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Hong Kong Rules Foster Collective, Opt-In Class Arbitration

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The Hong Kong International Arbitration Center, or HKIAC, has promulgated a new set of administered arbitration rules, or AAR, effective Nov. 1, 2018. Among those rules are Articles 27-30 concerning the HKIAC's powers to join additional parties in an arbitration, to consolidate arbitrations, to consolidate related claims in a single arbitration and to coordinate related unconsolidated arbitral proceedings. Those powers, which the HKIAC can exercise without the consent of the parties to any bilateral arbitration agreement, are not trivial; among other things, they arguably institutionalize pathways to collective or opt-in class arbitration proceedings.

Consolidation of Arbitration — AAR 28

The HKIAC has the power to consolidate multiple pending arbitrations that are being conducted under the AAR upon the request of any party in any such pending arbitration[1] and after consulting with the parties and any appointed arbitrators, if:

- The parties agree to consolidate;
- The claims in the separate arbitrations are made under the same arbitration agreement; or
- The claims are made under more than one arbitration agreement, the arbitrations in question involve a common question of law or fact, the claimed rights to relief concern or arise out of the same transaction or series of related transactions, and the respective arbitration agreements are compatible.[2]

AAR 28.1(c) apparently gives the HKIAC party-independent latitude to consolidate multiple pending arbitrations, thus providing an institutional avenue to collective arbitration.[3]

Moreover, when the HKIAC does consolidate arbitrations, it "shall" appoint the arbitral tribunal, and any previous arbitrator appointments may be revoked by HKIAC. Indeed, the parties to such consolidated arbitrations "shall be deemed to have waived their right to designate an arbitrator."[4]

In addition, after a request for consolidation has been submitted, HKIAC may "adjust" its Administrative Fees and the fees of the arbitral tribunal.

Single Arbitration Under Multiple Contracts — AAR 29

This provision looks like a pathway to an opt-in class proceeding. The principal provision is as follows.

"Claims arising out of or in connection with more than one contract may be made in a single arbitration, provided that:

- A common question of law or fact arises under each arbitration agreement giving rise to the arbitration;
- The rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions; and
- The arbitration agreements under which those claims are made are compatible."[5]

Consent by the respondent(s) evidently is not required. This provision therefore would seem to make possible the organization of an opt-in class arbitration proceeding under the AAR, analogous to the group litigation order process under English judicial rules.[6]

Joinder of Additional Parties — AAR 27

Article 27, regarding joinder of additional parties, authorizes the arbitral tribunal or, where the tribunal has not yet been constituted, the HKIAC, to allow the joinder of additional parties in an arbitration, including in an arbitration under AAR 28 (Consolidation of Arbitration) or AAR 29 (Single Arbitration Under Multiple Contracts), if:

- All parties (including the additional party) expressly agree, or
- If, prima facie, the additional party is bound by an arbitration agreement adopting the AAR.[7]

While a request for joinder, either by a party wishing to join an additional party, or by an additional party wishing to be joined, see AAR 27.4, 27.5, will trigger a determining process, Article 27 does not expressly make such a request a prerequisite to joinder of additional parties. Moreover, is the consent of any additional party required in this process? The provision does not say that it is.

Thus, again, the consents of all parties to any bilateral arbitration agreement are not required, and HKIAC or the arbitral tribunal thus arguably have somewhat independent powers under the new AAR to enable or create a collective arbitration or an opt-in class arbitration.

Furthermore, when an additional party is joined, HKIAC "shall appoint the arbitral tribunal,"[8] and "may revoke any [prior] confirmation or appointment of an arbitrator."[9]

In addition, when a request for joinder has been submitted, HKIAC may "adjust" its administrative fees as well as the arbitral tribunal's fees.[10]

Concurrent Proceedings — AAR 30

Finally, another AAR provision enables the arbitral tribunal to coordinate the conduct of related arbitrations that are not consolidated. That is, where an identical tribunal of arbitrators is constituted in more than one arbitration under the AAR, and there is a common question of law or fact in each arbitration, but the proceedings are not consolidated, the tribunal may conduct the respective arbitrations at the same time, seriatim, or by suspending any arbitration until "after the determination of any other of them."[11]

Exercise of this ancillary administrative power requires consultation with, but not the consents of, the affected parties.[12]

Kompetenz-Kompetenz — AAR 19

Furthermore, we note that, as in many other administered arbitration rules, the AAR provides that an arbitral tribunal has authority to rule on its own jurisdiction, "including any objections with respect to the existence, validity or scope of the arbitration agreement."[13] In addition, the tribunal is expressly authorized to determine "the existence or validity of any contract of which an arbitration agreement forms a part."[14]

In all, these new HKIAC administered arbitration rules provide noteworthy institutional means, without the consents of all parties, for joinder of parties and consolidation of proceedings so as to effectuate collective or opt-in class arbitration proceedings.

Joinder and Consolidation in Arbitration Generally

The promulgation of institutional rules promoting the consolidation of claims and the joinder of additional parties into fewer proceedings is intended to promote efficiency and thus to make arbitration more attractive, particularly compared to litigation in national courts. The movement toward enabling joinder and consolidation arguably jumps the shark, however, when the specific consents of all of the affected parties ceases to be a prerequisite. That is inconsistent with the fundamental nature of arbitration as a wholly consensual method of dispute resolution. One would expect, for example, that a contracting party with a full appreciation of the possibilities under rules like those in the new AAR would wish to exclude delegations of discretionary authority to the administrator or to the arbitrators concerning joinder of parties and consolidation of claims.

The typical consolidation and joinder rules of the prominent administering institutions allow for consolidation of proceedings and joinder of additional parties in certain circumstances, albeit generally with the consent of the affected parties.

Pertinent ICC Arbitration Rules

Under the ICC arbitration rules, for example, an additional party may be joined to an arbitration at the request of a party prior to the appointment of an arbitrator,[15] provided the ICC is satisfied that "an arbitration agreement under the Rules that binds them all may exist,"[16] or, when more than one arbitration agreement is involved, "that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration."[17] After the appointment of an arbitrator, all parties must agree to the joinder of an additional party.[18]

In addition, "claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the rules."[19]

Furthermore, while the provision for consolidation of arbitrations under ICC Article 10 is similar to AAR 28, it is different in important respects. Specifically, two or more arbitrations pending under the ICC Rules may be consolidated into a single arbitration at the request of a party where:

- The parties have agreed to such consolidation;
- All of the claims in the arbitrations are made under the same arbitration agreement; or
- Where the claims in the arbitration are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship and the ICC court finds the arbitration agreements to be compatible.

Thus, the key differences are in two of the four conditions under the ICC Art. 10(c).

Proposed Protocol for Cross-Institutional Consolidations

Finally, at the very leading edge of the drive to enable broad consolidation of arbitration is a proposal in December 2017 by the Singapore International Arbitration Center, or SIAC, of a protocol on "Cross-Institution Consolidation" of arbitration, to be adopted by all of the leading arbitration-administering institutions. The aim is to enable the consolidation of international arbitration proceedings that were commenced under disparate institutional arbitration rules. (Not much has come of that proposal yet.)

SIAC's proposal is "designed to facilitate the efficient and enforceable resolution of international commercial disputes, which would lead to significant gains for parties."[20] SIAC notes that "the consolidation provisions of existing institutional rules of leading arbitral institutions do not permit the consolidation of arbitrations that are subject to different sets of institutional arbitration rules."[21] It argues that:

"[t]he consolidation of arbitral proceedings offers important benefits to parties that help reduce the complexity, cost and time of proceedings. The cross-institution consolidation of arbitrations under different institutional rules takes these benefits further, making arbitration an even more efficient system of dispute resolution."[22]

However, SIAC expressed no distinct regard for a need for clear specific consents by all of the affected parties, which is concerning.

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[1] AAR 28.2

[2] AAR 28.1.

[3] Compare LCIA Arbitration Rules (2014), Arts. 22.1(ix), (x).

[4] AAR 28.8.

[5] AAR 29 (emphasis added).

[6] Civil Procedure Rules 19.10-19.15.

[7] (The former condition is similar to that in other arbitration rules. See, e.g., LCIA Arbitration Rules (2014), Art. 22.1(viii). The latter alternative is not.)

[8] AAR 27.13.

[9] Id.

[10] AAR 27.15.

[11] AAR 30.1.

[12] Id.

[13] AAR 19.1. Cf. AAR 27.2.

[14] AAR 19.2.

[15] ICC Art. 7.

[16] ICC Art. 6(4)(i),

[17] ICC Art. 6(4)(ii).

[18] ICC Art. 7(1).

[19] ICC Art. 9, albeit subject to the requirements of ICC Art. 6(4) as well.

[20] SIAC Bulletin re "Proposal on Cross-Institution Consolidation Protocol," Dec. 19, 2017.

[21] Id.

[22] Id.