International Arbitration

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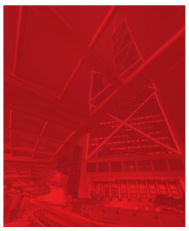
INTERNATIONAL ARBITRATION QUARTERLY



The CIETAC split: some implications and recommendations

Almost two years have now passed since the China International Economic and Trade Arbitration Commission (CIETAC) brought into effect the CIETAC Arbitration Rules (2012). The result was a schism within CIETAC which has potentially significant consequences for parties arbitrating in China.

Background

The new rules were designed to bring CIETAC's rules and procedures into greater conformity with those of other major international arbitration providers, to increase party autonomy and to reduce expense. However, they also considerably strengthened the power of CIETAC, which is based in Beijing, at the perceived expense of its four sub-committees within China: Shanghai (CIETAC Shanghai), Shenzhen (CIETAC South China), Tianjin and Chongqing.

CIETAC Shanghai and CIETAC South China vehemently opposed the new rules, in particular because new Article 2(6) provided that, in the absence of a specific nomination of a named sub-commission by the parties, the Secretariat of CIETAC in Beijing would accept an arbitration application and administer the case. It appeared that they were concerned that this would reduce the number of cases referred to the CIETAC sub-commissions by diverting them to Beijing.

On 1 May 2012, CIETAC Shanghai declared itself an independent arbitral institution. CIETAC South China followed suit shortly thereafter. In response, CIETAC suspended its authorisation to both sub-commissions to accept and administer CIETAC arbitrations. It announced that parties who had agreed to commence arbitration in CIETAC Shanghai or CIETAC South China would still be able to hold their hearings in the place agreed, but would have to submit their applications to CIETAC Beijing to enable the CIETAC Secretariat to administer the arbitration. On 22 October 2012, CIETAC South China changed its name

to the South China International Economic and Trade Arbitration Commission (SCIETAC or 华南国际经济贸易仲裁委员会); its second official name is the Shenzhen Court of International Arbitration (SCIA or 深圳国际仲裁院).

On 16 April 2013, CIETAC Shanghai was renamed the Shanghai International Economic and Trade Arbitration Commission (SIETAC or 上海国际经济贸易仲裁委员会); its second official name is the Shanghai International Arbitration Centre (SHIAC or 上海国际仲裁中心).

Both the Shenzhen and Shanghai municipal governments have separately confirmed that SCIA and SHIAC have the right to accept and administer arbitration cases. SCIA and SHIAC have now published and implemented their own rules and have convened new panels of arbitrators.

CIETAC has since established new sub-commissions in Shanghai and Shenzhen.

Implications

A party contemplating arbitration under a clause providing for CIETAC arbitration administered by "CIETAC Shanghai" or "CIETAC Shenzhen/South China" could encounter difficulties. Such clauses could now be interpreted as referring to either the CIETAC sub-commissions or the break-away commissions, SHIAC and SCIA.

It is easy to anticipate that parties might disagree about which commission is intended, or even that a party might argue that under Article 18 of the Chinese Arbitration Law, the arbitral agreement is null and void because it *"contains no or unclear provisions concerning the matters for arbitration or the arbitration commission".* Our view is that such a challenge is unlikely to succeed: neither SHIAC nor SCIA are likely to rule that they do not have jurisdiction in such circumstances. Further, the Shanghai and Shenzhen courts have explicitly ratified SHIAC and SCIA, so that awards from SHIAC are likely to be enforced in Shanghai and awards from SCIA in Shenzhen.

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However, enforcing SHIAC or SCIA awards outside Shanghai or Shenzhen may be far less certain. For example, in May 2013, the Suzhou Court refused to enforce an arbitration award made by SHIAC pursuant to an arbitration agreement that provided for disputes to be heard by CIETAC, with the place of arbitration being Shanghai. The Suzhou Court held that the parties had chosen CIETAC to settle their disputes and, once SHIAC had declared its independence from CIETAC, it was no longer the chosen institution. We are aware of a number of other cases where similar difficulties in relation to jurisdiction have arisen.

In an apparent attempt to resolve this confusion caused by the schism within CIETAC, on 4 September 2013, the Supreme People's Court of China (the SPC) issued a Notice on Certain Issues Relating to Correct Handling of Judicial Review of Arbitral Matters (最高人民法院关于正确审理仲裁司法审查案件有关问题的通知) (Fa [2013] No. 194). In summary, the Notice requires that where a court is to review the validity of a CIETAC arbitration agreement, or to hear an application to set aside or not enforce an award made by CIETAC, the relevant court shall report its intended decision to the SPC and to all levels of court between the court seised of the matter, and the SPC. Further, the court seised of the matter is not to make any ruling until the SPC has given its own opinion on the matter.

We are unaware of the SPC having issued any notice setting out its own preferred approach. However, the fact that the SPC has imposed reporting requirements on the lower courts, and that they may not make any ruling until receiving the SPC's comments, suggests that the SPC is alive to the potential problems caused by the CIETAC schism and is concerned to ensure consistency of decisions across the board.

Recommendations

In light of the uncertainty brought about by the problems outlined above, we recommend that:

- Even if no dispute is anticipated, parties should review any existing contracts which contain CIETAC arbitration clauses. If they provide for arbitration in Shanghai or Shenzhen, or make reference to CIETAC Shanghai, CIETAC Shenzhen, SCIETAC, SCIA,

SIETAC or SHIAC, parties should consider amending them to make their particular choice clear. If CIETAC arbitration is preferred, the safest option may be to state expressly that the arbitration is to be administered by CIETAC Beijing according to its 2012 rules.

- Parties may prefer to refer their disputes to arbitration by a different arbitration commission, such as the Hong Kong International Arbitration Centre, or to adopt other arbitral rules such as the UNCITRAL Model law.
- In negotiating arbitration clauses, parties should be cautious about relying on the CIETAC, SCIA and SHIAC model arbitration clauses without seeking legal advice. These clauses may not be sufficiently clearly drafted to achieve the desired result.
- Where proceedings have been commenced pursuant to the old CIETAC rules (i.e. the pre-2012 rules) and they are being administered by the SHIAC or the SCIA, the claimant should ask the tribunal to obtain written confirmation from the respondent that the respondent accepts the tribunal's jurisdiction. Such written confirmation ought to strengthen the claimant's case in the event of a future dispute as to jurisdiction. Equally, as in the case of any jurisdiction dispute, a respondent in such proceedings should raise any objection it has to jurisdiction at the earliest opportunity.

For further information, please contact Peter Murphy, Partner, on +852 3983 7700 or peter.murphy@hfw.com, or Fergus Saurin, Associate, on +852 3983 7693, or fergus.saurin@hfw.com, or your usual contact at HFW.

Hong Kong arbitration update: amendments to the Arbitration Ordinance (cap 609)

The Hong Kong Arbitration (Amendment) Ordinance came into force on 19 July 2013 and introduced a number of changes to the Arbitration Ordinance (Cap 609) (the Arbitration Ordinance). These amendments are aimed at maintaining Hong Kong's position as a centre for international dispute resolution.

The amendments to the Arbitration Ordinance include:

- Giving Hong Kong courts power to enforce relief granted by emergency arbitrators whether made in or outside Hong Kong.
- Implementing the "Arrangement Concerning Reciprocal Recognition and the Enforcement of Arbitral Awards between the Hong Kong SAR and the Macao SAR".

Emergency relief

The key legislative changes made to the Arbitration Ordinance are contained in Sections 22A and 22B. These sections give the Hong Kong courts power to enforce emergency orders/relief granted by an emergency arbitrator, whether such relief was initially granted by an arbitral tribunal within Hong Kong or outside Hong Kong.

The new Section 22B (1) of the Arbitration Ordinance gives power to the Hong Kong courts to enforce any emergency relief made by an emergency arbitrator in the same manner as an order or direction of the High Court of Hong Kong.

However, Section 22B (2) qualifies that power in the case of emergency relief orders granted outside of Hong Kong: it provides that the courts may not grant such relief unless it can be demonstrated that the relief consists of one or more of the temporary measures ordering a party to do one or more of the following:

- Maintain or restore the *status quo* pending the determination of the dispute concerned.
- Take action that will prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitration proceedings.
- Preserve assets out of which a subsequent award may be satisfied.
- Preserve evidence that may be relevant to resolve a dispute.
- Provide security in connection with the points above and/or security for costs of the arbitration.

These new powers are particularly useful when a party is seeking to preserve evidence or assets at the commencement of an arbitration.

This new provision runs in parallel with the Hong Kong International Arbitration Centre's amended Administered Arbitrational Rules 2013 (HKIAC Administered Rules), which came into effect on 1 November 2013. Article 23 of the HKIAC Administered Rules provides that a party may apply for urgent interim or conservatory relief. Such an application is made at the same time a party files its notice of arbitration to the HKIAC. Once the HKIAC determines whether it is appropriate to appoint an emergency arbitrator an appointment is then made within two days.



Enforcement of arbitral awards between Hong Kong SAR and Macao SAR

Sections 98A to 98D implement into the Arbitration Ordinance the *"Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards between the Hong Kong SAR and the Macao SAR",* which was signed in January 2013. Under the new legislation, Macao arbitration awards are enforceable in Hong Kong in the same way as other non-New York Convention awards. The grounds for refusal to enforce a Macao award are in line with those grounds set out in the New York Convention. This legislation deals with the problem brought about by both Hong Kong and Macao having their own judicial systems but not being separate countries for the purpose of the New York Convention, and is similar to legislation already in place between Hong Kong and mainland China.

Conclusion

The amendments to the Arbitration Ordinance and related amendments to the HKIAC Administered Rules on emergency procedures are designed to assist arbitral tribunals, with the support of the courts, to deal swiftly and efficiently with urgent applications for interim remedies, which are often crucial to a party at the start of proceedings. These amendments show Hong Kong's commitment to maintaining its position as a leading centre for international arbitration and dispute resolutions.

For further information, please contact Catherine Smith, Senior Associate, on +852 3983 7665, or catherine.smith@hfw.com, or your usual contact at HFW.

hfw Large complex claims and the role of managed mediation

Following the recent launch of the new ICC Mediation Rules, which is being marked by a year of mediation events organised by the ICC throughout 2014, mediation finds itself in the dispute resolution spotlight. In this article, HFW Partner Paul Wordley reflects on the managed mediation of a complex claim in which he was involved.

Introduction

For some time, mediation in the more traditional sense has been successfully used to deal with a variety of claims, including large complex claims involving a number of parties. However, for a number of reasons, mediation is not always possible where there are very many parties and the proceedings are spread over several jurisdictions. Nevertheless, with a pragmatic and practical approach and, more importantly, the willingness of all parties to make such a process work, a managed mediation over a period of time can be a successful tool in the resolution of complex disputes.

Background

The dispute involved a series of large, complex insurance claims in various parts of the world for a major client. This required the investigation, presentation, negotiation and settlement of over a dozen major claims and ascertainment of potential recoveries from the international reinsurance market. The claims were complex and subject to different local law and jurisdiction provisions. More importantly, as well as issues between the local insureds and the insurers, there were discrete claims of significant value between the insurers and the reinsurers. All of these matters had to be resolved in order to conclude the claim successfully.

With more than 40 parties involved, a process to resolve these claims could only work with genuine commitment, a following wind and some luck. The process agreed upon was that of a managed mediation over a period of time (eventually some 15 months) and a 10-day final formal mediation in a major capital city in Asia.

One of the main drivers for seeking a resolution by mediation was the fact that strict contractual interpretations and proceedings in various parts of the world on some fairly unique insurance and reinsurance issues for the relevant jurisdictions would inevitably have led to a number of preliminary issues being tried in the different jurisdictions, with a risk that the appellate process would add further time and uncertainty.

Throughout the 15-month mediation, there were various occasions on which the mediator was invited to hold what were effectively case management conferences to ensure that the process remained on track and to maximise the likelihood of there being a consensual outcome...

PAUL WORDLEY

It was conservatively estimated by all the parties that litigation could take around 10 years. Given that the claims had already been under investigation for a period of three to five years, it was understandable that the parties, each of whom was in a position to compromise, should make every effort to do so.

The mediation framework

As in most mediations, it was agreed by the legal advisers that the mediation framework should be contractually binding. Importantly, it was also agreed that the mediation agreement would include a timetable for identifying issues, presenting issues and articulating the various parties' positions on all the issues, both as to liability and quantum.

The parties also agreed to give the mediator (a retired High Court Judge from a common law jurisdiction) contractually binding powers to compel the production of information and documentation. While this is not usual in a mediation, in this case it was considered that it would be a necessary and appropriate discipline to ensure that the parties engaged on the issues. Perhaps not surprisingly, in the event, the agreement to give the mediator the power was enough and it was never used. Undoubtedly, it helped.

Mediation case management

Throughout the 15-month mediation, there were various occasions on which the mediator was invited to hold what were effectively case management conferences to ensure that the process remained on track and to maximise the likelihood of there being a consensual outcome at the end of the 10 day formal mediation when it took place.

It is fair to say that there were a number of occasions on which all the parties, or any one or more of them, could have walked away from the process. These crisis moments, together with some real deadlocks on issues, were ultimately resolved through the leadership and guidance given by the mediator in conjunction with the various legal teams.

The issues

Not only were there a large number of parties but, due to the nature and complexity of the underlying claims in various parts of the world, there were around 300 individual issues to be addressed. Throughout the mediation process, these issues were either resolved by the parties with the guidance of the mediator or put into the frame for engagement and dialogue in the formal 10-day mediation. Three months before that final formal mediation, any unresolved issues were reduced to position papers and opening statements. Several days of the 10-day mediation were then spent with the parties giving their opening mediation submissions and responses.

Location

Whilst most of the mediation case management conferences took place by telephone conference call, on several occasions there were physical meetings at various locations around the world, to suit the convenience of the parties.

Conclusion

This case is an example of how, with the appropriate subject matter and the willingness of the parties to achieve a consensual outcome, complex, costly and time-consuming litigation can be avoided for the benefit of all concerned. HFW is a leader in the field of mediation of large complex international claims.

For further information, please contact Paul Wordley, Partner on +44 (0)20 7264 8438 or paul.wordley@hfw.com, or your usual contact at HFW.



News

Global Arbitration Review has just released the 7th edition of its GAR 100 report, and we are delighted that HFW has again been listed as a leading firm. The GAR 100 is a guide to specialist arbitration firms around the world and offers extensive qualitative analysis of those arbitration practices.
HFW's review can be found at http://globalarbitrationreview.com/journal/article/32193/holman-fenwick-willan/

hfw Conferences and events

APRAG 2014 Conference
Melbourne
26-28 March 2014
Presenting: Nick Longley
Attending: Chris Lockwood and Damian Honey

Asian Maritime Law and Arbitration Conference
Singapore
10–11 April
Presenting: Paul Aston

LCIA European Users' Council Symposium, Tylney Hall
London
9–11 May

SIAC Congress
Singapore
6th June 2014
Presenting: Chanaka Kumarasinghe

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