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The New CIETAC Arbitration Rules 2012

After more than two years of review by a working group and various consultations with arbitrators and practitioners, the China International Economic and Trade Arbitration Commission (CIETAC) has published its revised Arbitration Rules (the "2012 Rules"), which will replace the existing Arbitration Rules which have been in place since 1 May 2005 (the "2005 Rules"). The 2012 Rules have been approved by the China Council for Promotion of International Trade and the China Chamber of International Commerce and will come into effect on 1 May 2012. They take into account the developments in modern international arbitration practice and contain new features such as the power to provide for interim measures and a conciliation process that is independent of the arbitral tribunal.

This article will examine some of the key changes brought about by the 2012 Rules.

Interim measures

The 2005 Rules expressly state that should a party seek interim measures, such as preservation of property / assets and protection of evidence, such requests shall be made to CIETAC in the first instance, who will then forward the same to the relevant Chinese Courts for determination (this is in line with the provisions of the Chinese Civil Procedure Law).

The 2012 Rules expressly allow an arbitral tribunal, upon the application of a party, to order any interim measure it deems necessary or proper in accordance with the law that applies. However, where a party applies for "*conservatory measures*", such an application shall be forwarded by CIETAC to the relevant Chinese Courts for determination.

The phrase "*interim measure*" has not been defined under the CIETAC Rules. However, given that applications for preservation of property / assets and protection of evidence will still need to be determined by the relevant Chinese Courts, it is likely that they will not fall under the ambit of "*interim measure*" and hence, within the arbitral tribunal's power to decide. They will instead fall under the ambit of "*conservatory* measures". It therefore remains to be seen what more extensive interim measures can be available from an arbitral tribunal, based on the 2012 Rules.

There have been suggestions by writers that the power of an arbitral tribunal to order interim measures under the 2012 Rules would be applicable only if parties have agreed to arbitrate outside China, i.e. a foreign seat of arbitration. However, there remains the issue of whether it is possible for such orders to be enforced in China in due course.

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Consolidation

Under the 2012 Rules, CIETAC may consolidate two or more arbitrations into a single arbitration, either on request of one party and with the agreement of all other parties, or if CIETAC considers it necessary for consolidation of the proceedings and all parties consent in this regard. Although this is certainly a welcome change, there are concerns that, in reality, very few arbitrations can achieve a consolidation of several proceedings, given that the consent of all parties is a pre-requisite for consolidation. In other words, a party can simply put a stop to the consolidation of proceedings by withholding its consent in this regard.

It bears noting that the rules of various arbitration institutions such as the Singapore International Arbitration Centre ("SIAC") and the International Chamber of Commerce ("ICC") provide for joinder of parties. However, the latest 2012 Rules do not contain any joinder provisions.

Summary Procedure

Under the 2012 Rules, the monetary threshold has been significantly increased from cases where the amount in dispute does not exceed RMB 500,000 to those where it does not exceed RMB 2,000,000. This takes into account the demand amongst arbitration users for swift and expedited arbitration procedures.

The 2012 Rules further do away with the current procedure whereby documents need to be submitted to the arbitral tribunal and other parties via the CIETAC Secretariat. Under the 2012 Rules, the documents can be exchanged directly between parties to expedite the arbitration proceedings.

Seat of arbitration and language

Under the 2012 Rules, in the absence of an agreement on the seat of arbitration, CIETAC may determine this "*having regard to the circumstances of the case*". This location is not necessarily limited to places where the offices of CIETAC are located, as was the case under the 2005 Rules. This amendment is a reflection of the growing number of cases administered by CIETAC which are seated outside China.

Under the 2005 Rules, should parties fail to agree on the language of the arbitration, the default language would be Mandarin Chinese. Under the 2012 Rules, Mandarin Chinese is no longer the default language and CIETAC is given the power to designate any language, depending on the circumstances of the case. Such an amendment is sensible as it allows CIETAC to consider all the circumstances of the case (this may include the identities / nationalities of the parties, the facts in dispute etc) before adopting a suitable language for the arbitration.

Suspension of arbitration proceedings

The 2005 Rules did not have any express provision allowing for parties to apply for a suspension of the arbitration proceedings. The 2012 Rules now provide for the suspension of the arbitration proceedings, where requested for by the parties or otherwise considered necessary. This provides a certain level of flexibility to the arbitration proceedings, particularly in the event of unforeseen circumstances. The decision to suspend / resume the arbitration proceedings shall rest upon the arbitral tribunal or, where it has not yet been constituted, the Secretary General of CIETAC.

Combination of mediation with arbitration – "med-arb"

A unique feature of CIETAC has been its process of resolving disputes through a combination of arbitration and mediation conducted by the same arbitral tribunal. CIETAC has in fact reported that about 20 to 30 percent of its annual caseload is resolved through this process. Having said that, there had been some recent concern in the

international legal community on the impartiality of an arbitrator in CIETAC mediation-arbitration proceedings, particularly in light of the latest Hong Kong Court of Appeal case of *Gao Haiyan v Keeneye Holdings Limited*. That case dealt with the enforcement of a Chinese arbitral award in Hong Kong, which was rendered after mediation conducted by the arbitral tribunal had failed.

The 2012 Rules provide an alternative for CIETAC to assist parties by way of a CIETAC-assisted conciliation process – this process will not include the arbitral tribunal. In this case, no issue would arise as to the impartiality of the arbitral tribunal being affected in the conciliation process. Having said that, there is no guidance in the 2012 Rules on how CIETAC would assist in the conciliation and it would be helpful for CIETAC to provide details of this proposed conciliation process in due course.

Conclusion

The amendment to the CIETAC Rules is timely, given the revisions made by the SIAC in 2010 and the ICC in 2012. It reflects the intentions of CIETAC in keeping up-to-date with current developments in the international arbitration scene. There have, however, been commentators who have remarked that the 2012 Rules do not go far enough in reflecting the practices of other international arbitration commissions, such as providing for joinder of parties and putting in place an emergency arbitrator procedure. It also remains to be seen how, from a practical perspective, the 2012 Rules will be applied to CIETAC-administered arbitrations going forward.

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