Practice Note on Compatibility of Arbitration Clauses under the HKIAC Administered Arbitration Rules

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1. Scope of Application and Interpretation

1.1 This Practice Note on Compatibility of Arbitration Clauses under the HKIAC Administered Arbitration Rules ("**Practice Note**") sets out HKIAC's general practice in assessing the compatibility of arbitration clauses for the purpose of Article 28.1(c) (Consolidation of Arbitrations) and Article 29 (Single Arbitration under Multiple Contracts) of the 2018 and 2024 HKIAC Administered Arbitration Rules ("**HKIAC Rules**"). In addition, this Practice Note explains HKIAC's general approach to the constitution of the arbitral tribunal in the event that consolidation is granted or a single arbitration is allowed to proceed.[1]

1.2 This Practice Note guides how the HKIAC generally applies Articles 28.1(c) and 29 in practice. Examples are not exhaustive or binding. Each application under Articles 28.1(c) or 29 will be assessed with reference to the specific circumstances of the case. HKIAC will interpret the terms of the relevant HKIAC Rules as it considers appropriate. This Practice Note does not amend any provision of the HKIAC Rules.

2. Background

2.1 Article 28.1(c) and Article 29 were introduced to address situations where a dispute arises under more than one contract.

(a) Article 28.1(c) relates to consolidation of two or more pending arbitrations where the claims are made under more than one arbitration agreement.
(b) Article 29 relates to a claimant's commencement of a single arbitration in respect of claims that arise out of or in connection with more than one contract.

2.2 Article 28.1(c) provides that HKIAC can consolidate two or more arbitrations where "*the claims are made under more than one arbitration agreement, a common question of law or fact arises in all of the arbitrations, 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 are compatible*."

2.3 Article 29.1 provides: "*Subject to Article 19.5, claims arising out of or in connection with more than one contract may be made in a single arbitration, provided that:*

(a) *a common question of law or fact arises under each arbitration agreement giving rise to the arbitration; and*
(b) *the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions; and*
(c) *the arbitration agreements under which those claims are made are compatible*."

[1] Parties should also refer to HKIAC's Practice Note on Appointment of Arbitrators.

As stipulated in Article 19.5 of the Rules, HKIAC applies a *prima facie* standard of review.

2.4 In deciding applications under Articles 28.1(c) and 29, HKIAC aims to achieve maximum procedural and cost efficiency in the arbitration while ensuring that the HKIAC Rules are interpreted correctly, consistently and in accordance with the applicable law.

2.5 For HKIAC to assess whether it may order consolidation under Article 28.1(c) or whether, pursuant to Article 19.5, a single arbitration under multiple contracts has been properly commenced under Article 29, HKIAC examines all of the criteria in the relevant provision. This Practice Note focuses on the criterion on the compatibility of arbitration clauses, but the other criteria must also be satisfied, i.e.: (i) there must be a common question of law or fact; and (ii) the rights to relief claimed must be in respect of, or arise out of, the same transaction or a series of transactions.

2.6 For consolidation under Article 28.1(c), there is no requirement that the parties to the multiple arbitrations be identical, provided that all criteria under Article 28.1(c) are met.

2.7 Following the introduction of the 2018 Rules, it was no longer a requirement for commencing a single arbitration under Article 29 that all parties to the arbitration are bound by each arbitration agreement giving rise to the arbitration. Thus, claims arising out of multiple contracts that were not entered into by identical parties may also be brought in a single arbitration, provided that all of the Article 29 criteria are met.

3. Recommendations for drafting arbitration clauses in related contracts

3.1 Where a transaction involves more than one contract, parties are advised to use HKIAC's model arbitration clause in each contract and to provide for the same seat, number of arbitrators, law governing the arbitration agreement and language of the arbitration in each clause. Using HKIAC's model arbitration clause will maximise the chances that the clauses will be compatible.

3.2 In particular, parties are advised to adopt HKIAC's model arbitration clause to determine how the arbitral tribunal is constituted. As the model clause is silent on the appointment mechanism, the tribunal will be constituted in accordance with the appointment mechanism under the HKIAC Rules (see Articles 7 and 8). This is preferable to stating in the contract that specific parties shall have rights to designate arbitrators, which may give rise to disputes about whether the clauses are compatible.

3.3 If parties choose not to adopt the model clause, it is important to draft the arbitration clauses carefully, considering the compatibility of all aspects of the arbitration clauses across all the contracts (see Section 4 below). Parties should pay particular attention to any bespoke mechanisms for appointing the arbitrators, as these may present a higher risk that the arbitration clauses will be deemed incompatible.

4. General approach in assessing compatibility of arbitration agreements

4.1 To be compatible, the arbitration agreements need not be identical, but any differences must be surmountable by the parties, the tribunal and/or HKIAC.

4.2 When making decisions under Articles 28 and 29, HKIAC adopts a pragmatic approach, bearing in mind its objective of facilitating fair and speedy resolution of the dispute without unnecessary expense. HKIAC recognises that an agreement to adopt the HKIAC Rules generally indicates that the parties have agreed to the possibility that claims arising out of multiple contracts will be heard in a consolidated or single arbitration, assuming the criteria in Article 28 or 29 of the HKIAC Rules are satisfied. HKIAC considers all relevant factors, including but not limited to:

(i) whether, given the differences in the arbitration agreements, it is practically feasible and procedurally efficient for the claims to be heard in a consolidated or single arbitration;

(ii) whether the differences in the arbitration agreements undermine the consent of the parties, through their agreement to adopt the HKIAC Rules, to the possibility of determining claims under multiple contracts in a consolidated or single arbitration; and

(iii) whether permitting consolidation or a single arbitration would change the parties' agreement with respect to the arbitral procedure in a way that might leave the award open to challenge in the future.

5. Examples of incompatible and compatible features in arbitration clauses

5.1 Below are examples of situations in which HKIAC has determined that the arbitration agreements were incompatible. These examples are provided for illustration only, and the list below is not exhaustive. HKIAC will consider each application under Article 28.1(c) and Article 29 individually and on its merits.

(a) One contract provided for a sole arbitrator, whereas the other two contracts provided for three arbitrators. HKIAC considered the arbitration clauses to be clearly incompatible.

(b) One contract provided for Chinese to be the language of the arbitration, and the other provided for English. HKIAC recognised that both requirements could be respected in a single proceeding if the arbitration were run bilingually. However, considering that this would increase the costs of the arbitration and reduce the pool of qualified arbitrators, HKIAC decided that the different language requirements rendered the arbitration clauses incompatible.

(c) Two contracts provided that HKIAC shall select the presiding arbitrator, whereas the third contract was silent. This meant that under the third contract, the two co-arbitrators would have 30 days to designate the presiding arbitrator pursuant to the

HKIAC Rules, and HKIAC would only appoint the presiding arbitrator if they failed to designate. There was also a clause in the first two contracts stating that, to the extent the HKIAC Rules conflict with the arbitration agreements, including the provisions concerning the appointment of arbitrators, the arbitration agreements shall prevail. Despite the possibility for the differences to be surmounted by either: (i) HKIAC appointing the presiding arbitrator designated by the co-arbitrators under the third contract to also act as the presiding arbitrator under the first two contracts; or (ii) the co-arbitrators in the third contract designating the same presiding arbitrator as that already appointed by HKIAC under the first two contracts, HKIAC determined that the arbitration clauses were incompatible. The key consideration was that finding compatibility may have *de facto* deprived HKIAC or the co-arbitrators of the right to appoint (in the case of HKIAC) or designate (in the case of the co-arbitrators), thereby running contrary to the agreed mechanism for the selection of the presiding arbitrator under one or more of the three contracts.

5.2 In the following scenarios, HKIAC found the arbitration agreements to be compatible despite the arbitration agreements not being identical:

(a) One arbitration agreement was expressly governed by English law and the other two arbitration agreements were expressly governed by Hong Kong law. HKIAC determined that the arbitration agreements were compatible as the two systems of law are sufficiently aligned to make it practically possible to run a single arbitration.

(b) The claimant commenced a single arbitration under multiple contracts, in which the underlying arbitration clauses were largely identical but provided different respondents with the power to designate the second co-arbitrator. All the respondents subsequently jointly designated the second co-arbitrator pursuant to the arbitration clauses. HKIAC concluded that the difference in the procedures for appointing arbitrators under the arbitration clauses was surmounted by the respondents themselves, such that the arbitration clauses could be deemed compatible.

(c) Claimant commenced a single arbitration under two contracts, with one contract entered into by Claimant and Respondent A, and the other contract entered into by Claimant and Respondent B. The underlying arbitration clauses provided different specified respondents with the power to designate the second co-arbitrator within a 30-day time limit, failing which HKIAC would make the appointment. All of the respondents were not participating and therefore all missed the time limit to designate the second co-arbitrator. Given the alignment of the respondents' interests, HKIAC considered the likelihood of the same second co-arbitrator being designated by the respondents to be high, and found that the arbitration clauses were compatible as it would not have made a practical difference to the identity of the second co-arbitrator if there had been two arbitrations or a single arbitration under the two contracts.

5.3 Parties should consider the wording of the arbitration agreements and the circumstances of each case. Factors such as whether all parties are willing to cooperate to surmount any differences in the clauses, or whether any party is not participating in the process (and hence, not objecting to the consolidation or commencement of a single arbitration), may result in different outcomes, even in scenarios similar to the above examples.

6. General approach to the appointment of arbitrators in multiple contract scenarios

6.1 Article 28.8 (Consolidation of Arbitrations) provides that "*where HKIAC decides to consolidate two or more arbitrations, the parties to all such arbitrations shall be deemed to have waived their right to designate an arbitrator, and HKIAC may revoke any confirmation or appointment of an arbitrator. HKIAC shall appoint the arbitral tribunal in respect of the consolidated proceedings with or without regard to any party's designation*".

6.2 Under the 2024 Rules, Article 29.2 (Single Arbitration under Multiple Contracts) similarly provides that "*where HKIAC decides pursuant to Article 19.5 that the arbitration has been properly commenced under this Article 29, the parties shall be deemed to have waived their rights to designate an arbitrator. HKIAC shall appoint the arbitral tribunal with or without regard to any party's designation*".

6.3 Given the primacy of party autonomy, in practice unless there are justifiable exceptions, HKIAC will appoint the arbitrator(s) that the parties designate. Exceptions may be required in the interests of ensuring the integrity of the proceedings and equal treatment of the parties. Similar to HKIAC's considerations in exercising its confirmatory powers under Article 9, HKIAC may not be able to appoint a party's designated arbitrator if HKIAC considers that the designated arbitrator may not be able to discharge his/her duty to be impartial, independent and available.

6.4 For example, HKIAC was unable to maintain a party's choice of arbitrator when the arbitrator had made a disclosure which fell under the Waivable Red List of the IBA Guidelines on Conflicts of Interest, and the other side objected to the appointment. The other exception is where there is a reasonable apprehension of unequal treatment of the parties in the appointment process, as further illustrated at paragraphs 6.5(b)and 6.6(b). This was the rationale behind the introduction of Articles 28.8 and 29.2.

6.5 Where HKIAC orders consolidation, it will generally appoint the arbitral tribunal in respect of the consolidated proceedings as follows:

(a) ***Where the parties to the original arbitrations which are consolidated are identical.*** If any arbitrators have been designated by the parties in any of the original arbitrations, the parties will be asked whether they wish to maintain their respective designations in the consolidated arbitration. If the parties wish to maintain their designations, HKIAC's default approach is to appoint that designated arbitrator or arbitrators.

(b) ***Where the parties to the original arbitrations which are consolidated are not identical*.** As noted at paragraph 2.6 above, it is possible to consolidate two or more arbitrations even where the parties are not identical. In such cases, it is essential to ensure that all the parties to the consolidated proceedings enjoy equal treatment in relation to the appointment of the tribunal. If parties on the same side (i.e. Claimant side or Respondent side) all agree on the same arbitrator (or to maintain the original designation of the same arbitrator), HKIAC's default approach is to appoint the preferred candidate. However, if parties on the same side fail to agree on an arbitrator, HKIAC will appoint another arbitrator. In making the appointment, HKIAC will take into account the parties' views and proposed criteria for the appointment, based on the circumstances of the case. Where appropriate, such as where there is a reasonable apprehension of unequal treatment of the parties in the appointment process, HKIAC may also appoint the entire arbitral tribunal without regard to any party's designation.

6.6 Where HKIAC decides that a single arbitration has been properly commenced under Article 29, it will generally appoint the arbitral tribunal in respect of the single arbitration as follows:

(a) ***Where the parties to the multiple contracts are identical.*** HKIAC's default approach is to appoint the arbitrator or arbitrators designated by the parties.

(b) ***Where the parties to the multiple contracts are not identical.*** As noted at paragraph 2.7 above, it is possible to commence a single arbitration even where the multiple contracts were not entered into by identical parties. In such cases, if all the parties on the same side (i.e. Claimant side or Respondent side) make a joint designation, HKIAC's default approach is to appoint the jointly designated candidate. If the parties on the same side designate different candidates, HKIAC will appoint another candidate. In making the appointment, HKIAC will take into account the parties' views and proposed criteria for the appointment. As noted above in 6.5(b) and in appropriate circumstances, HKIAC may also appoint the entire arbitral tribunal without regard to any party's designation.

6.7 If the consolidated or single arbitration under multiple contracts involves non-participating parties, HKIAC will invite the claimant(s) and the respondent(s) to respectively designate an arbitrator. Where a joint designation is made, HKIAC's default approach is to appoint the jointly designated arbitrator. If the claimant(s) or the respondent(s) fail to make a joint designation (either because a party is not participating in the arbitration or for any other reason), HKIAC will make the appointment, taking into account views of the participating claimant(s) or respondent(s) (as applicable) and their proposed criteria or candidates for the appointment. In most cases, this will result in HKIAC appointing the candidate designated by the participating parties.

6.8 For example, in a scenario where (i) Claimant commences a single arbitration against Respondents A, B and C under two contracts, one entered into with Respondents A and B, and the other entered into with Respondents A, B and C; and (ii) Respondents A and B are

participating but Respondent C is not, once HKIAC decides that the single arbitration has been properly commenced, it will invite Respondents A, B and C to make a joint designation of a co-arbitrator. The Respondents will be unable to do so due to Respondent C's non-participation in the arbitration. However, if the participating Respondents, i.e. Respondents A and B, identify the same candidate, HKIAC will generally appoint the candidate jointly identified by Respondents A and B.