

ARBITRATION:

THE AIAC ARBITRATION RULES 2021 AND THE KEY CHANGES TO MALAYSIAN ARBITRATION PRACTICE & PROCEDURE



INTRODUCTION

On 1st August 2021, the [AIAC Arbitration Rules 2021](#) (“**2021 Rules**”) was launched and took effect, replacing all previous editions of the AIAC Arbitration Rules. The 2021 Rules shall apply to all arbitrations commenced after this date, unless agreed otherwise by the parties.

The 2021 Rules introduce significant changes to the previous AIAC Arbitration Rules 2018 (“**2018 Rules**”) in order to provide “*a wider range of sophisticated and tailored provisions to govern the efficient conduct of arbitration proceedings*” and to offer a “*comparable and competitive product reflecting contemporary international standards and practices on the global stage*”.

This article summarizes some of the key changes introduced in the 2021 Rules.

MERGER OF PARTS I AND II OF THE AIAC ARBITRATION RULES 2018

The former 2018 Rules was comprised of three parts, respectively the AIAC Arbitration Rules in Part I, the UNCITRAL Model Law (as revised in 2013) in Part II and schedules¹ in Part III.

This disjointed system was inefficient because the UNCITRAL Model Law always had to be read in conjunction with the AIAC Rules as should there be any conflict between the two, the AIAC Rules in Part I would prevail.²

The 2021 Rules overcomes said problem by amalgamating both the UNCITRAL Model Law together with the AIAC’s arbitral rules to “*ensure a comprehensive, harmonious and coherent set of procedural rules*”. This amalgamation into a single and streamlined set in the 2021 Rules is welcomed with relish to increase accessibility to practitioners and the general public alike in interpreting and construing the rules of arbitral procedure.

Rule 8: Incorporation of the Fast Track Procedure for expedited arbitrations

Under the former 2018 Rules, the rules governing ordinary arbitrations are separate from that of expedited arbitrations which are governed by the AIAC’s Fast Track Arbitration Rules 2018 (“**2018 Fast Track Rules**”). The 2021 Rules incorporate the expedited procedural rules and does away with the need for a standalone set of rules.

¹ The Schedules in Part III set out the fees

² see Rule 1(3) of the AIAC Rules 2018

The 2021 Rules also widens the availability of such expedited arbitrations to more parties. Expedited arbitrations under the 2018 Fast Track Rules were previously limited and available only where parties had expressly agreed they will apply.³ In contrast, Rule 8.2 widens parties' options by permitting parties to make a request for the operation of the Fast Track Procedure ("**Fast Track Request**") not only (1) where parties had agreed to adopt said procedure,⁴ but also to (2) disputes wherein the amounts in dispute are less than USD500,000.00 (international arbitration) or RM2,000,000.00 (domestic arbitration);⁵ or (3) where there is exceptional urgency.⁶ A Fast Track Request shall be determined by the Director of the AIAC ("**Director**") after having regard to all relevant circumstances.⁷

Some relevant characteristics of expedited arbitrations under the proposed Fast Track Procedure under Rule 8 of the 2021 Rules are shorter and stricter timelines for delivery of the response to the notice of arbitration,⁸ appointment⁹ of and challenge¹⁰ to the arbitral tribunal, case management meeting and delivery of the first Procedural Order,¹¹ service of pleadings,¹² closure of proceedings,¹³ limitation of 5 days for oral hearings to be conducted,¹⁴ and submission of the draft Final Award for technical review to the AIAC.¹⁵

Rule 9: Appointment of the Arbitral Tribunal and Multi-Party Appointments

The 2021 Rules introduce several new provisions governing the appointment of the Arbitral Tribunal in different permutations, listed as follows:-

(1) Arbitral Tribunals consisting of three arbitrators

For arbitral tribunals consisting of three arbitrators, Rule 9.5 of the 2021 Rules makes new provisions regulating and refining the appointment procedure of the arbitral tribunal. It clarifies the parties responsible for the nomination/appointment and provides for the Director to carry out the appointments in the event parties fail to do so.

(2) Arbitral Tribunals consisting of two or an even number of arbitrators

Rule 9.6 of the 2021 Rules introduces a new provision where it is agreed that the Arbitral Tribunal shall consist of two, or any even number of arbitrators. Each party shall nominate half the number of arbitrators, failing which either party may request the Director appoint either one party's arbitrator(s) or the entire Arbitral Tribunal.

(3) Multiple parties as Claimant or Respondent

Rule 9.7 of the 2021 Rules provides for instances where there are multiple parties as claimant or respondent. Its stated purpose is to accord "*party autonomy and minimize delays in the appointment process where multiple parties are involved.*" Where the Arbitral Tribunal consists of:-

³ see Rule 1 of the AIAC Fast Track Arbitration Rules 2018

⁴ see Rule 8.2(a) of the 2021 Rules

⁵ see Rule 8.2(b) of the 2021 Rules

⁶ see Rule 8.2(c) of the 2021 Rules

⁷ see Rule 8.3 of the 2021 Rules

⁸ see Rule 8.8(a) of the 2021 Rules

⁹ see Rule 8.8(b) & (c) of the 2021 Rules

¹⁰ see Rule 8.8(d) of the 2021 Rules

¹¹ see Rule 8.8(f) of the 2021 Rules

¹² see Rule 8.8(g) to (j) of the 2021 Rules

¹³ see Rule 8.8(k) of the 2021 Rules

¹⁴ see Rule 8.8(l) of the 2021 Rules

¹⁵ see Rule 8.8(m) of the 2021 Rules

- (i) a sole arbitrator, parties are at liberty to agree or absent such agreement, request the Director to appoint the sole arbitrator;¹⁶
- (ii) two or more even number of arbitrators, the claimant(s) and respondent(s) shall nominate half the number of arbitrators;¹⁷
- (iii) two or more odd number of arbitrators, the claimant(s) and respondent(s) shall nominate an equal number of arbitrators who will together nominate a presiding arbitrator for the Director's confirmation. Failing such nomination, the Director shall appoint the presiding arbitrator.¹⁸

In scenarios (ii) and (iii) above, where such joint nomination fails, the entire Arbitral Tribunal shall be constituted by the Director and any nominated arbitrators shall be excluded from consideration and appointed arbitrators shall be released unless parties agree to retain such nominations and appointments.¹⁹

Rules 17 & 18: Provisions on Emergency Arbitrators

Schedule 3 of the 2018 Rules provided parties in need of emergency interim measures prior to the constitution of the Arbitral Tribunal an avenue to obtain such measures. Some new changes introduced under the Rules 17 and 18 of the 2021 are as follows:-

- (1) where the appointment of an emergency arbitrator is challenged under Schedule 3 Rule 8 of the 2018 Rules, the time limit of one day from the date of notification of appointment of the emergency arbitrator or date of disclosure/becoming aware of relevant circumstances, is increased to two days;²⁰
- (2) previously unavailable under the 2018 Rules, a party who submits an Emergency Arbitrator Request may also submit a Fast Track Request for an expedited arbitration pursuant to Rule 8.2 of the 2021 Rules;²¹
- (3) unlike under the 2018 Rules, the Emergency Arbitrator is empowered to conduct the proceedings *in absentia* even where a party does not participate in the proceedings;²² and
- (4) Rule 17 in Schedule 3 of the 2018 Rules provided for interim awards or order for interim measures to be made conditional upon the provision of appropriate security by the applicant. A similar provision is not present in Rule 18 of the 2021 Rules, though Rule 16.7 of the 2021 Rules already provides where a party seeking an interim measure may be required to provide appropriate security in connection with the measure.

Rule 19: Summary Determination for the early dismissal of claims

Rule 19 of the 2021 Rules provides for a process of summary determination similar to summary judgment proceedings in court litigation. Under Rule 19.1, a party may submit a request to dismiss, in whole or in part, a claim, counterclaim or defence where it is manifestly without merit, or falls outside the jurisdiction of the Arbitral Tribunal.

¹⁶ see Rule 9.7(a) of the 2021 Rules

¹⁷ see Rule 9.7(b)(i) of the 2021 Rules

¹⁸ see Rule 9.7(b)(ii) of the 2021 Rules

¹⁹ see Rule 9.7(c) of the 2021 Rules

²⁰ see Rule 17.8 of the 2021 Rules

²¹ see Rule 17.9 of the 2021 Rules

²² see Rule 18.5 of the 2021 Rules

The procedure for summary determination would be useful in disposing, at an early stage, any claims that are without merit or would otherwise fail for want of jurisdiction. This would avoid the expense and effort of completing the arbitral proceeding, only to fail after crossing the finishing line.

Rule 21: Joinder of Parties

The Rule 21 of the 2021 Rules seeks to supplement and clarify the existing provisions on the joinder of additional parties previously provided for under Rule 9 of the 2018 Rules. Some of the key changes under Rule 21 are:-

- (1) a request for additional part(ies) to be joined as a party to an arbitration may only be made prior to the filing of the statement of defence and counterclaim. If a Joinder Request is filed after the filing of the statement of defence and counterclaim, there must exist exceptional circumstances.²³ No equivalent provision existed under the 2018 Rules;
- (2) the irrevocable waiver of parties to challenge the validity/enforcement of an award on the basis the joinder of additional part(ies) to the arbitration previously in Rule 9(9) of the 2018 Rules is removed; and
- (3) the Arbitral Tribunal's power to determine its jurisdiction is not prejudiced by any decision by the Director on a Joinder Request.²⁴

Rule 22: Consolidation of Multi-Contract Disputes

Rule 22 of the 2021 Rules makes revisions to Rule 10 of the 2018 Rules, key of which are as follows:-

- (1) where consolidation is sought, the agreement of the parties to the consolidation needs to be in writing, such requirement not being necessary under the 2018 Rules;²⁵
- (2) absent in the 2018 Rules, the information and particulars to be contained in a Consolidation Request are now set out fully in Rule 22.3 of the 2021 Rules;
- (3) in deciding whether to grant the Consolidation Request, the three relevant circumstances the Director need consider under Rule 10(2) of the 2018 Rules are increased to six in Rule 22.5 of the 2021 Rules;
- (4) where two or more arbitrations are consolidated and parties are unable to agree on the appointment of the arbitrator, the Director shall, at the request of any party, re-constitute the entire Arbitral Tribunal to the exclusion and release of any arbitrators nominated or appointed and parties are deemed to have waived their right to nominate an arbitrator;²⁶
- (5) the irrevocable waiver of parties to challenge the validity/enforcement of an award on the basis of any decision to consolidate or otherwise arbitrations previously in Rule 10(5) of the 2018 Rules is removed; and
- (6) a decision to allow a Consolidation Request shall not affect the validity of any act done or order made by an arbitrator released from the arbitral proceedings pursuant to Rule 22.8.²⁷

²³ see Rule 21.1 of the 2021 Rules

²⁴ see Rule 21.7 of the 2021 Rules

²⁵ see Rule 22.1(a) of the 2021 Rules

²⁶ see Rule 22.8 of the 2021 Rules

²⁷ see Rule 22.10 of the 2021 Rules

Rule 32: Closure of Proceedings

Rule 32 of the 2021 Rules substantially supplements Article 31 of the UNCITRAL Model Law 2013 in Part II of the 2018 Rules. Key changes to the provision are:-

- (1) the Arbitral Tribunal shall declare the closure of proceedings in respect of each Final Award:-
 - (i) in cases of bifurcated arbitral proceedings and the Arbitral Tribunal intends to issue separate Final Awards; and²⁸
 - (ii) in cases involving multiple parties and several Final Awards are intended to be issued to the parties;²⁹
- (2) declarations of closure of proceedings and the date of closure shall be notified in writing to the parties and the AIAC, following which no further evidence or submissions in respect of the matters to be decided in the relevant Final Award shall be allowed;³⁰ and
- (3) in respect of the re-opening of proceedings, the power of the Arbitral Tribunal is largely the same as in Article 31(2) save that such a decision can only be made following a consultation with the Director. Where proceedings are re-opened, the Arbitral Tribunal shall re-declare the closure of proceedings.³¹

Rule 34: Technical Review of the Award

Rule 34 of the 2021 Rules introduces changes to Rule 12 in Part I of the 2018 Rules. The key changes to note are:-

- (1) extensions to the 90 days period for the Arbitral Tribunal's submission of the draft Final Award to the AIAC no longer require the consent of the parties,³² though such a decision by the Director may be made after consulting the parties;³³
- (2) where proceedings are re-opened, the time limit for submission of the draft Final Award for technical review recommences;³⁴
- (3) where previously the technical review under Rule 12(4) of the 2018 Rules identified perceived irregularities as to the form of the award or errors in the calculation of interest and costs, other irregularities to be identified under Rule 34.4 of the 2021 Rules include matters relating to procedural history, general content issues, and any clerical, typographical or computational errors;
- (4) where perceived irregularities have been identified, the Arbitral Tribunal shall resubmit the draft Final Award within 10 days from the date on which the Arbitral Tribunal is notified of such irregularities;³⁵
- (5) where parties reach a settlement after the commencement of the arbitration and request the Arbitral Tribunal to issue a Consent Award, such Consent Award shall be submitted to the AIAC for technical review;³⁶ and
- (6) technical reviews of the Award are no longer needed in the case of Interpretations and Corrections of the Award.³⁷

Rule 36: Settlement or Other Grounds for Termination

²⁸ see Rule 32.2 of the 2021 Rules

²⁹ see Rule 32.3 of the 2021 Rules

³⁰ see Rule 32.4 of the 2021 Rules

³¹ see Rules 32.5 and 32.6 of the 2021 Rules

³² parties' consent was previously required under Rule 12.3 in Part I of the 2018 Rules

³³ see Rule 34.2 of the 2021 Rules

³⁴ see Rule 34.3 of the 2021 Rules

³⁵ see Rule 34.5 of the 2021 Rules

³⁶ see Rule 36.3 of the 2021 Rules

³⁷ see Rule 34.7 of the 2021 Rules, *cf* Articles 37(2) and 38(3) of Part II of the 2018 Rules

Where parties reach a settlement after the commencement of arbitration and request for a consent award, the Arbitral Tribunal shall record the settlement in the form of a Consent Award for which no reasons need be given. However, Rule 36.1 of the 2021 Rules only allow Consent Awards to be issued provided the Arbitral Tribunal finds the dispute arbitrable and the settlement genuine and within its jurisdiction. These restrictions were not present in the 2018 Rules.

Rule 36.3 of the 2021 Rules also requires Consent Awards to be submitted to the AIAC for technical review, unlike the 2018 Rules where there was no necessity to do so.

Rules 40 & 41: Costs and Deposits

Under the 2018 Rules, it was necessary to cross-reference Rule 13 in Part I together with Article 40 of Part II in order to determine the relevant provisions relating to costs. Similarly with deposits, Rule 14 of Part I had to be read together with Article 43 of Part II of the 2018 Rules. Consolidating the relevant provisions on costs and deposits into Rules 40 and 41 of the 2021 Rules respectively is therefore desirable.

Rule 44: Confidentiality

The 2021 Rules enhance the confidentiality protections of arbitral proceedings. This is done in several ways:-

- (1) specifically extending the requirement to maintain confidentiality to the Arbitral Tribunal, Director, the AIAC, any tribunal secretary, witness or expert appointed by the Arbitral Tribunal;³⁸
- (2) requiring parties to obtain the undertaking of confidentiality from all parties involved in the arbitration, including authorized representatives, witnesses of fact, experts or service providers;³⁹ and
- (3) empowering the Arbitral Tribunal to take appropriate measures, including the issuance of orders or awards for costs or damages against any party for any breaches of confidentiality.⁴⁰

Alternatively, the 2021 Rules also offers the option to parties to waive the requirement to maintain confidentiality by way of agreement.⁴¹

Rule 44.6 of the 2021 Rules also permits, with the express written consent of the parties, the publication of arbitral Awards, subject to redaction of references to parties' names or other identifying information. This opens the path to the reporting of awards which may serve as useful, if not persuasive precedent to benefit practitioners and legal academicians alike, particularly as relates to determinations on arbitral rules, procedure and challenges.

³⁸ see Rule 44.3 of the 2021 Rules

³⁹ see Rule 44.4 of the 2021 Rules

⁴⁰ see Rule 44.5 of the 2021 Rules

⁴¹ see Rule 44.1 of the 2021 Rules

CONCLUSION

Overall, the 2021 Rules provides a satisfactory and welcome change addressing the shortcomings and lacunae under the 2018 Rules. The widening of the availability of the Fast Track Procedure to more disputes beyond those with parties' approval and the introduction of the procedure of summary determination for the early dismissal of claims clearly show that efforts are being taken to overcome the perceived problems of the costs and delays of arbitration proceedings.

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