

# HKIAC Administered Arbitration Rules

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of the Hong Kong Arbitration Ordinance. Similar requirements are also found in other major institutional rules.<sup>316</sup>

By rendering an unreasoned award, an arbitral tribunal would fail to comply with its obligation to render a valid award under Article 13.10. The obligation to state reasons in an award is in line with the principle of due process and the parties' right to justice. It also enhances the quality of the arbitral tribunal's decision-making and provides the parties with the opportunity to understand how their submissions have been considered.

Arbitral tribunals enjoy a broad discretion with respect to the format and extensiveness of their reasoning, subject to a variety of factors, such as the complexity of the dispute, how the parties have pled their case, and how many issues are involved. The arbitral tribunal in principle does not need to state any reasons in consent awards handed down pursuant to Article 37.2.

## V. Execution of the Award

Article 35.5 sets out the formalities required for a valid arbitral award under the 2018 HKIAC Rules. Any award shall be signed by all members of the arbitral tribunal, dated with the date on which the award was made, and state the seat of arbitration. All requirements should be strictly complied with in order to ensure the validity of the award.

If any of the arbitrators is unable or unwilling to sign, the award must state the reason(s) for the absence of the signature(s). Failure to satisfy this requirement may result in the setting-aside of an award.<sup>317</sup>

The arbitral award is deemed to have been made on the date stated in the award for all relevant purposes. In practice, the date of the award is commonly also when the award is serviced on the parties to the arbitration.<sup>318</sup> If the date of the award is different from the date of the service of the award, the provisions on calculation of time limits under Article 3.3 of the 2018 HKIAC Rules apply.<sup>319</sup> As the award is communicated to more than one party, the provisions under Article 3.4 of the 2018 HKIAC Rules also apply.<sup>320</sup> The stated date is the starting point for the calculation of post-award interest, if awarded. The date(s) on which the award is communicated to the respective parties, as determined in accordance with Article 3 of the 2018 HKIAC Rules, also triggers the

<sup>316</sup> See e.g. Article 34(3) UNCITRAL Arbitration Rules; Article 32(2) ICC Rules (2021); Article 49(3) CIETAC Rules; Article 26.2 LCIA Rules (2020).

<sup>317</sup> See e.g. *Bursa Büyükşehir Belediyesi v Güris Insaat VE Mühendislik AS*, Supreme Court, 5 December 2008, Netherlands Court Reports [NJ] 2009, 6].

<sup>318</sup> HKIAC's practice is to serve the soft copy of the award to the parties of the arbitration on the date of the award and usually in advance of serving the hard copies of the award.

<sup>319</sup> Article 3.3 provides that "[a]ny written communication shall be deemed received on the earliest day when it is communicated pursuant to paragraph 3.1(a) to (d), uploaded pursuant to paragraph 3.1(e), or attempted to be communicated pursuant to Article 3.2. For this purpose, the date shall be determined according to the local time at the place of receiving such written communication or a notice of the upload pursuant to paragraph 3.1(e)."

<sup>320</sup> Article 3.4 provides that "[w]here a written communication is being communicated to more than one party, or more than one arbitrator, such written communication shall be deemed received when it is communicated pursuant to Article 3.1(a) to (d), or attempted to be communicated pursuant to Article 3.2, to the last intended recipient, or when a notice that such written communication has been uploaded pursuant to Article 3.1(e) is communicated to the last intended recipient."

relevant post-award time limits under the 2018 HKIAC Rules, such as under Articles 38 to 40, and other applicable laws.

- 15 The seat of arbitration is an essential element and determines, *inter alia*, the supervising jurisdiction of the arbitral award<sup>321</sup> and “*the territory of a State*” in which the arbitral award is made for the purpose of seeking recognition and enforcement of the award in a foreign jurisdiction under the New York Convention.<sup>322</sup> The seat of arbitration should be clearly stated in the award to remove any uncertainty regarding the “nationality” of the award.

## VI. Transmission of the Award

- 16 Under Article 35.6, the arbitral tribunal shall communicate the signed originals of the arbitral award to the HKIAC, which will thereafter affix its seal and, subject to any lien, dispatch the awards to the parties.
- 17 Prior to dispatching the award to the parties, the HKIAC may pursue any outstanding claims for payment of fees and expenses from the parties. The HKIAC could exercise a lien over the arbitral award until full payment is made.<sup>323</sup>
- 18 The 2018 HKIAC Rules do not provide for institutional scrutiny of an arbitral award. The HKIAC will not review the arbitral tribunal’s decisions or interfere with the analysis or reasoning of its decisions. The arbitral tribunal may ask the HKIAC to proofread or review the non-substantive parts of the arbitral award, including the identity and contact details of the parties, and the procedural history of the arbitral proceedings.<sup>324</sup>

### Article 36 – Applicable Law, Amiable Compositeur

36.1 The arbitral tribunal shall decide the substance of the dispute in accordance with the rules of law agreed upon by the parties. Any designation of the law or legal system of a given jurisdiction shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction and not to its conflict of laws rules. Failing such designation by the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

36.2 The arbitral tribunal shall decide as amiable compositeur or *ex aequo et bono* only if the parties have expressly agreed that the arbitral tribunal should do so.

36.3 In all cases, the arbitral tribunal shall decide the case in accordance with the terms of the relevant contract(s) and may take into account the usages of the trade applicable to the transaction(s).

## I. Applicable law

- 1 Article 36.1 deals with the law applicable to the substantive merits of the dispute, which should be distinguished from the law governing the arbitration agreement due to the

<sup>321</sup> See *supra* under Article 14.1.

<sup>322</sup> Article I(1) New York Convention.

<sup>323</sup> See Schedules 2 and 3 to the HKIAC Rules.

<sup>324</sup> Moser/Bao, *A Guide to the HKIAC Arbitration Rules* (2017), para. 11.49.

separability of the arbitration agreement. If the parties do not have an agreement on the law applicable to the merits of the dispute, the applicable law shall be determined by the arbitral tribunal. The provision is in accordance with the principle that, while any agreement based on party autonomy generally prevails, the arbitral tribunal should fill in any gaps by determining what is appropriate for the specific case.

Article 36.1 allows the parties to choose any “rules of law” to govern their dispute and there is no requirement that the applicable law should be the law of a specific jurisdiction. The parties may choose international or transnational laws, such as the United Nations Convention on Contracts for the International Sale of Goods, as the rules of law governing the substance of their dispute.<sup>325</sup> According to the HKIAC’s statistics, there were 12 different governing laws in disputes submitted to HKIAC in 2020, 11 in 2019, and 19 different governing laws in disputes submitted in 2018.<sup>326</sup> Hong Kong law remains the most commonly selected governing law, followed by English law and Chinese law.<sup>327</sup>

Article 36.1 also clarifies that any designation of the law or legal system of a given jurisdiction by parties shall only refer to the substantive law of that jurisdiction and shall not refer to the conflict of law rules in that jurisdiction, unless expressly agreed otherwise. This provision is consistent with Article 28(2) of the 2006 UNCITRAL Model Law, which is incorporated in Section 64(2) of the Hong Kong Arbitration Ordinance and requires that, failing any designation by the parties, the arbitral tribunal apply “the law determined by the conflict of laws rules which it considers applicable”. In accordance with “the spirit” of the 2018 HKIAC Rules, Article 36.1 is designed to streamline the process for the arbitral tribunal to determine the applicable law in the dispute, by allowing it to directly designate an appropriate law without necessarily considering the conflict of laws rules. The arbitral tribunal can, but does not have to, conduct an analysis under the applicable conflict of laws rules, which may require additional submissions from the parties or even legal experts.

## II. Amiable compositeur or ex aequo et bono

Article 36.2 reflects a practice in international commercial arbitration in which the parties to an arbitration authorise the arbitral tribunal to decide the dispute as *amiable compositeur* or as *ex aequo et bono*. This provision allows the arbitral tribunal to decide the dispute, with the express agreement of the parties and when applicable, based on the general principles of fairness, equity and justice without being bound by a strict application of the law.<sup>328</sup>

The concept of *amiable compositeur* or *ex aequo et bono* is not universally recognised in all jurisdictions. In jurisdictions where *amiable compositeur* and/or *ex aequo et bono* are clearly recognised under applicable laws,<sup>329</sup> they may be given different meanings and applications. Because the meaning and scope of *amiable compositeur* and *ex aequo*

<sup>325</sup> Moser/Bao, *A Guide to the HKIAC Arbitration Rules* (2017), para. 11.53.

<sup>326</sup> The 2018–2020 Statistics of HKIAC administered arbitration cases, see <https://www.hkiac.org/about-us/statistics> (last accessed in February 2021).

<sup>327</sup> The 2020 Statistics of HKIAC administered arbitration cases, see <https://www.hkiac.org/about-us/statistics> (last accessed in February 2021).

<sup>328</sup> Born, “Chapter 15: Procedures in International Arbitration” in: *International Commercial Arbitration* (Third Edition, 2021), § 15.01.

<sup>329</sup> See e.g. Section 64(3) Hong Kong Arbitration Ordinance.

*et bono* are unclear, if the parties wish to invoke this provision, they should clearly specify the scope of the tribunal's power and the principles by which the tribunal should abide. The arbitral tribunal cannot *sua sponte* grant itself powers as *amiable compositeur*, even if it may be allowed to do so under applicable laws.

- 6 Despite being introduced in the 2008 HKIAC Rules, the provision of *amiable compositeur* or *as ex aequo et bono* has been rarely used in HKIAC arbitration cases.

### III. Applicable Contractual Terms and Trade Usages

- 7 Article 36.3 is modelled on Article 28(4) of the 2006 UNCITRAL Model Law, which is given effect in Hong Kong-seated arbitrations by Section 64(4) of the Hong Kong Arbitration Ordinance. Article 36.3 allows the arbitral tribunal to apply the terms of relevant contracts and to take into consideration trade usages when applicable, provided that they do not violate the mandatory provisions of applicable laws. This reflects the common practice of international commercial arbitration.
- 8 In contrast to Article 28(4) of the 2006 UNCITRAL Model Law and some other institutional rules<sup>330</sup>, however, Article 36.3 does not require the arbitral tribunal to apply trade usages but provides the arbitral tribunal with an option to do so, if it considers appropriate. This provision grants more flexibility and discretion to the arbitral tribunal, which should in any case be guided by the applicable substantive law and should not allow trade usages to prevail over unambiguous terms of a contract.

#### Article 37 – Settlement or Other Grounds for Termination

37.1 If, before the arbitral tribunal is constituted, a party wishes to terminate the arbitration, it shall communicate this to all other parties and HKIAC. HKIAC shall set a time limit for all other parties to indicate whether they agree to terminate the arbitration. If no other party objects within the time limit, HKIAC may terminate the arbitration. If any party objects to the termination of the arbitration, the arbitration shall proceed in accordance with the Rules.

37.2 If, after the arbitral tribunal is constituted and before the final award is made,

- (a) the parties settle the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitration or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.
- (b) continuing the arbitration becomes unnecessary or impossible for any reason not mentioned in Article 37.2(a), the arbitral tribunal shall issue an order for the termination of the arbitration. The arbitral tribunal shall issue such an order unless a party raises a justifiable objection, having been given a reasonable opportunity to comment upon the proposed course of action.

37.3 The arbitral tribunal shall communicate copies of the order to terminate the arbitration or of the arbitral award on agreed terms, signed by the arbitral tribunal, to HKIAC. Subject to any lien, HKIAC shall communicate the order for termination

<sup>330</sup> See e.g. Article 21(2) of the 2012 ICC Rules of Arbitration; Rule 31.3 SIAC Rules.

**of the arbitration or the arbitral award on agreed terms to the parties. Where an arbitral award on agreed terms is made, the provisions of Articles 35.2, 35.3, 35.5 and 35.6 shall apply.**

## I. Settlement of Dispute Pre-Arbitral Tribunal

Article 37.1 of the 2018 HKIAC Rules introduces the possibility of terminating an arbitration before the constitution of the arbitral tribunal. A party may file a request to terminate the arbitration with the HKIAC and all other parties to the arbitration any time prior to the constitution of the arbitral tribunal. If no objection to the request is made, the HKIAC may terminate the arbitration and close the file, after collecting any outstanding payments.

Termination under Article 37.1 is solely subject to the parties' agreement and does not require any determination from an arbitral tribunal. Article 37.1 allows an arbitration to be terminated pursuant to the parties' agreement and before incurring any further costs. Any party can submit a request to terminate the arbitration and does not need to provide written support of the parties' agreement to terminate. If the request is made unilaterally by one party to the arbitration, the HKIAC will seek confirmation from the other party and set a timeline for it to provide its comments, if any.

## II. Settlement or Unnecessary or Impossible Continuation

Article 37.2 deals with the termination of an arbitration after the constitution of the arbitral tribunal and prior to the issuance of the final award. It foresees two situations where termination is appropriate: (a) when the parties settle the dispute; or (b) when the continuation of the arbitration is either unnecessary or impossible.

Firstly, if the parties settle their dispute, the arbitral tribunal shall, pursuant to Article 37.2(a), either issue a termination order or an arbitral award recording the terms of the parties' settlement, also known as a consent award. If the parties do not request a consent award, the arbitral tribunal will issue a termination order by default to terminate the proceedings.

A termination order formally declares the arbitral proceedings closed and may also deal with any outstanding issues relating to costs pursuant to Article 34.6, if applicable. The arbitral tribunal does not need to provide any reasons in a termination order. Once the termination order is issued to the parties, the arbitral tribunal's mandate in the arbitration is complete, except in so far as any duties it may have under Articles 38 to 40. A termination order in principle does not constitute an arbitral award under the New York Convention.

In practice, parties who settle their disputes often request the arbitral tribunal to record the terms of their settlement agreement in a consent award. The arbitral tribunal usually states in the award that the terms are based on the parties' settlement agreement, and the arbitral tribunal is not required to provide any reasons in the consent award. A consent award is final and binding on the parties.<sup>331</sup> Thus, a key purpose of consent

<sup>331</sup> Under the HKIAC Rules, a consent award is given the same effect as any other award and is final and binding. See also Section 66(1) Hong Kong Arbitration Ordinance.

awards is to ensure that settlement agreements may be entitled to the same legal protections and effects that are generally attached to arbitral awards and may be recognised and enforced under the New York Convention.

- 7 Even if the parties make a request to the tribunal to issue a consent award, the arbitral tribunal retains the discretion to decide whether it wishes to issue the consent award. The arbitral tribunal is responsible under Article 13.10 for ensuring that any consent awards it issues are valid and may consider factors including: whether the settlement has been obtained by fraud or made to facilitate money laundering, or if the settlement violates any public policy, antitrust laws, income tax laws, or contains any manifestly unfair terms.<sup>332</sup>
- 8 Secondly under Article 37.2(b), the arbitral tribunal shall terminate the arbitral proceedings if the continuation becomes unnecessary or impossible for reasons other than the settlement of the dispute. Both Article 37.2(b) of the 2018 HKIAC Rules and Article 32(2)(c) of the 2006 UNCITRAL Model Law, given effect by Section 68 of the Hong Kong Arbitration Ordinance and upon which Article 37.2(b) is based, do not define what renders the arbitral proceedings “unnecessary” or “impossible”.<sup>333</sup> The arbitral tribunal has the discretion to determine, based on the specific circumstances of the matter and the purported reason(s) for termination, whether it is necessary or possible to proceed with the case.
- 9 Under Article 37.2(b), the arbitral tribunal may terminate the proceedings with a termination order, but it should provide the parties with a reasonable opportunity to comment on the proposed termination. The arbitral tribunal cannot, however, unilaterally decide to terminate the arbitration if a justified objection is raised by a party and not addressed.

### III. Communication of Termination Order or Consent Award

- 10 Article 37.3 provides that the termination order or the consent award made by the arbitral tribunal shall be communicated to the HKIAC first and then distributed to the parties, subject to any lien. The HKIAC can pursue any outstanding payments of fees and expenses before distributing the termination order or the consent award to the parties.
- 11 A consent award must comply with the same formality requirements under Article 35 of the 2018 HKIAC Rules as any other awards, except the requirement under Article 35.4 to provide reasons, which is specifically excluded under Article 37.2.

#### Article 38 – Correction of the Award

**38.1 Within 30 days after receipt of the award, either party, with notice to all other parties, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may set a time limit, normally not exceeding 15 days, for all other parties to comment on such request.**

<sup>332</sup> Moser/Bao, *A Guide to the HKIAC Arbitration Rules* (2017), para. 11.73.

<sup>333</sup> In Moser/Bao, *A Guide to the HKIAC Arbitration Rules* (2017), para. 11.79, the authors discuss that “[i]n one HKIAC matter, an arbitral tribunal referenced Article 36.2 when issuing a termination order in a case, where the claimant decided to terminate the arbitration, refused to participate in the scheduled hearing, and failed to pay the deposit to cover the hearing costs”. This would be subject to the absence of any justifiable objection from the other party.



38.2 The arbitral tribunal shall make any corrections it considers appropriate within 30 days after receipt of the request but may extend such time limit if necessary.

38.3 The arbitral tribunal may within 30 days after the date of the award make such corrections on its own initiative.

38.4 The arbitral tribunal has the power to make any further correction to the award which is necessitated by or consequential on (a) the interpretation of any point or part of the award under Article 39; or (b) the issue of any additional award under Article 40.

38.5 Such corrections shall be in writing, and the provisions of Articles 35.2 to 35.6 shall apply.

## I. Request for Correction of the Award

Article 38.1 allows a party to make a request to the arbitral tribunal to correct any clerical errors in the award and provides a speedy procedure to deal with such requests. A request to make a correction in the award must be made within 30 days from the date of receipt of the award. If a request for a correction(s) is not made by a party within 30 days of the award's receipt, it shall be not be considered.

Article 38 does not give the parties another chance to get a different result from the award issued. The arbitral tribunal cannot review the substance of its decisions or determine new issues or claims under Article 38. The corrections shall also not alter the substantive content of the award, such as the amount of compensation awarded by the tribunal,<sup>334</sup> except in case of a pure computational mistake on the part of the arbitral tribunal. Minor errors that can be corrected include typos, computational mistakes, and inadvertent misuse or misspelling of a word that leads to a clearly unintended meaning.

A party should communicate its request for a correction(s) to all other parties to the arbitration, in accordance with Article 13.3. This ensures that all parties are put on notice of such a request and can promptly provide their comments. The arbitral tribunal will invite and set a timeline for the parties to provide comments on the request, usually no longer than 15 days after having received the request. Following receipt of the parties' comments, the arbitral tribunal will determine whether the award needs to be corrected.

## II. Correction of the Award

The arbitral tribunal has a discretion to decide whether or not to make the requested correction(s). If the arbitral tribunal considers it appropriate to correct the award, it shall do so within 30 days after receipt of a party's request. The arbitral tribunal can also make any other appropriate corrections to the award *sua sponte* under Article 38.3.

Article 38.4 further clarifies that the arbitral tribunal can also correct the award if an interpretation of the award pursuant to Article 39 renders the correction(s) necessary or an additional award is issued under Article 40. This provision mirrors Section 69(2) of the Hong Kong Arbitration Ordinance and addresses situations in which the arbitral tribunal or the parties, after the arbitral tribunal provided an

<sup>334</sup> Girsberger/Voser, *International Arbitration: Comparative and Swiss Perspective* (2016), para. 1532.



interpretation of the award or made an additional award and the time limit under Articles 38.1 and 38.2 has expired, identify issues in the award that must be corrected. A party may make a request for a correction(s), with respect to the interpretation of an award, including an additional award.

- 6 The arbitral tribunal has the discretion to determine the format of the correction(s). In practice, and subject to the type of the correction(s) requested and made, arbitral tribunals will most often issue a separate award or an addendum to the original award setting out the correction(s). The correction(s) then become an integrated part of the arbitral award and are final and binding on the parties. In making any corrections to an award, the arbitral tribunal shall bear in mind its obligation to make a valid award under Article 13.10, as well as the requirements under Articles 35.2 to 35.6.
- 7 Any correction of an arbitral award under the 2018 HKIAC Rules Article 38 should address “*any errors in computation, any clerical or typographical errors, or any errors of similar nature*”, corresponding to Article 33(1)(a) of the UNCITRAL Model Law, as given effect by Section 69 of the Hong Kong Arbitration Ordinance. The scope of application of Article 38 for correction of the award differs from that of Article 40 for issuing an additional award.<sup>335</sup> The High Court of Hong Kong has confirmed that, if an award fails to address some of the reliefs claimed in its dispositive section but only includes them in the body of the award, an arbitral tribunal cannot remedy such “*a mistaken omission*” and simply make corrections to the award by repeating its findings and providing a declaration in the dispositive section.<sup>336</sup> Due to the strong policy reasons against alterations of an award after it has been issued, any potential omission of an arbitral tribunal should be dealt with by way of an additional award.<sup>337</sup>
- 8 The prohibition against charging additional fees for correcting the award under the 2008 HKIAC Rules has been removed from the 2013 revision of the HKIAC Rules and the 2018 HKIAC Rules.<sup>338</sup> Article 38 does not expressly address the issue of any additional arbitral tribunal’s fees with respect to a correction of the award and an arbitral tribunal should not charge any additional fees if the work concerns fixing any clerical errors or issues that should have been correctly addressed in the original award. This is without prejudice to the situation under Section 69(3) of the Hong Kong Arbitration Ordinance, where the arbitral tribunal was previously “*not aware of any information relating to costs (including any offer for settlement) which it should have taken into account*” in a costs award<sup>339</sup>. In such a situation, an arbitral tribunal may confirm, vary, or correct the award of costs, if appropriate.<sup>340</sup>

## Article 39 – Interpretation of the Award

**39.1 Within 30 days after receipt of the award, either party, with notice to all other parties, may request that the arbitral tribunal give an interpretation of the award. The arbitral tribunal may set a time limit, normally not exceeding 15 days, for all other parties to comment on such request.**

<sup>335</sup> Article 40 of the 2018 HKIAC Rules corresponds to Article 33(3) of the UNCITRAL Model Law, which is discussed in detail below under Article 40.

<sup>336</sup> *SC v OE1* (HCCT48/2019) [2020] HKCFI 2065.

<sup>337</sup> *SC v OE1* (HCCT48/2019) [2020] HKCFI 2065. See also Article 40 below.

<sup>338</sup> See 2008 HKIAC Rules, Article 36.7.

<sup>339</sup> Section 69(3) Hong Kong Arbitration Ordinance.

<sup>340</sup> Section 69(4) Hong Kong Arbitration Ordinance.