

Ten Key Changes to the AIAC Arbitration Rules

A summary of updates you must know

In brief

The Asian International Arbitration Centre (AIAC) recently published its Arbitration Rules 2021 ("**2021 Rules**"). It presents a major overhaul and update to its 2018 predecessor both in form and substance.

The preliminary research and revisions by AIAC's legal services team started in August 2019, consultation with the Rules Revision Committee occurred in March and June 2021 with the AIAC Rules published for public consultation in July 2021. The Rules took effect on 1 August 2021.

Here is a summary of 10 Key Changes you must know.

One. Wider applicability

Introduction, Model Arbitration Clause and Submission Agreement, Rule 1

The new AIAC Rules cast a wider net on applicable disputes. In the event parties agree to refer their dispute to AIAC or arbitration in accordance with the AIAC arbitration rules, this is taken to be an arbitration to be administered by AIAC under the AIAC rules.¹

In addition, the 2021 Rules recognises third-party funding, i.e., a financial arrangement whereby a third-party provides funds to a Party in arbitration for an agreed return. Although third-party funding is presently not recognised in Malaysian courts, the AIAC nonetheless acknowledges such arbitration financing. Should Parties finance their arbitration via third-party funding this would not affect nor preclude the adoption of the Rules unless provided otherwise². The Arbitral Tribunal may enquire on the existence of third-party funding arrangements and direct Parties to disclose the existence of the same³.

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¹ Introduction, at page 1 of the AIAC Arbitration Rules 2021. All subsequent footnote references are to the AIAC Arbitration Rules 2021 unless stated otherwise.

² Rule 1.4

³ Rule 13.5(e)



Two. Streamlined Rules: The incorporation of the UNCITRAL Rules and the Fast Track Rules (Revised), Emergency Arbitrators

Rules 8, 17-18

Merging of UNCITRAL Rules

The UNCITRAL Rules is now incorporated into the 2021 Rules. Previously, the AIAC and UNCITRAL Rules were contained in Part I and Part II of the 2018 Rules. Where conflicts arose, the former prevailed⁴. Now, however, both Rules are merged, making the 2021 Rules more comprehensive and streamlined.

Incorporation of Fast Track Rules

In addition, the Fast Track Procedure which was previously contained in the separate Fast Track Arbitration Rules is incorporated as Rule 8. The Procedure envisages a timeframe of 180 days within which the Final Award shall be rendered by the Tribunal from the delivery of the first procedural order in situations where the dispute is less than USD 500,000.00/ RM 2,000,000.00 or where there is exceptional urgency or where parties agree, and contain an opt out procedure if this proves impracticable.

Emergency Arbitrators

Tied to Rule 16 (interim measures), are Rules 17 and 18 which relate to the appointment of an emergency arbitrator and the conduct of emergency arbitration proceedings. These provisions have been moved from Schedule 3 of the 2018 Rules into the main text of the 2021 Rules and changes made to provide greater clarity in these provisions.

For example:

- Provisions relating to the conduct of emergency arbitration proceedings such as permitting the conduct of proceedings *in absentia* where a party fails to participate in the emergency arbitration have been included
- The emergency arbitrator is empowered to make any order or award that the arbitral tribunal itself may make.

The entire emergency arbitration process is envisaged to be completed within a 21-day period. Rule 17.1 provides that an Emergency Arbitrator Request can be submitted where urgent interim measures are sought prior to the constitution of the arbitral tribunal. If the Request is approved by the Director, the Director will appoint the emergency arbitrator within 2 days of receiving the Request. Thereafter, the emergency arbitrator is required to issue a first procedural order within 3 days of their appointment, following which an emergency award shall be delivered to the AIAC no later than 15 days thereafter.

Three. Commencement of arbitration and mandatory response

Rules 5 and 6

The commencement of arbitration now takes effect when a Notice of Arbitration is received by a Respondent (in line with the Malaysian Arbitration Act) as opposed to when the arbitration is registered with the AIAC under the 2018 Rules.⁵

Rule 5.3 also enables parties to file a single notice of arbitration and pay a single registration fee where claims arise out of multiple contracts. This is on the proviso that a consolidation request is also submitted to the AIAC at the time of registration to enable the Director to consider whether or not the multi-contract arbitrations should be consolidated at the outset as a single dispute.

It is now mandatory for the Respondent under Rule 6.1(c) to include a brief statement describing the nature of any counterclaim or set-off it intends to raise in the proceedings in the Response to Notice of Arbitration.

⁴ Rule 1.3 of the AIAC Arbitration Rules 2018

⁵ Rule 5.1



Four. Summary Determination

Rule 19

Summary determination is now available to Parties to dismiss a claim, counterclaim or defence where they are manifestly without merit (legal or factual) or where they fall outside the Arbitral Tribunal's jurisdiction.⁶ This is similar to early dismissal procedures found in other institutional rules such as LCIA, SIAC⁷ and HKIAC.

To initiate this procedure, a Summary Determination Request is to be submitted to the Arbitral Tribunal within 30 days of the filing of the defence and counterclaim⁸, and the other Parties may respond to the Request within 15 days.⁹ Where the Arbitral Tribunal is satisfied that there are no further submissions in respect of the Summary Determination Request, it shall then decide to allow or dismiss the Request within 45 days from the receipt of the final submission.¹⁰

Five. Arbitrator's powers

Rules 13, 15, 16, 44

The Tribunal's power is expanded to include the power to determine the applicable law in the absence of an agreement between parties. The Tribunal is also empowered to make enquiries on the existence of third-party funding arrangements including the third-party funder's economic interest in the proceedings.¹¹ In terms of language, the Tribunal may determine the language (unless otherwise agreed)¹² and order the translation of a document or other communication that has been submitted in a language other than the language of the arbitral proceedings.¹³

The Tribunal also has added powers in respect of confidentiality i.e., the Tribunal is empowered to take appropriate measures including the issuing of an order or Award for costs or damages in the event of any breaches of confidentiality.¹⁴ Previously, the 2018 Rules provided that Parties, experts, witnesses and the AIAC shall keep confidential all matters relating to the arbitral proceedings¹⁵. Now the confidentiality of proceedings extends to the Director, any tribunal secretary and any witness or expert appointed by the Arbitral Tribunal as well.¹⁶ Parties must also seek the same undertaking of confidentiality from all those that they involve in the arbitration, including any authorised representative, witness of fact, expert or service provider.¹⁷

⁶ Rule 19.1

⁷ Rule 29 of the Singapore International Arbitration Centre Rules 2016

⁸ Rule 19.2

⁹ Rule 19.4

¹⁰ Rule 19.5

¹¹ Rule 13.5(e)

¹² Rule 13.5(b)

¹³ Rule 15

¹⁴ Rule 44.5

¹⁵ Rule 16 of the AIAC Arbitration Rules 2018

¹⁶ Rule 44.3

¹⁷ Rule 44.4



Six. Multiple Parties and Contracts - Joinder and consolidation

Rules 21, 22

In general, Joinder relates to the addition of a party to the proceedings whereas Consolidation refers to the merging of more than one arbitration.

Joinder

Requests for Joinder must now be made no later than the filing of the statement of defence and counterclaim.¹⁸ Furthermore, the 2021 Rules now permit the submission of a Joinder Request on the new ground that the participation of the Additional Party is "**necessary for the efficient resolution of the dispute**" and that such participation "**directly affects the outcome of the arbitral proceedings**".¹⁹

Consolidation

Rules 22.4 and 22.6 now permit the consolidation of multi-contract disputes in a single notice of arbitration. If the Director dismisses such a multi-contract consolidation request, the Claimant would be required to serve separate notices of arbitration with respect to each dispute and file separate Registration Requests with the AIAC.

The test for approving or rejecting a Joinder Request and a Consolidation Request is one of "**all relevant circumstances**" (Rule 21.6) as opposed to "**any relevant circumstances**" (Rule 9.5 of the 2018 Rules).

Seven. Appointment, challenge, replacement processes

Rules 9, 10, 11 and 12

Appointment

The appointment process is now more detailed and transparent with a "List Procedure". Where the Director is requested to appoint an arbitrator, the AIAC shall provide Parties with an identical list containing at least three arbitrators from which the Parties may respond within 15 days with an indication of their preferred choice. The Director shall then appoint the arbitrator based on the returned lists and in accordance with the order of preference indicated by the Parties. If this is not possible, then the Director may exercise his discretion in appointing a suitable arbitrator. In doing so, he may seek such information from the Parties as he deems appropriate.²⁰

With respect to multi-party appointments specifically, new Rule 9.7 prescribes a separate procedure for the appointment of both even and odd numbered arbitral tribunals whereby the multiple Claimants or Respondents are to act collectively in nominating their share of the required number of arbitrators, failing which, the Director will constitute the entire arbitral tribunal and will exclude or release any nominated or appointed arbitrators from consideration, unless otherwise agreed to by the Parties.

Rule 10.5 addresses the issue of the arbitrator's nationality. Where Parties are of different nationalities, the sole or presiding arbitrator shall not be of the same nationality as any Party unless otherwise agreed.²¹

Challenge

The language of the challenge provision in Rule 11 has also been modified to factor in situations where a party is aware of an existing circumstance at the time of the arbitrator's appointment, and that circumstance does not give rise to any apparent conflict at that point in time, although a change in circumstances during the course of the arbitral proceedings later gives rise to justifiable doubts.

The new challenge provision also clarifies how the Director will remunerate any challenged arbitrator who is removed from the proceedings as well as how that arbitrator's replacement will be appointed to carry on with the proceedings.

Replacement

¹⁸ Rule 21.1

¹⁹ Rule 21.1

²⁰ Rule 9.8

²¹ Rule 10.5



Rule 12 specifies the circumstances in which the Director may replace a member of the Arbitral Tribunal. Interestingly, Rule 12.2 enables the Director to replace an arbitrator on his own initiative and after consulting the parties and the arbitral tribunal, if the prescribed circumstances exist.

Interestingly, an arbitrator may be removed where there exist "**exceptional circumstances**", including any violation of the AIAC Code of Conduct for Arbitrators or the improper discharge of functions under the AIAC Arbitration Rules. Such examples (based on the Code of Conduct) could include a conflict of interest, failure to disclose facts that may give rise to doubts as to his impartiality or independence, or a breach of confidentiality during the course of proceedings.

AIAC has also provided for the remuneration of any arbitrator that is replaced as well as drawing the re-constituted arbitral tribunal's attention to matters relating to the subsequent conduct of the proceedings.

Eight. Closure and Re-opening of Arbitral Proceedings

Rule 32

Following the delivery of final submissions and where the Arbitral Tribunal is satisfied that Parties have no further relevant and material evidence to produce or submissions to present, proceedings shall be promptly declared as closed.²²

Where the Arbitral Tribunal intends to issue several Final Awards with respect to the Parties in a multi-Party proceeding, the Arbitral Tribunal shall declare closure of proceedings in respect of each Final Award issued to the various Parties.²³

Once closed, an arbitral proceeding may now be re-opened in "**exceptional circumstances**" (not defined).²⁴ This may be done on the Arbitral Tribunal's own initiative or upon a Party's application and after consulting the Director. Arbitral proceedings can be re-opened at any time before the Final Award is made.²⁵

Nine. Technical Review explained, possible publication of Awards

Rules 34 and 44.6

Technical Review

This process of a review of a draft Final Award is explained in the Rules. The Director will draw the Arbitral Tribunal's attention to any perceived irregularity as to the form of the draft Final Award in matters relating to procedural history, general contents and any clerical, typographical or computational errors. The Review is not one on the merits.

This process is not applicable to an Emergency Award (Rule 18), an interpretation of an Award (Rule 37) and a correction of an Award (Rule 38).²⁶

Publication

Awards may now be published by the AIAC with the express written consent of the Parties, subject to the redaction of identifying information such as the Parties' names.²⁷

²² Rule 32.1

²³ Rule 32.2

²⁴ Rule 32.5

²⁵ Rule 32.5

²⁶ Rule 34.7

²⁷ Rule 44.6



Ten. Updated and revamped definitions

Rule 2

Lastly, various amendments have been made to revamp the definitions:

- Distinctions have been made between Awards, Final Awards and Consent Awards for the purpose of the technical review process.
- "**International arbitration**" has also been amended to include arbitrations that are seated outside of Malaysia where neither party has its place of business at the seat, and a wide definition of the word "**virtually**" to keep in line with the global trend of virtual proceedings.
- Rule 3 provides for the calculation of time limits such as the service effected by way of electronic emails and clarifies how the service or the delivery of documents is deemed to be effected where there are multiple parties or multiple addresses or modes for service on the same party.
- E-signature is provided for although this is only envisaged for the Director of the AIAC or the AIAC (not the Arbitrator or representatives).

Conclusion

All in all, the 2021 Rules is a welcome update and revision to the 2018 Rules. It is more streamlined and comprehensive, and is set to assist in making arbitration in the AIAC more accessible, convenient and more time and cost efficient. It is hoped that this in turn would strengthen the public's confidence in arbitration as an effective dispute resolution mechanism.

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