request of any party. In this case, the previously nominated arbitrators shall be excluded from consideration and appointed arbitrators shall be released, unless the parties agree to retain such nominations or appointments.

The new Rule 9.7 provides for some certainty and facilitates the appointment of arbitrators in multi-party disputes with different interests to protect.

List Procedure

The list procedure has been introduced in Rule 9.8 for appointment of arbitrators by the Director. This enhances parties' right to have their preferred arbitrator determine the dispute and minimises allegations of bias in arbitrator selection. Flexibility is afforded to the Director to make a direct appointment if for any reason the appointment cannot be made according to the list procedure.

The list procedure does not apply to Fast Track Arbitration Proceedings.

Replacement of the Arbitral Tribunal

Rule 12 of the 2021 Rules sets out the circumstances and procedure relating to the replacement of arbitrators.

The circumstances upon which an arbitrator may be replaced by the Director of the AIAC include the following:

- (a) the arbitrator is deceased;
- (b) the arbitrator resigns;
- (c) the parties agree to the replacement, or
- (d) the arbitrator is removed by the Director of the AIAC pursuant to a successful challenge where there are circumstances that gives rise to the arbitrator's impartiality or independence or that the arbitrator does not possess the requisite qualifications agreed to by the parties.

The arbitrator may also be replaced at the Director of the AIAC's initiative after consultation with the parties to the arbitration and the arbitral tribunal where the arbitrator is prevented from discharging his functions or there exist exceptional circumstances, such as violation of the AIAC Code of Conduct for Arbitrators or the improper discharge of the arbitrator's functions under the AIAC Rules.

Where an arbitrator is removed, the replacement arbitrator shall be appointed pursuant to the rules applicable to the replaced arbitrator unless otherwise agreed by the parties. The reconstituted tribunal shall determine whether or to what extent any previous hearings or procedural steps in the arbitration remain effective. In arbitrations with multiple arbitrators, where the proceedings have been closed, the Director of the AIAC may dispense with the appointment of a replacement arbitrator and decide that the remaining arbitrators continue with the arbitration.

Revisions to Emergency Arbitration Procedure

The emergency arbitration procedure allows parties to seek urgent interim measures from an emergency arbitrator prior to the formation of the arbitral tribunal that will determine the

main dispute. Previously provided for in Schedule 3 to the 2018 Rules, the same is now amalgamated into the main body of the 2021 Rules in the form of Rules 17 and 18.

The revisions to the emergency arbitration procedure provides additional powers to emergency arbitrators, such as allowing emergency arbitration proceedings to be conducted virtually or on a documents-only basis, allowing the conduct of emergency arbitration proceedings in the absence of the other party, allowing emergency arbitrators to rule on their own jurisdiction, and allowing emergency arbitrators to make orders or Awards that the arbitral tribunal can make, including adjourning all or any part of the claim for emergency interim measures for determination by the arbitral tribunal once constituted.

The provision for emergency arbitrations to be conducted on a virtual or documents-only basis showcases the AIAC Rules' adaptability to arbitrations in the times of pandemic and ensures that emergency applications may be continue to be heard timeously and expeditiously.

New Summary determination procedure

Another significant new feature in the 2021 Rules is the introduction of applications for summary determination.

The new Rule 19 expressly provides for any party to an arbitration to submit a request for summary determination to dismiss, in whole or in part, a claim, counterclaim or defence where the same is manifestly without merit; or if the same manifestly falls outside the jurisdiction of the arbitral tribunal. This is to be done no later than 30 days from the filing of the statement of defence. It is to be made by a statement setting out the legal and factual basis for the summary determination request. The request will be responded to within 15 days from the date of receipt of the summary determination request.

A decision by the arbitral tribunal to either allow or to dismiss the request is to be made no later than 45 days from the arbitral tribunal's receipt of the final submission of the parties.

The introduction of the summary determination procedure showcases the flexibility and modernization of the AIAC

Arbitration Rules to reflect commercial reality of the need for speed and expeditious determination in warranted circumstances. This encourages parties to adopt the arbitration process with the assurance that the option of summary disposal will be made available to them.

Expansion on Joinder and Consolidation Provisions

The joinder provisions in the AIAC Rules have been amended in the 2021 Rules to prescribe the circumstances in which a party to an arbitration or a third party may request for one or more additional parties to be joined as a party to an arbitration: where all parties to the arbitration and the additional party consent in writing to the joinder, where the additional party is bound by the arbitration agreement that gives rise to arbitral proceedings, or where the participation of the additional party is necessary for the efficient resolution of the dispute and directly affects the outcome of arbitral proceedings.

Further, the consolidation provisions have also been amended in the 2021 Rules to set out the documentary requirements for a consolidation application. It provides additional considerations to be taken into account for a consolidation request, that is, whether the disputes concern the same legal relationship, whether the rights or reliefs claimed arise out of the same transaction or a series of related transactions and the compatibility of the arbitration agreements.

It also clarifies that where a consolidation request is dismissed in respect of claims arising out of multiple contracts, the claimant will be required to issue separate notices of arbitration pursuant to each contract and submit separate registration requests.

These revisions are timely and facilitate the efficient disposal of disputes involving multiple parties and arbitration agreements.

New Confidentiality Provisions

Confidentiality requirements have been tightened with the introduction of new confidentiality provisions in the 2021 Rules.

The new Rule 44.4 now requires the parties to obtain undertakings of confidentiality from all those involved in the arbitration, including any authorised representative, witness of fact, expert, or service provider. Rule 44.5 provides for the arbitral tribunal to take appropriate measures to award costs or damages for any breaches by a party of rule 44.1 requiring parties to keep matters relating to arbitral proceedings confidential, a provision which is not present in the 2018 Rules. These revisions to the confidentiality provisions provide robust measures for the preservation of confidentiality, with the power of the Tribunal to take quick steps to sanction breaches by Parties. It emphasises the importance of adhering to the principles of confidentiality in arbitral proceedings and increases the attractiveness of arbitration as an alternative form of dispute resolution due to its confidential nature.

To ensure the confidentiality provisions do not stifle the growth and development of arbitration, Rule 44.6 permits the AIAC to, with the written consent of the parties, publish the whole, excerpts or summaries of arbitration awards, subject to the redaction to remove all references to the parties' names and other identifying information. This provides for transparency in the arbitral award making process and will certainly assist in facilitating the development of procedural law in arbitration and commercial jurisprudence in Malaysia.

Clarifications

In addition to the major additions and/or modifications to the AIAC Rules described above, the 2021 Rules introduce various other improvements to the AIAC Rules, such as:

- (a) clarifications on the procedure and how proceedings may be closed or terminated (Rules 32 and 36);
- (b) the form and contents of arbitral awards and the technical review process at the AIAC (Rules 33 – 35);

(c) enhancing clarity and transparency in the AIAC's collection of deposits towards the costs of the arbitration (Rule 41).

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