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# EDITORIAL

We are grateful for the many positive comments which we have received in response to the new-look Asian Dispute Review. Special thanks go to our publishers, LexisNexis and their team, for their untiring efforts in helping to put together the first issue of the reformatted Review. Going forward, we hope to continue to build on the look and feel of the Review, and to strengthen further its relevance and content.

In this issue, we begin with a commentary by Gary Born and Sabrina Lee on the new HKIAC Rules, which focuses on its emergency arbitrator procedures. Those Rules come into effect on 1 November 2013 and have a number of other innovative features. We will endeavour to have more coverage of the new Rules in future issues. Also included in the current issue is an article by Neil Kaplan QC, exploring the links between investment arbitration and commercial arbitration; an article by Luke Nottage and Joel Rheuben considering the resolution of claims arising from the Fukushima nuclear disaster; as well as two notes on important China and India cases. The second part of Philip Yang's article on procedural issues at the interlocutory and hearing stage continues, as part of our Nuts and Bolts Lecture series. The two books reviewed in this issue by Peter Caldwell have a common theme – both are commentaries on the new UNCITRAL Arbitration Rules. For the In-House Counsel Focus article, we feature a very practical contribution from Rosemary Jackson QC, on getting the best out of mediation.

We hope that you enjoy this issue, and we look forward to receiving further comments that will help enhance the content, look and feel of the revamped Review.

General Editors

*Ramesh John*

## CONTRIBUTORS



**Sheila Ahuja**  
*Allen & Overy*  
Hong Kong



**Sabrina Lee**  
*Wilmer Hale*  
London



**Gary B Born**  
*Wilmer Hale*  
London



**Professor Luke Nottage**  
*University of Sydney Law School*  
*Japanese Law Links Pty Ltd*



**Frances van Eupen**  
*Allen & Overy*  
Hong Kong



**Joel Rheuben**  
*LLM Candidate, University of Tokyo*  
*Solicitor, New South Wales*



**Rosemary Jackson QC**  
*Mediator, adjudicator and arbitrator*  
*Keating Chambers, London*



**Terence Wong**  
*Hogan Lovells*  
Shanghai



**Neil Kaplan CBE QC SBS**  
*International Arbitrator*



**Philip Yang**  
*Chartered Arbitrator*  
Hong Kong



# The Emergency Arbitrator Procedures Under the New HKIAC Rules

Gary B Born & Sabrina Lee

This article discusses the Emergency Arbitrator Procedures in Schedule 4 of the HKIAC Administered Arbitration Rules (2013 Edn) and extensively compares these provisions to those of other international arbitral institutions. The authors also offer suggestions for further refinements to the Procedures.

### Introduction

In recent years, many arbitration institutions have revised their rules to incorporate procedures for the appointment of emergency arbitrators. These procedures are intended to allow parties to seek interim measures prior to the appointment of a tribunal, without having to resort to national courts.

The Hong Kong International Arbitration Centre (HKIAC) is the latest arbitration institution to incorporate such a procedure into its rules. The 2013 Administered Arbitration Rules (HKIAC Rules), scheduled to come into effect on 1 November 2013, explicitly provide that a party may apply for urgent interim or conservatory relief prior to the constitution of the arbitral tribunal,<sup>1</sup> and include a detailed set of rules governing the emergency arbitrator process.<sup>2</sup> As discussed in more detail below, these new rules bring the HKIAC in line with international best practices regarding emergency arbitrators.

Below, we discuss the new provisions in the HKIAC Rules governing emergency arbitrators, and compare these rules to the rules of some other leading international arbitration institutions, including the International Chamber of Commerce (ICC, 2012 Edn), International Centre for Dispute Resolution (ICDR, 2009 Edn), Singapore International Arbitration Centre (SIAC, 2013 Edn) and Stockholm Chamber of Commerce (SCC, 2010 Edn). We then conclude with a few suggestions for further refinements that could be made to the emergency arbitrator procedure under the HKIAC Rules.

### Timing of application for emergency arbitrator

Under the HKIAC Rules, a party seeking emergency relief may submit an application concurrent with or after the filing of a Notice of Arbitration, but prior to the constitution of the arbitral tribunal.<sup>3</sup> This is in line with the SIAC Rules, which similarly provide that an application may be submitted concurrent with or after the commencement of the arbitration.<sup>4</sup>

“ [The] ... new rules bring the HKIAC in line with international best practices regarding emergency arbitrators. ”

However, the HKIAC procedure is not as flexible as the procedure available under the ICC Rules, which allows parties to file an application for emergency arbitrators even prior to the filing of a Notice of Arbitration, so long as that Notice is filed within 10 days of the application for emergency arbitrators.<sup>5</sup> Similarly, the SCC and ICDR Rules provide that an application for emergency arbitrators may be submitted any time prior to the constitution of the tribunal, and do not force parties to wait until after submission of the Notice of Arbitration to file an application for emergency arbitrators.<sup>6</sup> Because the emergency arbitrator procedure is intended to address situations of extreme urgency, it makes little sense to force parties to wait until formal commencement of arbitral proceedings to seek interim relief through that procedure. Such a formalistic restriction does not seem to serve any practical purpose, and any concerns regarding abuse of the emergency arbitrator process (ie, use of the emergency arbitrator process outside the context of an arbitration) could be addressed by adding a caveat similar to that included in the ICC Rules, whereby an application for emergency arbitrators is only valid if a Notice of Arbitration is served shortly thereafter.<sup>7</sup> As such, it may be advisable to revise the HKIAC procedure to permit the filing of applications for emergency arbitrators prior to the filing of the Notice of Arbitration, so long as a Notice of Arbitration is filed shortly afterwards.

## **Expedited timeframes for appointment of emergency arbitrator and issuance of decision**

The HKIAC Rules set out very quick timelines for the appointment of an emergency arbitrator and the rendering of a decision, to ensure that parties obtain interim relief as quickly as possible. First, the Rules provide that the HKIAC will seek

to appoint an Emergency Arbitrator within two days after receipt of the application and deposit.<sup>8</sup> The ICC, SCC, SIAC and ICDR have also imposed very short deadlines, requiring appointment within one or two days.<sup>9</sup>

Second, the HKIAC Rules have shortened the time frames to challenge the appointment of emergency arbitrators, allowing parties only three days to challenge the appointment of an emergency arbitrator, after which the HKIAC has three days to decide on the challenge.<sup>10</sup> This is again in line with the ICC, SCC, SIAC and ICDR Rules, which have given parties either one or three days to challenge the appointment of emergency arbitrators.<sup>11</sup>

However, the SIAC, ICC and ICDR Rules go one step further, and require that the emergency arbitrator establish a schedule for considering the application for emergency relief within two days of appointment.<sup>12</sup> The HKIAC Rules do not contain such a requirement, perhaps in line with the ‘light touch’ that the institution is known for taking towards administering arbitrations.

Finally, the new HKIAC Rules provide that the emergency arbitrator must issue an emergency decision within 15 days of receipt of the file (though extensions may be granted).<sup>13</sup> This is in line with the ICC Rules, which also impose a 15-day deadline for emergency decisions,<sup>14</sup> and is much clearer than the ICDR and SIAC Rules, which impose no concrete deadline at all. Only the SCC Rules impose a shorter deadline (five days), which may be extended if needed.<sup>15</sup>

## **Powers of emergency arbitrator**

Under the HKIAC Rules, the emergency arbitrator has a very broad grant of authority to conduct proceedings in any manner he/she considers appropriate.<sup>16</sup> Other institutions have similarly given the emergency arbitrator maximum flexibility over procedural matters.<sup>17</sup> More specifically, the HKIAC Rules provide that the emergency arbitrator has the power to rule on his/her own jurisdiction.<sup>18</sup> This again is in line with the approach of other institutions.<sup>19</sup> The HKIAC Rules

also give emergency arbitrators the power to order that the party seeking emergency relief post an appropriate security,<sup>20</sup> which also aligns with international best practice, as evidenced by the rules of the ICC, SCC, SIAC and ICDR.<sup>21</sup>

The HKIAC Rules, however, are silent regarding the type of relief an emergency arbitrator is authorised to grant. This approach is similar to the ICC Rules, which are also silent on this issue, but differs from the ICDR, SIAC and SCC Rules, which all explicitly provide that the emergency arbitrator shall have the power to award any interim relief he/she deems necessary or appropriate.<sup>22</sup> The HKIAC Rules already seem to imply that the emergency arbitrator is authorised to grant any interim relief he/she deems appropriate,<sup>23</sup> but it may be worth making this broad grant of authority explicit in the Rules, for the avoidance of doubt.

### Enforcement of emergency decision

The HKIAC Rules very clearly provide that an emergency decision has the same effect as an interim measure ordered by an arbitral tribunal, the emergency decision is binding on the parties when rendered, and the parties undertake to comply with it “without delay.”<sup>24</sup> This approach is similar to that taken by the ICC, SCC and SIAC Rules, which also provide that a

decision rendered by the emergency arbitrator is binding on the parties, who undertake to comply without delay.<sup>25</sup>

Most importantly, the Hong Kong Arbitration Ordinance (Cap 609) has recently been amended (as of 19 July 2013) to clarify that emergency relief granted by an emergency arbitrator is enforceable in the same manner as an order made by a court.<sup>26</sup> This amendment removes any doubt as to the enforceability of emergency decisions in Hong Kong, in stark contrast to most other jurisdictions, where the enforceability of emergency decisions in local courts under the New York Convention is still in doubt.<sup>27</sup> This amendment clearly makes the emergency arbitrator mechanism in Hong Kong more reliable and effective than that available in most other jurisdictions.

### Effect of emergency decision after constitution of tribunal

Under the HKIAC Rules, emergency decisions may, upon a reasoned request by a party, be modified, suspended or terminated by the emergency arbitrator.<sup>28</sup> This is in line with the ICC, SCC, SIAC and ICDR Rules, which also provide that the emergency arbitrator may modify his/her own decision.<sup>29</sup>

The HKIAC Rules also provide that decisions made by the emergency arbitrator may be modified by the arbitral tribunal, once constituted.<sup>30</sup> Again, this is in line with the ICC, SIAC and ICDR Rules, which contain similar provisions.<sup>31</sup>

However, other arbitration institutions go slightly further than the HKIAC, and explicitly provide in their rules that the emergency arbitrator’s findings do not bind the tribunal. For example, the ICC Rules provide that the “emergency arbitrator’s order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order.”<sup>32</sup> The SCC Rules also state very explicitly that the arbitral tribunal is not bound by the decision and reasons of the emergency arbitrator.<sup>33</sup> Similarly, the SIAC Rules provide that “[t]he Tribunal is not bound by the reasons given by the Emergency Arbitrator.”<sup>34</sup> By contrast, the HKIAC Rules do not explicitly state that the tribunal is not bound by the emergency

“Because the emergency arbitrator procedure is intended to address situations of extreme urgency, it makes little sense to force parties to wait until formal commencement of arbitral proceedings before seeking interim relief through that procedure. Such a formalistic restriction does not seem to serve any practical purpose ...”



arbitrator's findings, though this principle is implicit in the rules (i) granting the arbitral tribunal power to modify, suspend or terminate the emergency arbitrator's decision,<sup>35</sup> and (ii) providing that the emergency decision ceases to be binding if the arbitral tribunal so decides.<sup>36</sup> It may nevertheless be worth making this principle explicit in the Rules, especially in regard to making it clear that the arbitral tribunal is not bound by the reasons (ie, not just the decision) given by the emergency arbitrator.

The HKIAC Rules also state that an emergency decision ceases to be binding (i) if the emergency arbitrator or arbitral tribunal so decides, (ii) when the tribunal renders a final award, (iii) if the claims are withdrawn, or (iv) if the tribunal is not constituted within 90 days.<sup>37</sup> This is in keeping with similar rules of the ICC, SIAC and SCC<sup>38</sup> and provides greater clarity regarding the duration of emergency relief than the ICDR Rules, which are silent on this issue.

## Status of emergency arbitrator after constitution of tribunal

Under the HKIAC Rules, an emergency arbitrator's power ceases once the tribunal has been constituted,<sup>39</sup> though an emergency decision may be made even if in the meantime the file has been transmitted to the arbitral tribunal.<sup>40</sup> Similarly, the SIAC and ICDR Rules provide that the emergency arbitrator has no further power once the tribunal has been constituted,<sup>41</sup> while the ICC Rules provide that emergency arbitrators may not be appointed after the file has been transmitted to the

arbitral tribunal, though any emergency arbitrator appointed prior to transmission still retains the power to make an order within 15 days.<sup>42</sup>

The HKIAC Rules also clearly provide that the emergency arbitrator may not act as an arbitrator in an arbitration relating to the dispute that gave rise to the emergency appointment, unless the parties agree otherwise.<sup>43</sup> This is, again, in line with the rules of the ICC, SCC, SIAC and ICDR, all of which contain similar provisions.<sup>44</sup>

## Availability of recourse to local courts for interim relief

The HKIAC Rules clearly provide that the emergency arbitrator procedure does not preclude parties from seeking urgent relief from any competent court.<sup>45</sup> This is again in keeping with the rules of the ICC, SCC, SIAC and ICDR, all of which make clear that parties can still seek the assistance of national courts for interim relief, notwithstanding the availability of the emergency arbitrator procedure.<sup>46</sup>

“ ... [T]he enforceability of emergency decisions in Hong Kong [is] in stark contrast to most other jurisdictions, where [their] ... enforceability ... in local courts under the New York Convention is still in doubt. ”

## Further steps

As seen above, the new HKIAC rules governing the emergency arbitrator procedure clearly adopt many of the best practices utilised at other major international arbitration institutions.

Nevertheless, there are a number of minor revisions that could further clarify the emergency arbitrator process.

First, as already discussed above, provisions could be added clarifying that (i) the emergency arbitrator has a broad grant of





authority to order any interim relief he/she deems appropriate, and (ii) the arbitral tribunal is not bound by the reasoning of the emergency arbitrator. These principles are arguably already implied by existing provisions in the HKIAC Rules, but it may be worth adding rules explicitly addressing these issues.

Second, again as discussed above, the HKIAC Rules could be revised to make the emergency arbitrator procedure available even prior to the filing of the Notice of Arbitration. This revision would make the emergency arbitrator procedure better able to address situations of extreme urgency, instead of forcing parties to apply to local courts just because a Notice of Arbitration has not yet been filed.

Third, it may be worth adding provisions to limit the power of emergency arbitrators under certain circumstances. For example, the ICC Rules explicitly state that the emergency arbitrator procedure applies *only* to signatories to the arbitration agreement or their successors<sup>47</sup>, ie, the emergency arbitrator does not have the power to grant interim orders over third parties to the arbitral proceedings. It may be advisable to add a similar provision to the HKIAC Rules, to limit clearly the jurisdiction of emergency arbitrators. <sup>48</sup>

1 HKIAC Rules, art 23.1.

2 *Ibid*, Schedule 4, entitled Emergency Arbitrator Procedures.

3 *Ibid*, Schedule 4(1).

4 SIAC Rules, Schedule 1(1).

5 ICC Rules, Appendix V, arts 1(1) & 1(6).

6 SCC Rules, Appendix II, art 1(1) ("A party may apply for the appointment of an Emergency Arbitrator until the case has been referred to an Arbitral Tribunal pursuant to Article 18 of the Arbitration

Rules."); ICDR Rules, art 37(2) ("A party in need of emergency relief prior to the constitution of the tribunal shall notify the administrator and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis.").

7 See ICC Rules, Appendix V, art 1(6) ("The President shall terminate the emergency arbitrator proceedings if a Request for Arbitration has not been received by the Secretariat from the applicant within 10 days of the Secretariat's receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary.").

8 HKIAC Rules, Schedule 4(5).

9 See SIAC Rules, Schedule 1(2) (one day to appoint emergency arbitrator); ICDR Rules, art 37(3) (same); SCC Rules, Appendix II, art 4(1) (same); ICC Rules, Appendix V, art 2(1) (two days to appoint emergency arbitrator).

10 HKIAC Rules, Schedule 4(8).

11 See ICDR Rules, art 37(3) (one day to challenge appointment); SCC Rules, Appendix II, art 4(3) (same); SIAC Rules, Schedule 1(3) (same); ICC Rules, Appendix V, art 3(1) (three days to challenge appointment).

12 See SIAC Rules, Schedule 1(5); ICC Rules, Appendix V, art 5(1); ICDR Rules, art 37(4).

13 HKIAC Rules, Schedule 4(12).

14 ICC Rules, Appendix V, art 6(4).

15 SCC Rules, Appendix II, art 8(1).

16 HKIAC Rules, Schedule 4(11).

17 See SCC Rules, art 19(1) & Appendix II, art 7 (granting broad discretionary powers to conduct proceedings as he/she sees fit); ICC Rules, Appendix V, art 5(2) (same).

18 HKIAC Rules, Schedule 4(11).

19 See ICDR Rules, art 37(4); ICC Rules, Appendix V, art 6(2); SIAC Rules, Schedule 1(5).

20 HKIAC Rules, Schedule 4(17).

21 See ICC Rules, Appendix V, art 6(7); SCC Rules, Appendix II, art 1(2) (emergency arbitrator shall have the same powers as an arbitral tribunal) & art 32(2) ("The Arbitral Tribunal may order the party requesting an interim measure to provide appropriate security in connection with the measure."); SIAC Rules, Schedule 1(8); ICDR Rules, art 37(7).

22 See ICDR Rules, art 37(5) ("The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property"); SIAC Rules, Schedule 1(6) ("The Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary."); SCC Rules, Appendix II, art 1(2) (emergency arbitrator shall have the same powers as an arbitral tribunal) & art 32(1) ("The Arbitral Tribunal may, at the request of a party, grant any interim measures it deems appropriate.").

23 Article 23.2 provides that "the arbitral tribunal may order any interim measures it deems necessary or appropriate," while Schedule 4(16) provides that an emergency decision issued by the emergency arbitrator "shall have the same effect as an interim measure granted pursuant to Article 23." Read together, these provisions imply that emergency relief ordered by the emergency arbitrator is similar to interim relief ordered by the arbitral tribunal, and therefore the emergency arbitrator, like the arbitral tribunal, should have the power to order any interim measures it deems necessary or appropriate.

24 HKIAC Rules, Schedule 4(16).

25 See ICC Rules, art 29(2); SCC Rules, Appendix II, arts 9(1) & 9(3); SIAC Rules, Schedule 1(9).

26 Arbitration (Amendment) Ordinance 2013 (No 7 of 2013), which adds a new s 22B(1) ("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.").

- 27 The other exception to this general trend is Singapore, which has also made amendments to its International Arbitration Act (Cap 143A) with effect from 1 June 2012 by (*inter alia*) clarifying that emergency decisions are enforceable in Singapore courts. See International Arbitration (Amendment) Act 2012 (No 12 of 2012) (expanding the definition of "arbitral tribunal" in s 2(1) to include emergency arbitrators, thereby ensuring that the orders made by emergency arbitrators receive the same legal status as orders made by arbitral tribunals).
- 28 HKIAC Rules, Schedule 4(18).
- 29 See ICC Rules, Appendix V, art 6(8); SCC Rules, Appendix II, art 9(2); SIAC Rules, Schedule 1(6); ICDR Rules, art 37(5).
- 30 HKIAC Rules, Schedule 4(18).
- 31 ICC Rules, art 29.3; SIAC Rules, Schedule 1(7); ICDR Rules, art 37(6).
- 32 ICC Rules, art 29(3).
- 33 SCC Rules, Appendix II, art 9(5).
- 34 SIAC Rules, Schedule 1(7).
- 35 HKIAC Rules, Schedule 4(18).
- 36 *Ibid*, Schedule 4(19)(a).
- 37 *Ibid*, Schedule 4(19).
- 38 See ICC Rules, Appendix V, art 6(6) (order issued by an emergency arbitrator ceases to be binding upon (a) the President's termination of the emergency arbitrator proceedings, (b) acceptance by the Court of a challenge against the emergency arbitrator, (c) the tribunal's final award, or (d) withdrawal of all claims or termination of arbitration before rendering of final award); SIAC Rules, Schedule 1(7) (any relief granted by an emergency arbitrator ceases to be binding after 90 days if the tribunal is not constituted within that time, the tribunal makes a final award, or the claim is withdrawn); SCC Rules, Appendix II, art 9(4) (emergency decision ceases to be binding if (1) the emergency arbitrator or tribunal so decides, (2) the tribunal makes a final award, (3) the arbitration is not commenced within 30 days, or (4) the case is not referred to tribunal within 90 days).
- 39 HKIAC Rules, Schedule 4(20).
- 40 *Ibid*, Schedule 4(13).
- 41 SIAC Rules, Schedule 1(7); ICDR art 37(6).
- 42 ICC Rules, Appendix V, art 2(2).
- 43 HKIAC Rules, Schedule 4(21).
- 44 See ICC Rules, Appendix V, art 2(6); SCC Rules, Appendix II, art 4(4); SIAC Rules, Schedule 1(4); ICDR Rules, art 37(6).
- 45 HKIAC Rules, Schedule 4(22).
- 46 See ICC Rules, art 29(7); SCC Rules, art 32(5); SIAC Rules, art. 26.3; ICDR Rules, art 37(8).
- 47 ICC Rules, art 29(5) ("Articles 29(1)–29(4) and the Emergency Arbitrator Rules set forth in Appendix V (collectively the "Emergency Arbitrator Provisions") shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories.").

## Invitation to Submit Articles for Publication in the *Asian Dispute Review*

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- Contributions should not have been previously published in or submitted to another journal or news letter for consideration, and should not be available online
- Contributions should not be on a subject covered in depth by any paper in the previous two issues of *Asian Dispute Review*
- Contributions should be no longer than 2,000 words.

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