

L.N. 190 of 2002**SECURITIES AND FUTURES (LEVERAGED FOREIGN EXCHANGE TRADING) (ARBITRATION) RULES****CONTENTS**

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SECURITIES AND FUTURES (LEVERAGED FOREIGN EXCHANGE TRADING) (ARBITRATION) RULES

(Made by the Securities and Futures Commission under section 118(2) of the Securities and Futures Ordinance (Cap. 571))

PART 1

PRELIMINARY

1. Commencement

These Rules shall come into operation on the day appointed for the commencement of the Securities and Futures Ordinance (Cap. 571).

2. Interpretation

In these Rules, unless the context otherwise requires—

“arbitration panel” (仲裁小組) means the arbitration panel established by section 4;

“arbitrator” (仲裁人) means an arbitrator appointed under any provision of these Rules;

“chairman” (主席) means the chairman of the arbitration panel;

“claimant” (申索人), in relation to a dispute being referred to arbitration, means the party making the claim;

“clerk” (書記) means the clerk to the arbitration panel referred to in section 4(6);

“client contract” (客戶合約) means any contract or arrangement between a licensed corporation and its client, which contains terms on which the licensed corporation is to provide leveraged foreign exchange trading services;

“deputy chairman” (副主席) means the deputy chairman of the arbitration panel;

“dispute” (爭議) means any dispute between a licensed corporation and a client regarding or touching upon any matter concerning the carrying on of leveraged foreign exchange trading;

“HKIAC” (仲裁中心) means the Hong Kong International Arbitration Centre;

“member” (成員) means a member of the arbitration panel;

“party” (當事一方) means a party to a dispute;

“respondent” (答辯人), in relation to a dispute being referred to arbitration, means the party against whom the claim is made.

3. Purpose of these Rules

These Rules govern the resolution of any dispute that is required to be settled by arbitration pursuant to section 118(1)(b) of the Ordinance.

4. Constitution of arbitration panel

(1) For the purposes of resolving disputes in accordance with these Rules, there is established a panel to be known as the arbitration panel.

(2) The arbitration panel consists of a chairman, a deputy chairman and other members, to be appointed by the Financial Secretary.

(3) Directors and employees of the Commission are not eligible for appointment as members.

(4) The Financial Secretary may determine the term of office of a member, but a member may resign his office at any time by a notice in writing sent to the Financial Secretary.

(5) If the office of chairman is vacant or the chairman is unable to act as chairman due to illness, other incapacity or absence from Hong Kong, the deputy chairman or failing him, such other member as the Financial Secretary may designate, shall act as chairman in his place.

(6) The arbitration panel shall have a clerk, who shall be appointed by the Commission.

(7) The clerk shall prepare and maintain a list of members, which shall be made available for public inspection at all reasonable times free of charge.

PART 2

RULES RELATING TO COMMENCEMENT OF ARBITRATION PROCEEDINGS

5. Commencement of proceedings

(1) Subject to subsection (3), a client may send a notice in writing, signed by him or on his behalf, to the licensed corporation with which he has a dispute requiring the dispute to be settled by arbitration in accordance with these Rules.

(2) Where the client has not sent a notice in writing under subsection (1)—

- (a) the licensed corporation may send to the client with whom it has a dispute a notice in writing (containing the particulars described in subsection (7)(b), (d) and (e)), signed by it or on its behalf, referring the client to his right to require the dispute to be settled by arbitration in accordance with these Rules; and

(b) the client may send to the licensed corporation a notice in writing, signed by him or on his behalf, within 14 days after the receipt of the notice in writing under paragraph (a), requiring the dispute to be settled by arbitration in accordance with these Rules.

(3) Where a licensed corporation has sent to a client a notice in writing under subsection (2)(a) and the client has not sent to the licensed corporation a notice in writing under subsection (2)(b) within the time specified in subsection (2)(b), the client is not entitled to require the dispute to be settled by arbitration in accordance with these Rules.

(4) Subject to subsection (5), despite court proceedings having commenced in respect of a dispute, the client may require that the dispute be settled by arbitration, by sending a notice in writing signed by him or on his behalf to the licensed corporation to that effect within 14 days after the commencement of the court proceedings.

(5) Where a licensed corporation has sent to a client a notice in writing under subsection (2)(a) and the client has not sent to the licensed corporation a notice in writing under subsection (2)(b) within the time specified in subsection (2)(b), subsection (4) does not apply to that dispute.

(6) Arbitration proceedings are deemed to commence on the date on which the notice in writing under subsection (1) or (4), or where applicable, the notice in writing under subsection (2)(b), is sent to the licensed corporation in accordance with section 33.

(7) A notice in writing sent under subsection (1) or (4) shall include—

- (a) a demand that the dispute be referred to arbitration;
- (b) the names and addresses of the parties;
- (c) a reference to the arbitration clause that the client is relying on, where applicable;
- (d) a reference to the client contract; and
- (e) a brief summary of the dispute, the remedy sought and an indication of the amount of money involved.

(8) Any notice in writing sent under this section by a body corporate or a partnership shall be completed and signed on its behalf by one of its directors or partners (as the case may be).

(9) A party who has sent a notice in writing under this section shall send a copy of the notice to the clerk for filing as soon as reasonably practicable.

(10) During the course of an arbitration under these Rules, neither party may pursue any suit, action or proceedings against the other in respect of the dispute referred to arbitration under these Rules.

6. Initial deposit

(1) When a copy of the notice in writing under section 5(1), (2)(a) or (4) is sent to the clerk for filing, the party sending the notice shall deposit with the clerk a sum of \$1,000.

(2) Where a licensed corporation has sent to a client a notice in writing under section 5(2)(a) and the client has not sent to the licensed corporation a notice in writing under section 5(2)(b) within the time specified in section 5(2)(b), the clerk shall, as soon as reasonably practicable, arrange to return to the licensed corporation the deposit that has been paid by the licensed corporation after deducting any amount reasonably incurred by the arbitration panel.

7. Representation

(1) A party may conduct arbitration proceedings in person or be represented by any other person.

(2) Where a party is a body corporate or a partnership, it may be represented by a director or a partner (as the case may be) or any other person authorized by it.

(3) A party shall send the name and address of its representative (if any) or other person (if any) authorized by it under subsection (1) or (2) (as the case may be) to the other party, with a copy sent to the clerk for filing, as soon as reasonably practicable after they have been decided on.

(4) A party shall notify the clerk and the other party immediately of any change of its representative or person authorized by it, or any change in the name or address of the representative or person authorized by it.

8. Oaths and affirmation

All evidence shall be given under oath or affirmation.

PART 3

THE ARBITRATOR

9. Selection of arbitrator

(1) The chairman shall appoint from the arbitration panel a tribunal consisting of a single arbitrator to conduct the arbitration as soon as reasonably practicable after—

- (a) the arbitration has commenced as provided in section 5(6); and
- (b) a deposit has been received by the clerk in accordance with section 6(1).

(2) The parties shall provide such information as may be required by the chairman to assist him in the selection of an arbitrator in respect of their arbitration.

(3) The chairman has full discretion in the selection of an arbitrator under these Rules.

(4) The chairman shall notify the parties of his decision on the selection of an arbitrator in respect of their arbitration as soon as reasonably practicable.

10. Challenge of arbitrator

(1) A party may challenge an arbitrator if circumstances exist to give rise to justifiable doubts as to the impartiality or independence of the arbitrator.

(2) A party challenging the appointment of an arbitrator shall send a notice of challenge to the clerk setting out the reasons for such challenge, with a copy to the other party, within 14 days of the notification of such appointment or, if later, of his becoming aware of the circumstances giving rise to justifiable doubts as to the impartiality or independence of the arbitrator.

(3) If the other party concurs with the challenge or the challenged arbitrator withdraws from the appointment, the challenged arbitrator's office falls vacant and section 9 applies for the purposes of selecting a new arbitrator. In neither case does this imply acceptance of the validity of the grounds for the challenge.

(4) Where the other party does not concur with the challenge or the challenged arbitrator does not withdraw from the appointment, the chairman shall make a decision on the challenge.

(5) If the chairman upholds the challenge, section 9 applies for the purposes of selecting a new arbitrator.

11. Replacement of arbitrator

(1) Section 9 applies for the purposes of selecting a new arbitrator if, during the course of an arbitration, the arbitrator—

(a) has died;

(b) has resigned;

(c) is absent from Hong Kong; or

(d) is unable to act as arbitrator due to illness or other incapacity.

(2) If a new arbitrator is appointed, the hearing of the dispute shall start afresh unless both parties and the new arbitrator agree to continue with the proceedings on the basis of notes of proceedings taken at any such hearing prior to the replacement of the arbitrator.

12. Remuneration of arbitrator

The arbitrator is to be paid such remuneration and allowances as the Financial Secretary may determine.

PART 4

RULES RELATING TO ARBITRATION PROCEEDINGS

13. Conduct of proceedings

(1) Despite other provisions of these Rules, the arbitrator—

- (a) may conduct the arbitration in such manner as he considers appropriate and has the power to adopt, whenever possible, a simplified or expedited procedure and to conduct proceedings to ensure the just, expeditious, economical and final determination of the dispute; and
- (b) shall ensure that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity to present that party's case.

(2) The arbitrator may, with the consent of the parties, decide whether to hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument, or to conduct proceedings only on the basis of documents and other materials.

(3) All documents or information to be supplied to an arbitrator shall be sent to the clerk for transmission to the arbitrator, save where documents or information are submitted during a hearing.

(4) All documents and information to be supplied to an arbitrator shall be sent to the clerk as follows—

- (a) where a party submits documents or information during a hearing, one copy shall be sent to the clerk by that party immediately after the hearing; and
- (b) in all other cases, a party shall supply 2 sets of all documents or information to the clerk, except where they have been sent to the clerk by facsimile or electronic mail transmission in accordance with section 33.

(5) The arbitrator may appoint any legally qualified person to advise him on any matter relating to the arbitration.

(6) Without prejudice to subsection (5), the arbitrator may seek advice from any representative of the HKIAC who is attending the proceedings in accordance with section 16 on any matter relating to the practice and procedure of an arbitration.

14. Notes of proceedings

(1) Notes of proceedings before an arbitrator may be taken by a person appointed as a note-taker by the arbitrator and any party is entitled to inspect and take copies of the transcript of such notes on payment of the note-taker's charges.

(2) If no note-taker is appointed, the arbitrator shall take a note of the proceedings and any party is entitled to inspect and take copies of such note.

15. Designation of date, time and place of arbitration

(1) The arbitrator shall designate a date, time and place in Hong Kong for the arbitration to take place.

(2) Notice of the date, time and place for the initial hearing shall be sent by the clerk to the parties, in accordance with section 33, at least 21 days prior to the date fixed for the hearing and notice for each hearing thereafter shall be given as the arbitrator may determine.

(3) The arbitrator may conduct hearings, hear witnesses and hold meetings for consultation at any place he considers appropriate, having regard to the circumstances of the arbitration.

16. Attendance of representative of HKIAC

A representative of the HKIAC may be present throughout the proceedings.

17. Statement of claim

(1) Unless a statement of claim was contained in or attached to the notice in writing requiring settlement of a dispute by arbitration, the claimant shall send his statement of claim to the respondent and to the arbitrator in accordance with sections 13(3) and (4) and 33, within 14 days from the date the arbitration is deemed to have commenced under section 5(6).

(2) A copy of the relevant client contract shall be annexed or otherwise attached to the statement of claim.

(3) The statement of claim shall include the following particulars—

- (a) the names and addresses of the parties;
- (b) a statement of the facts supporting the claim;
- (c) the points at issue; and
- (d) the remedy sought.

(4) The claimant may—

- (a) annex or otherwise attach to the statement of claim all documents that the claimant considers relevant; or

- (b) add a reference to the documents or other evidence that the claimant intends to submit.

18. Statement of defence or counterclaim

(1) The respondent shall send a statement of defence to the claimant and to the arbitrator in accordance with sections 13(3) and (4) and 33, within 14 days from the date on which the statement of claim is sent to the respondent.

(2) The statement of defence shall reply to the particulars of the statement of claim referred to in section 17(3)(b), (c) and (d).

(3) The respondent may—

- (a) annex or otherwise attach to the statement of defence documents on which the respondent relies in defence; or
- (b) add a reference to the documents or other evidence that the respondent intends to submit.

(4) In the statement of defence, or at a later stage in the arbitration proceedings if the arbitrator decides that the delay is justified under the circumstances, the respondent may—

- (a) make a counterclaim arising out of the same dispute; or
- (b) rely on a claim arising out of that dispute for the purpose of a set-off.

(5) Section 17 applies to a counterclaim and a claim relied on for the purpose of a set-off in the same manner as it applies to a statement of claim.

19. Amendments and further statements

(1) During the course of an arbitration, a party may amend or supplement that party's claim, defence or counterclaim except where the arbitrator considers it inappropriate to allow this, having regard to—

- (a) any delay involved;
- (b) the likelihood of prejudice to the other party; or
- (c) any other relevant circumstances.

(2) The arbitrator may require or accept amendment to or supplement of a party's claim, defence or counterclaim, and shall fix the period for the sending of such amendment or supplement.

20. Time period for sending further statements

The period fixed by the arbitrator for the sending of any amendments or supplements under section 19, may not exceed 21 days from the date of such amendments or supplements, unless an extension is requested by a party and the arbitrator is satisfied that such an extension is justified in the circumstances.

21. Evidence

(1) Each party has the burden of proving the facts relied on to support that party's claim, defence or counterclaim.

(2) The arbitrator—

- (a) shall determine the admissibility, materiality, relevance and weight of any evidence; and
- (b) may admit evidence irrespective of the rules governing the admissibility of evidence in court if, in his opinion, the interest of justice is served by so doing.

(3) If the arbitrator considers it appropriate, he may require a party to send to him and to the other party, within a period stipulated by him, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in that party's statement.

22. Hearing of witnesses

(1) If any witness is to be heard, each party shall send a notice to the arbitrator and to the other party at least 14 days before the hearing specifying—

- (a) the name and address of the witness;
- (b) the subject matter of the witness's testimony or, if the arbitrator so requires, a transcript of the witness's statement or expert report; and
- (c) the language in which the witness will give his testimony.

(2) The arbitrator may arrange for translations or recordings to be made at a hearing as he considers appropriate.

(3) Hearings shall be held in public unless the arbitrator decides otherwise with the consent of the parties.

(4) The arbitrator may require the retirement of any witness during the testimony of any other witness.

(5) Evidence of a witness may also be presented in the form of a written statement signed by him.

(6) The arbitrator is free to determine the manner in which a witness is examined.

23. Default

(1) If, within the period fixed by the arbitrator, the claimant fails to file a statement of claim without showing sufficient cause for such failure, the arbitrator may make an order for the termination of the arbitration proceedings in accordance with section 27.

(2) If, within the period fixed by the arbitrator, the respondent fails to file a statement of defence without showing sufficient cause for such failure, the arbitrator may, as he thinks fit, make an order in favour of the claimant or make an order for the termination of the arbitration proceedings in accordance with section 27.

(3) If one of the parties, duly notified under these Rules, fails to appear at a hearing or fails to produce any document in that party's possession when required to do so, without valid excuse, the arbitrator may proceed with the arbitration and such proceedings are deemed to have been conducted in accordance with section 13(1).

24. Consolidation of proceedings

(1) Where in relation to 2 or more arbitration proceedings it appears to the chairman—

- (a) that a common question of law or fact arises in both or all of them;
- (b) that the claims arise out of the same transaction or series of transactions; or
- (c) that it is desirable to make an order under this section for any other reason,

the chairman may—

- (d) order those arbitration proceedings—
 - (i) to be consolidated on such terms as he thinks just; or
 - (ii) to be heard immediately after one another; or
- (e) order any of those arbitration proceedings to be stayed until after the determination of any other of them.

(2) Subject to section 10, the chairman may select another arbitrator to conduct the arbitration proceedings consolidated under subsection (1)(d)(i).

(3) Where the chairman selects an arbitrator pursuant to subsection (2), any prior appointment of an arbitrator for any of the arbitration proceedings being consolidated ceases to have effect.

25. Jurisdiction

(1) The arbitrator has the power to rule on any objection by either party to his jurisdiction to hear the dispute.

(2) No objection to the arbitrator's jurisdiction may be raised after the sending of the statement of defence or, with respect to a counterclaim, after the sending of the reply to the counterclaim.

(3) The arbitrator may rule on an objection to his jurisdiction as a preliminary question or may proceed with the arbitration and rule on such an objection in his final award.

(4) Where applicable, an arbitration clause is treated as being independent of the other terms of a client contract and any decision made by the arbitrator or a court of law declaring that the client contract is void does not of itself invalidate the arbitration clause.

PART 5

RULES RELATING TO TERMINATION OF ARBITRATION PROCEEDINGS

26. Settlement

(1) If, before the award is made, the parties agree on a settlement of the dispute, the arbitrator shall record the settlement in the form of an arbitration award on agreed terms.

(2) The arbitrator is not obliged to give reasons for an award made under subsection (1).

(3) An award made under subsection (1) shall be signed by the arbitrator, sent to the parties and lodged with the clerk for filing.

(4) An award made under subsection (1) is final and binding on the parties.

27. Termination of proceedings

(1) If, before the award is made, the continuation of the arbitration proceedings becomes unnecessary or impossible for any reason other than by way of an agreement to settle between the parties, the arbitrator may, either on his own initiative or at the request of a party, make an order for the termination of the arbitration proceedings.

(2) The arbitrator shall state in the order the reasons for the termination.

(3) An order made under subsection (1) shall be signed by the arbitrator, sent to the parties and lodged with the clerk for filing.

(4) An order made under subsection (1) is final and binding on the parties.

28. Form and effect of awards

(1) An award shall—

(a) give reasons for the decision;

(b) be signed by the arbitrator; and

(c) contain the date on which and the place where it was made.

(2) In addition to making a final award, the arbitrator has the power to make interim, interlocutory or partial awards during the course of an arbitration.

(3) An award made by the arbitrator under this section shall be sent to the parties and lodged with the clerk for filing.

(4) An award made by the arbitrator shall be made public but, where the arbitrator considers it appropriate to do so, this may be done in a manner that preserves the anonymity of the parties.

(5) Despite subsection (4), the Commission—

(a) shall be notified by the clerk of any award made in respect of a licensed corporation; and

(b) may make use of any findings made by an arbitrator for the purposes of performing its functions under the Ordinance including, but without limitation, assessing whether the licensed corporation is a fit and proper person to be so licensed.

(6) An award made by the arbitrator is final and binding on the parties.

29. Correction of awards

(1) Within 14 days after the receipt of the award, either party may, with notice to the other party, request the arbitrator to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature.

(2) If the arbitrator considers the request made under subsection (1) to be justified, he shall make the correction within 14 days after the receipt of the request.

(3) The arbitrator may, on his own initiative, correct any error of the type referred to in subsection (1) within 28 days after the date of the award.

(4) Section 28 applies in relation to such corrections.

30. Additional awards

(1) Within 14 days after the receipt of an award, either party may, with notice to the other party, request the arbitrator to make an additional award as to claims presented during the course of the arbitration but omitted from the award.

(2) If the arbitrator considers the request for an additional award to be justified and considers that the omission can be rectified without any further evidence, he may make the additional award within 14 days after the receipt of the request.

(3) Section 28 applies in relation to such additional award.

31. Costs

(1) The arbitrator shall make an order for costs whenever he makes an arbitration award, including an award on agreed terms, and an order for the termination of the arbitration proceedings.

(2) Subject to subsection (3), the costs of an arbitration are to be borne by the unsuccessful party.

(3) The arbitrator may apportion costs between the parties if he considers that apportionment is reasonable in the circumstances.

(4) The order for costs shall specify—

(a) the sum to be paid, which shall include—

(i) the amount of fees of the arbitrator;

(ii) costs for legal advice or for other assistance such as translation, oral interpretation and note-taking required by the arbitrator;

(iii) travel and other expenses of witnesses to the extent allowed by the arbitrator;

(iv) costs of the successful party, including the costs for legal representation, to the extent allowed by the arbitrator; and

(v) the amount of administrative or other costs incurred by the arbitrator and the arbitration panel;

(b) the parties to and by whom payment shall be made; and

(c) the time limit for making payment.

(5) A party against whom such an order is made shall make payment in accordance with the order.

32. Deposits of costs

(1) At any time during the arbitration proceedings, the arbitrator may require any party to deposit with the clerk such sum or sums to defray the expenses of the arbitration if the arbitrator considers it expedient to do so in the circumstances.

(2) In determining the amount of any deposit, the arbitrator shall take into account the amount in dispute, the complexity of the subject matter, the costs incurred or to be incurred by the arbitrator, and other relevant circumstances of the case.

(3) If payment of the required deposit is not made by the relevant party within 14 days after the receipt of the requirement, the arbitrator may make an order for the termination of the arbitration proceedings in accordance with section 27.

(4) After the termination of proceedings, with the assistance of the arbitrator, the clerk—

- (a) shall render an account to the parties of the total deposits received under these Rules; and
- (b) after all the costs required to be borne by a party have been paid, shall return any unexpended balance of the party's portion of the deposits to that party.

PART 6

MISCELLANEOUS

33. Communication and notice period

(1) Any challenge, notice, order, award, or other document (however described) sent or lodged (however described) to or with a party or the clerk under these Rules may be sent or lodged in accordance with the provisions of section 400 of the Ordinance.

- (2) For the purposes of calculating a period of time under these Rules—
- (a) the period begins to run on the day following the day when the document is sent or lodged;
 - (b) if the last day of the period is a public holiday or a day on which banks are not generally open for business, the period is extended until the first business day that follows; and
 - (c) public holidays or days on which banks are not generally open for business occurring during the running of the period of time are included in calculating the period.

34. Interest

The arbitrator may order the payment of interest on any damages or costs, including the payment of compound interest if appropriate in the circumstances.

35. Exclusion of liability

None of the following persons is liable to any party for any act or omission in connection with any arbitration conducted under these Rules unless he is found to have been fraudulent or dishonest—

- (a) the chairman;
- (b) the deputy chairman;
- (c) a member;
- (d) the arbitrator;
- (e) the clerk;

- (f) a representative of the HKIAC who attends arbitration proceedings in accordance with section 16.

36. Destruction of documents

The clerk and the arbitrator may destroy any document relating to an arbitration sent to them under these Rules after the expiry of a period of one year after the later of the following—

- (a) the last correspondence relating to the arbitration received by the clerk;
- (b) the making of an arbitration award by the arbitrator;
- (c) the making of an order for the termination of the arbitration proceedings.

37. Confidentiality

(1) The arbitrator may in his discretion determine that certain information relating to the arbitration is to be kept confidential.

(2) Subject to section 28(5), such confidential information may not be disclosed by any person without the written consent of the arbitrator.

38. Applicable law

(1) Hong Kong law applies to the arbitration proceedings.

(2) The arbitrator shall take into account the trade practice applicable to the transaction.

(3) Pursuant to section 2AB of the Arbitration Ordinance (Cap. 341), the provisions of that Ordinance apply to an arbitration conducted under these Rules, save for those matters that have been specifically provided for in these Rules.

39. Miscellaneous

(1) The arbitrator, or if the arbitration proceedings have not been commenced, the chairman, may modify the requirements of these Rules in relation to the sending of documents or the length of time periods in particular cases where, in his opinion, it is expedient to do so in the interest of justice.

(2) A party who knows or reasonably ought to know that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance is deemed to have waived his right to object.

Andrew Len Tao SHENG
Chairman,
Securities and Futures Commission

25 November 2002

Explanatory Note

These Rules are made by the Securities and Futures Commission under section 118(2) of the Securities and Futures Ordinance (Cap. 571). They prescribe for the purposes of section 118(1)(b) of the Ordinance the procedure for the settlement by arbitration of any dispute between a licensed corporation and a client in relation to leveraged foreign exchange trading.