

ONPOINT / A legal update from Dechert's International Arbitration Group

How to choose between the arbitration rules commonly used in South East Asia?

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As explained in this briefing, factors to be considered when selecting an arbitral institution include each institution's track record for handling international cases, any particular nuances or innovations in their arbitration rules, and the fees the institutions charge for their services and those of arbitrators.

The leading arbitral institutions operating in South Asia based on their respective case-loads are:

- the International Chamber of Commerce (**ICC**), which has offices in Hong Kong and Singapore, and had 966 new cases in 2016,¹ amounting to an annual increase of 20%;
- the Singapore International Arbitration Centre (**SIAC**), which has headquarters in Singapore and liaison offices in Shanghai, Gujarat, Mumbai and Seoul, 'handled'² 343 new cases in 2016 out of which 274 were international arbitrations, also up by 20% since 2015;
- the Hong Kong International Arbitration Centre (**HKIAC**), which had 94 new administered arbitrations in 2016 out of which 81 were international arbitrations, which is down by 25% from the year before; and
- the Kuala Lumpur Regional Centre for Arbitration (**KLRCA**), which administered 7 new arbitration cases in 2016.³

Each of these institutions has arbitration rules which are broadly similar. Indeed, there has been something of a 'rules race' in recent times as arbitral institutions regularly update their rules to reflect best practice. Nonetheless, subtle but important differences in the rules remain, which are summarized in the table below.

¹ The ICC does not distinguish in its statistics between domestic and international administered cases.

² SIAC uses the term 'handled' rather than 'administered' as the figure includes cases in which SIAC acted as the appointing authority as well as cases it supported which were governed by the UNCITRAL Arbitration Rules.

³ KLRCA has not reported its 2015 case-load.

Comparison of the rules of arbitration of ICC, SIAC, HKIAC, and KLRCA

	ICC Rules, 2017	SIAC Rules, 2016	HKIAC Rules, 2013	KLRCA Rules, 2017
1. Standard procedures for commencement of the arbitration, appointment of arbitrators, and conduct of proceedings	✓	✓	✓	✓
2. Interim relief available from arbitral tribunal or courts	✓	✓	✓	✓
3. Interim relief from Emergency Arbitrator	✓	✓	✓	✓
4. Default seat	✗	✗	✓ (HK)	✓ (KL)
5. Expedited procedures	✓	✓	✓	✓ (KLRCA Fast Track Arbitration Rules 2015)
6. Early dismissal mechanism	✗	✓	✗	✗
7. Joinder of third party	✓	✓	✓	✓
8. Arbitration under multiple contracts	✓	✓	✓	✗
9. Consolidation of related proceedings	✓	✓	✓	✓
10. Time limit for rendering draft award/final award	✓	✓	✗	✓
11. Express obligation of confidentiality	✗	✓	✓	✓
12. Scrutiny of awards	✓	✓	✗	✓
13. Institutional and Tribunal fees	Calculated ad valorem based on amount in dispute	Calculated ad valorem based on amount in dispute	Hourly rates apply by default. Parties can agree to opt into the HKIAC Schedule of Fees.	Calculated ad valorem based on amount in dispute
14. Specifically tailored investment rules	✗	✓	✗	✗

Thus, by way of illustration, all four of the arbitral institutions under consideration in this briefing allow a party to seek interim relief from an arbitral tribunal, a local court or an emergency arbitrator (hence, a tick for each in the second row in the table above). Only the SIAC Rules, however, incorporate a mechanism to enable a party to seek the early dismissal of a claim or defence that is manifestly without legal merit or outside the jurisdiction of the arbitral tribunal (thus, SAIC is the only institution with a tick in row six).⁴

While the rules of SIAC, HKIAC and ICC each allow a party to pursue claims arising under different contracts in a single arbitration (row eight), that is currently not permitted under the KLRCA Rules. Similarly, while there is an express obligation of confidentiality under the rules of SIAC, HKIAC and KLRCA (row 11), the ICC Rules are silent on the point, leaving the question as to whether ICC proceedings are confidential to be answered by the parties or the applicable law. Another key difference is that the ICC (from 1927), SIAC (from 2007), and KLRCA (since June this year) will scrutinise a draft award and provide comments (row 12), including making suggestions as to the form of an award and drawing attention to points of substance without affecting the tribunal's liberty to decide the dispute as it deems appropriate. In contrast, the HKIAC does not formally scrutinise draft awards before they are circulated to the parties (although a degree of review is undertaken).

Thus, it could be said that the HKIAC adopts a more 'light-touch' approach to the supervision and management of arbitrations under its auspices as compared to that of some of its peers. As a consequence, HKIAC arbitrations can have lower administrative costs than those administered by SIAC and the ICC. As the table below demonstrates, the HKIAC also has a cheaper filing fee to commence an arbitration than the ICC and SIAC.

The table compares the filing fees (which never change regardless of the amount in dispute) and the administration and tribunal fees (which will vary) potentially payable in cases conducted under the auspices of SIAC, the ICC, and the HKIAC. The administration and arbitrator fees are calculated with reference to the amount in dispute (ie ad valorem), using five different sample claim amounts. The SIAC fees and HKIAC fees, which are respectively set in Singapore and Hong Kong dollars, have been converted to US dollars at the prevailing exchange rate for comparison purposes. The cheapest option is highlighted in yellow.

Comparative cost of three arbitral institutions (in USD)

Dispute Amount (USD)	Case filing fee			Administration fee			Sole arbitrator fee (maximum)			Three-person tribunal fee (maximum)		
	ICC	SIAC	HKIAC	ICC	SIAC	HKIAC	ICC	SIAC	HKIAC	ICC	SIAC	HKIAC
1 million	5,000	1,481	1,020	23,335	12,825	9,893	64,130	55,183	50,528	192,390	165,554	151,584
10 million	5,000	1,481	1,020	57,515	31,591	24,173	187,400	128,975	122,934	562,200	386,925	368,802
100 million	5,000	1,481	1,020	100,975	70,485	51,045	351,300	275,082	262,720	1,053,900	825,247	788,160
1 billion	5,000	1,481	1,020	150,000	70,485	51,045	783,300	715,307	564,566	2,349,900	2,145,923	1,693,698
10 billion	5,000	1,481	1,020	150,000	70,485	51,045	4,383,300	1,483,919	1,604,685	13,149,900	4,451,757	4,814,057

Thus, it could be said that HKIAC arbitration is generally cheaper than those administered by the ICC or SIAC. The reality can be different, however, as the default position under the HKIAC Rules is that HKIAC arbitrators are paid an hourly rate (see row 13 in the first table). In other words, the HKIAC Schedule of Fees (on which the HKIAC arbitrator fees in the table above have been calculated) only applies if all parties agree to opt into the

⁴ With that said, arguably an arbitral tribunal constituted under other arbitration rules could exercise its inherent powers to dismiss a claim early even if not expressly stated in the applicable rules of arbitration.

Schedule of Fees, otherwise HKIAC tribunal members will be paid based on how many hours they devote to a case, which of course is difficult to predict.⁵

Further, while the HKIAC charges the lowest filing and administration fees, the services that the institutions provide are not identical. In particular, as already noted, the HKIAC does not scrutinize draft awards, whereas both the ICC and SIAC expend considerable resources seeking to ensure that draft awards are enforceable.

Direct comparisons are also complicated by the fact that none of these institutions tend to pay arbitrators the maximum fees payable under their respective schedule of fees. The amount actually paid to an arbitrator will depend on the complexity of the case, its duration, and the extent to which the arbitration was conducted efficiently. A SIAC tribunal, for instance, will generally receive 75 to 80 per cent of the maximum fees payable under the SIAC Schedule of Fees.⁶ If a case is terminated, withdrawn, or settled, the SIAC Registrar will take into account the stage of the proceedings at which the arbitration ended and the amount of work done or time spent by the tribunal on the matter in order to determine an appropriate fee for the tribunal.⁷

Conclusion

While the ICC, SIAC, HKIAC and KLRCA all provide an excellent service, factors which help make an informed choice between them include the historical case-load and thus experience each institution has in handling complex international cases, the subtle differences in their rules of arbitration, and lastly the fees that they charge.

For more information and guidance on these issues, please contact the authors named below or consult the leading commentary on the SIAC Rules, 'A Guide to the SIAC Arbitration Rules' by Dechert's Mark Mangan et al (with the second edition published by Oxford University Press forthcoming in early 2018), in which the SIAC Rules are compared to those of its closest competitors.

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⁵ Like SIAC and the ICC, the KLRCA charges administration and arbitral fees with reference to the amount in dispute. See row 13 in the first table.

⁶ Similarly, the ICC's starting point for calculating an arbitrator's fee is the 'average' amount, being the midpoint between the minimum and maximum fee payable under the ICC's Scale of Administrative Expenses and Arbitrators Fees. Likewise, if the parties to a HKIAC arbitration have agreed to opt into the payment of the arbitrators based on the HKIAC Schedule of Fees, the HKIAC will take into account various factors when fixing the tribunal's fees, including the amount in dispute, the complexity of the matter, and the work done by the tribunal: HKIAC Rules (2013), Art 10.3(a).

⁷ SIAC Practice Note for Administered Cases (2 January 2014), para 15.

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