



Emergency relief under new HKIAC rules

Newsletters

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Introduction

The Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018 have significantly amended the 2013 rules, particularly with regard to emergency relief and the emergency arbitrator procedure.

The recent case involving real estate tycoon Xu Jiayin and LeTV founder Jia Yueting – who attracted public attention when they teamed up to compete in the new energy vehicle field – coincided with these amendments and provides a springboard for analysing the relevant arbitration rules from a procedural perspective and the key amendments.

Jia recently submitted a request for arbitration with the HKIAC in the name of Smart King, seeking to terminate its agreements with Hengda and deprive the latter of all of its rights to Smart King. Smart King has applied for emergency relief pursuant to the emergency arbitrator procedure, and some media outlets have alleged that this may have an effect on the entire arbitration.

To date, the parties to the arbitration have not disclosed additional information to the media. However, it has been confirmed that Smart King has applied for emergency relief.

Emergency relief

What is emergency relief?

Emergency relief, also known as urgent interim or conservatory relief, is provided for in Article 23.3 of the HKIAC Administered Arbitration Rules 2013(1) and is similar to the concept of preservation. Aimed at preventing Hengda from interfering with the operation and financing of Smart King, Jia's proposal in this case appears to be a type of behaviour preservation, as provided for in Article 23.3(b) of the 2013 rules.

Applying for emergency relief

Under Article 23.3 of the 2013 rules, emergency relief must be applied for before the constitution of an arbitral tribunal in accordance with the emergency arbitrator procedure. This is because the international arbitration procedure for constituting an arbitral tribunal is more complicated than domestic arbitration procedures for doing so.

Under the international procedure:

- each party will appoint an arbitrator; and
- the arbitrators appointed by the parties will jointly select the presiding arbitrator.

If the presiding arbitrator cannot be jointly selected, the arbitral institution will appoint one. During this procedure, the parties may negotiate the backgrounds and language abilities of the arbitrators and challenge the conflict of interest disclosure documents submitted by the presiding arbitrator. Therefore, the international arbitration procedure is more time consuming. Further, questions have arisen as to how the legitimate rights

of applicants can be protected from the procedure's adverse effects. One way in which applicants can achieve this is by obtaining remedies and protection through emergency relief and the emergency arbitrator procedure before the formal constitution of an arbitral tribunal.

Parties must submit an application for emergency relief to the HKIAC. If the HKIAC accepts the application, it must appoint an emergency arbitrator within two days from receipt of both the application and the advanced application fees, which cover both the HKIAC's emergency administrative fees and the emergency arbitrator's fees (charged by the hour). Once appointed, the case will be transferred to the emergency arbitrator, who should render their emergency decision within 15 days from receipt of the case. Any emergency decision will have the same effect as the abovementioned emergency relief.

The emergency arbitrator procedure is effective and convenient and has been used in many commercial arbitration cases involving relatively large amounts of money.

Official HKIAC data shows that the emergency arbitrator procedure takes only 14 days to complete. For example, according to a 2014 annual report, it took only five hours for an emergency arbitrator to be appointed in an M&A case involving a disputed amount of \$1.9 billion, which demonstrates the procedure's efficiency.

Effect of emergency decisions

Under the HKIAC Administered Arbitration Rules 2013, each party must agree to fulfil an emergency decision without delay.⁽²⁾ The newly amended Arbitration Ordinance⁽³⁾ stipulates that any emergency relief granted by an emergency arbitrator is as enforceable as an order of the High Court of the Hong Kong Special Administrative Region.

However, this does not mean that an emergency decision granted by an emergency arbitrator has absolute authority.

Emergency decisions may be modified, suspended or terminated by the emergency arbitrator or the arbitral tribunal (after its constitution). Further, emergency decisions cease to be binding when:

- the arbitral tribunal renders a final award;
- the request for arbitration is withdrawn;
- the arbitration procedure is terminated; or
- an arbitral tribunal is not constituted within 90 days from the date of the emergency decision.

Therefore, it appears that under the 2013 rules, neither an emergency decision nor emergency relief can affect the final arbitral award. It is also impossible to prejudge the

final outcome of a case on the basis of the emergency procedure or an emergency decision.

Amendments to emergency arbitrator procedure

Article 1.4 of the HKIAC Administered Arbitration Rules 2018 stipulates that unless provided otherwise, the rules apply to all arbitrations that fall within Article 1.1 in which the notice of arbitration was submitted on or after 1 November 2018. Thus, the 2018 rules are not applicable to Jia's request for arbitration, which was submitted on 3 October 2018. However, the amendments to the emergency arbitrator procedure are still worth examining.

Application

The 2013 rules state that a party must apply for emergency relief concurrently with or following the filing of a notice of arbitration, but before the constitution of the arbitral tribunal. However, according to the 2018 rules, a party may apply before filing a notice of arbitration. Further, the 2018 rules stipulate that the emergency arbitrator procedure will be terminated if a notice of arbitration is not submitted to the HKIAC within seven days from the HKIAC's receipt of the application, unless the emergency arbitrator extends this time limit. As such, this amendment prevents parties from abusing the emergency arbitrator procedure.

Payment of fees

The 2013 rules stipulate that a party must pay the payment methods for advance application fees by cheque or wire transfer. Consistent with the increasing convenience of online payments, this requirement has been removed from the 2018 rules.

Information disclosure

The 2018 rules introduce the requirement for parties to submit to the HKIAC any third-party funding agreement where such funding is provided. This is undoubtedly a highlight of the 2018 rules.

Deadline for appointing emergency arbitrators

Under the 2018 rules, the time limit for appointing an emergency arbitrator has been reduced from two days to 24 hours, regardless of whether the appointment is being made under normal circumstances or in the case of reappointment after an emergency arbitrator's death, successful challenge, dismissal or resignation. This amendment will significantly reduce the length of the emergency arbitrator procedure, which will encourage parties to undertake this action to protect their legitimate rights.

Emergency arbitrators' fees

The 2018 rules limit emergency arbitrators' fees to the amount set by the HKIAC, unless the parties agree or the HKIAC determines otherwise in exceptional circumstances.

Effect of emergency relief

The 2013 rules did not clarify the relationship between emergency relief and emergency decisions. However, the 2018 rules stipulate that Articles 23.2 to 23.8 of the rules will apply *mutatis mutandis* to any emergency relief granted by an emergency arbitrator. Further, the provision that an emergency decision will lose its binding effect "upon the withdrawal of all claims before the rendering of a final award" has been removed from the 2018 rules.

Burden of fees

The 2018 rules stipulate that the cost of emergency relief proceedings will be apportioned among both parties. This differs to the 2013 rules, which stipulated that it was up to the emergency arbitrator to decide the way in which each party would bear such costs. The 2018 rules also state that where an emergency arbitrator procedure is terminated without an emergency decision, the emergency arbitrator may fix and apportion any costs incurred during the procedure.

Security

The provision that "the Emergency Arbitrator shall be entitled to order the provision of appropriate security by the party seeking Emergency Relief" has been removed from the 2018 rules. However, the 2018 rules retain Article 23.6 of the 2013 rules, which stipulates that an arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure (ie, security can be requested only by the arbitral tribunal; emergency arbitrators will not have this power).

Other amendments

The 2018 rules have introduced a number of other amendments, including as follows.

Amendment	Related articles	Major changes
Delivery	<ul style="list-style-type: none">• Article 3.1(e)• Article 3.3• Article 3.4	A party will be deemed to have received any written communication on its upload to a secured online repository that the parties have agreed to use.

Suspension of arbitration or emergency arbitrator procedure	<ul style="list-style-type: none"> Article 13.8 	Where the parties agree to pursue other means of settling their dispute after arbitration commences, the HKIAC, the arbitral tribunal or the emergency arbitrator may, at the request of any party, suspend the arbitration or emergency arbitrator procedure, as applicable, on such terms as it considers appropriate. The arbitration or emergency arbitrator procedure will resume at the request of any party, the arbitral tribunal or the emergency arbitrator.
Arbitration language	<ul style="list-style-type: none"> Article 15.1 	The parties may previously agree the arbitration language; where parties fail to do so, the arbitral tribunal will decide the arbitration language. Parties must communicate in English or Chinese prior to this decision.
Additional situation in which party can be added to proceedings	<ul style="list-style-type: none"> Article 27.1(b) 	An additional party can be added to the proceedings when all parties, including the additional party, expressly agree.
One award for multiple contracts	<ul style="list-style-type: none"> Article 29 	The precondition that all parties to the arbitration are bound by each arbitration agreement giving rise to the arbitration has been deleted.
Concurrent proceedings	<ul style="list-style-type: none"> Article 30 	An arbitral tribunal may: <ul style="list-style-type: none"> conduct two or more arbitrations under the rules at the same time; conduct one arbitration immediately after another; or suspend any arbitration and resume it after the determination of another.
Third-party funding	<ul style="list-style-type: none"> Article 34.4 Article 44 Article 45.3(e) 	A provision regarding the disclosure of any third-party funding has been added.
Early determination procedure	<ul style="list-style-type: none"> Article 43 	Arbitral tribunals have the power to make preliminary decisions on one or more points of law or facts: <ul style="list-style-type: none"> which are manifestly without merit;

		<ul style="list-style-type: none"> • which are outside the arbitral tribunal's jurisdiction; or • whose submission to the arbitral tribunal will have no effect on the submitting party.
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Comment

The HKIAC Administered Arbitration Rules 2018 have significantly amended the 2013 rules, making the above procedures more convenient for both parties to an arbitration. In particular, the amendments have significantly reduced the time in which it takes to appoint an emergency arbitrator, saving parties both time and money.

By standardising its procedures and making them more efficient, the HKIAC has made itself an attractive international forum for settling a dispute.

For further information on this topic please contact [Weiwei Gu](#), [Angela Sui](#) or [Suri Hu](#) at Global Law Office by telephone (+86 10 6584 6688) or email (guweiwei@glo.com.cn, angelasui@glo.com.cn or surihu@glo.com.cn). The Global Law Office website can be accessed at www.glo.com.cn.

Endnotes

(1) Article 23.3 of the HKIAC Administered Arbitration Rules 2013 states as follows:

An interim measure, whether in the form of an order or award or in another form, is any temporary measure ordered by the arbitral tribunal at any time prior to the issuance of the award by which the dispute is finally decided, that a party, for example and without limitation: (a) maintain or restore the status quo pending determination of the dispute; (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) preserve evidence that may be relevant and material to the resolution of the dispute.

(2) Schedule 4, Article 16 of the 2013 rules states as follows:

Any Emergency Decision shall have the same effect as an interim measure granted pursuant to Article 23 of the Rules 74 and shall be binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to comply with any Emergency Decision without delay.

(3) Article 22B(1) of the Arbitration Ordinance states as follows:

Any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court.

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