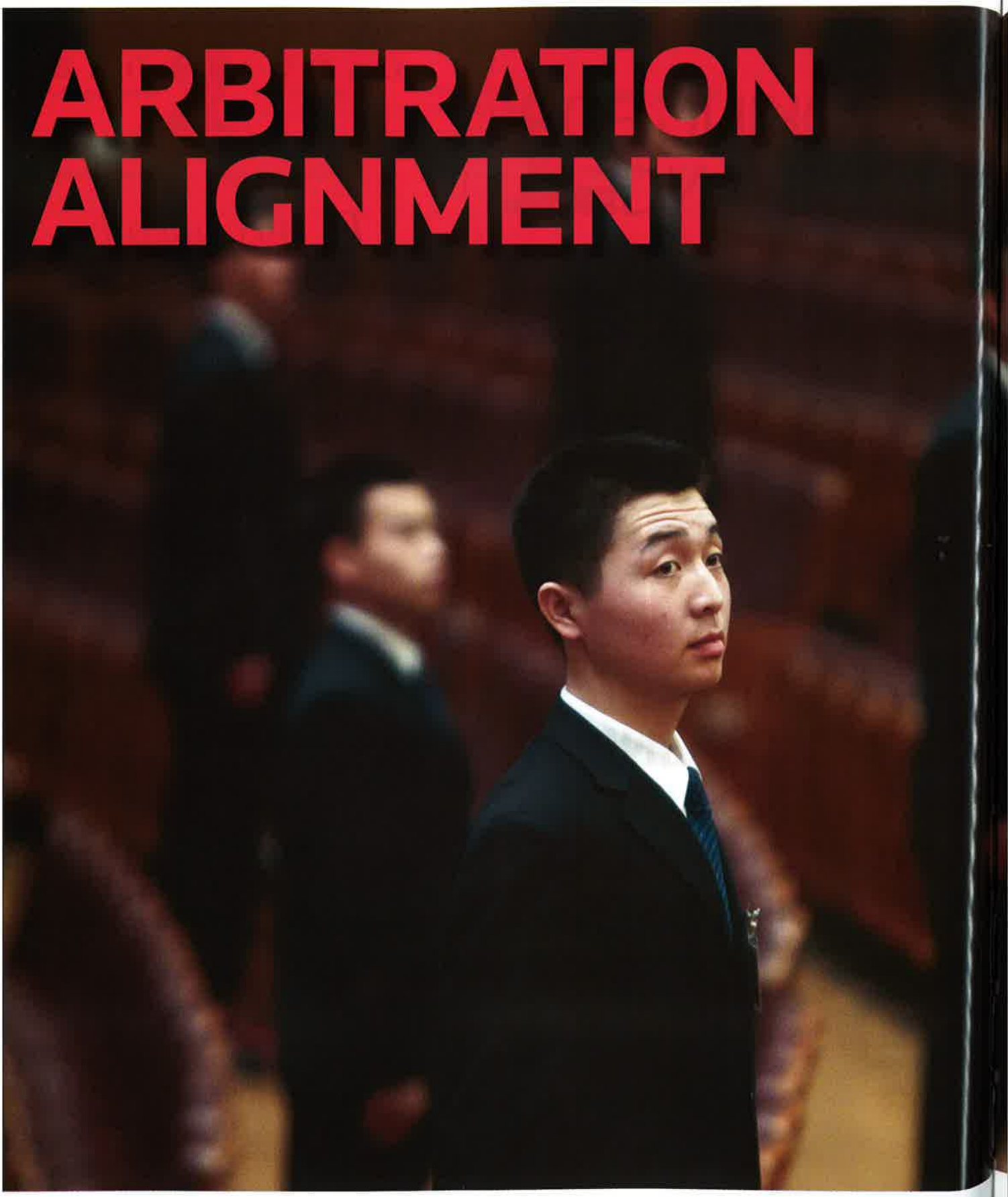
ARBITRATION ALIGNMENT



EFFECTIVE SINCE MAY 1, THE LATEST VERSION OF THE CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION'S (CIETAC'S) RULES IS WIDELY REGARDED BY PRACTITIONERS AS A WELCOME DEVELOPMENT TOWARDS REGULATIONS THAT FOLLOW INTERNATIONAL STANDARDS. THEY DEMONSTRATE CIETAC'S INTERNATIONAL AMBITIONS, ALTHOUGH UNCERTAINTIES REMAIN OVER THE CONSTRAINTS IMPOSED BY PRC LAW. **LIU ZHEN** REPORTS

REUTERS/Jason Lee

In the eyes of several lawyers, the 2012 Amendment of the CIETAC Rules (Rules) does not appear to be a radical remake of the 2005 edition. Nor is it likely to expand business for them dramatically. There are still things which have been left unclear or restricted by current Chinese laws. However, some meaningful changes have shown the determination of CIETAC to develop from a China-centric organisation towards an internationally-competitive arbitral institution.

GOOD TIMING

It is a long-awaited amendment. Lawyers have uniformly anticipated it because the timing was ripe for a revision of CIETAC's arbitration rules. "Seven years is a long time in terms of policy making," says Charles Qin, a partner at Llinks Law Firm. "CIETAC has to catch up." In a similar vein, Friven Yeoh, a partner at O'Melveny & Myers told *ALB* that: "Generally, arbitration institutions try and review and revise their rules from time to time to keep up with international trends."

The trends, says Yeoh, such as the increasing demand for the consolidation of proceedings, have already been addressed in the recent updates of other major international arbitration institutions like the International Chamber of Commerce (ICC). Jessica Fei of Herbert Smith believes that the key driver of CIETAC's changes was the increase in competition from both domestic and international arbitration institutions.

She says CIETAC is aiming at attracting more China-related cases in the Asian region. CIETAC has historically been the dominant arbitration institution in mainland China, notes Yeoh, but so far it has mostly housed matters that are domestic-focused. "Obviously, it has international ambitions because of the growing demand for arbitration and it has begun to position itself to try to attract some of these cases internationally," says Yeoh.

CIETAC's intention of internationalising its processes and seeking the creation of a more international arbitration body aligns with the general trend that Chinese legal business is gradually opening up and integrating into the outside world, suggests Shanghai-based King & Wood Mallesons partner Meg Utterback. "It only makes sense that as Chinese law firms like King & Wood merge with foreign firms to go outbound and Chinese companies increasingly invest internationally, that CIETAC too is internationalising its processes and seeking to create a more international arbitration body," she says.

According to Mayer Brown JSM's Hong Kong partner Thomas So, the amendment also improves some of the controversial issues in the previous rules, such as the involvement of the tribunal in the mediation process. Additionally, these changes come in the context of CIETAC's recent announcement that it will be opening an office in Hong Kong in the course of 2012, says James Rogers, a Hong Kong and Beijing-based lawyer of Fulbright & Jaworski.

The opening of the Hong Kong sub-commission, the first office outside mainland China, not only requires CIETAC to internationalise its rules generally, but also that it make some specific practical amendments. For example, CIETAC's power to decide the seat of arbitration will be in Hong Kong, and the tribunal's power to grant interim measures will also be under Hong Kong law, adds Fei.

INTERNATIONALISATION

It is hard to ignore the changes to the provisions in the Rules concerning the seat of arbitration, the language of arbitration and the nationality of the arbitrator, with stresses on the "non-PRC" elements. For the seat of the arbitration, any city in or outside China can now be named as such by CIETAC; even where the parties have not agreed on the seat of arbitration. Previously, the seat had to be where CIETAC or its sub-commissions were located, namely, Beijing, Shanghai, Tianjin,

Chongqing and Shenzhen.

This is a further step from the 2005 version, which permitted CIETAC to administer an arbitration outside mainland China under the condition of party agreement. But under the current PRC law, only "foreign-related" arbitrations were allowed to take place outside mainland China.

Moving the seat of arbitration from mainland China to overseas will change a number of important elements of the arbitration, suggests Fei, including the applicable arbitration and procedural laws, supervisory courts, and pools of counsel and arbitrators. The change in these elements, therefore, could possibly change the outcome of the case.

Similarly, the new Rules allow CIETAC to designate a language of proceedings other than the Chinese absent party agreement. In the past, Chinese was the default language, which had severely restricted the parties' choice of arbitrators to a mainly domestic pool of individuals and a limited number of foreign arbitrators who were fluent in Chinese, according to Yeoh.

"The choice of language will significantly impact on the pool of counsel and arbitrators available to the parties. If foreign counsels and arbitrators were appointed, the approach of the tribunal to apply relevant rules may become more flexible, which may eventually lead to a different arbitral award," says Fei.

While appointing arbitrators in the absence of party agreement, the nationality is explicitly listed in the new Rules as a factor to be taken into account. However, the presiding or sole arbitrator does not necessarily have to be of a different nationality from the parties.

This consideration of a nationality issue suggests the possibility that CIETAC may consider expanding its panel to include more arbitrators with international backgrounds and experiences. Being expected to deal with arbitrations involving more international elements, CIETAC needs to either recruit more foreign arbitrators or improve its domestic arbitrators' relevant capabilities.

"CIETAC arbitrators may need to improve their foreign language proficiency and knowledge on foreign laws," says Fei. "They will be expected to be more familiar with the practice of international arbitrations, and have the ability to apply procedural law as chosen by the parties while conducting the arbitration."

It goes in line with the geographical and lingual expansion indicated by other articles of the Rules. If the English-language and foreign seats become more and more frequent in its future practice, CIETAC would see itself become truly internationalised. Given the current legal and practical restrictions in China, Fei predicts that few CIETAC arbitrations would be determined at a seat outside China, and that very few foreign arbitrators would be appointed in the absence of the parties' agreement.

INTERIM MEASURES

One of the major topics in the new Rules is the provision of interim measures. Outside mainland China, interim measures ordered by an arbitral tribunal can take one of many forms, says Terence Wong, a Shanghai-based consultant at Hogan Lovells. For example, he men-

tions the disposal of perishable goods, the prohibition against the distribution of profits before the determination of disputes among joint venture parties, and the prohibition against a party from infringing intellectual property rights.

However, PRC law currently does not empower the arbitral tribunal to grant interim measures. Such orders can be given by Chinese courts alone, and in the case of arbitration proceedings, such measures could be conservatory only, either through the preservation of property or by protection of evidence. CIETAC has to convey the parties' requests for such measures to the competent Chinese court, according to Rogers of Fulbright & Jaworski.


REUTERS/Toby Melville

While the new Rules remain unchanged in relation to the request for such measures in China, it allows the tribunal to order any necessary interim measures in accordance with the applicable law. Since arbitration can be administered outside mainland China, the tribunal would have wider power.

"This change allows CIETAC tribunals sitting outside of mainland China to make interim orders - including orders for specific performance and orders in relation to the provision of security - where permitted under local law," says Rogers. "Questions remain over the enforceability of any such orders in China. It will also be interesting to see whether tribunals in China-seated CIETAC arbitrations attempt to make non-conservatory interim orders."

Notably, the PRC Civil Procedural Law is currently under revision and the revised version is expected to broaden the courts' power to issue mandatory and prohibitory injunctions, Fei adds.

All cases that require swift action will benefit from interim measures, including the international sale of goods, joint ventures, and intellectual property disputes among others, says Wong.

EFFICIENCY

The new Rules seek to increase efficiency in the conduct of CIETAC arbitration, says Yeoh. For instance, they provide a consolidation mechanism for separate arbitrations to be consolidated into a single one with the consent of all the parties. Similar procedures have already been introduced by ICC and a few other arbitration institutions.

"It is because the contracts are getting increasingly complex," says Yeoh. "It is not just party A contracting with party B for the supply of goods. A 100 years ago, it might have been that case, but not now. These days we have a lot of M&A transactions involving multiple parties which require them to enter into a number of related agreements at the same time."

The dilemma lies in the fact that the right of arbitration is based on a contract. Under the overcomplicated modern contracting structure, "the whole idea of consolidation is to try to bring the proceedings involving different parts of the dispute together, so that they are resolved in a more coordinated, effective, efficient and less costly way," says Yeoh.

"ALTHOUGH THE NEW RULES PROVIDE MORE FLEXIBILITY TO THE PARTIES, IT REMAINS TO BE TESTED HOW THESE NEW PROVISIONS WILL BE IMPLEMENTED BY CIETAC IN PRACTICE."

JESSICA FEI, Herbert Smith

Meanwhile, the increase of the threshold for the summary procedure from RMB 500,000 to RMB 2 million, will help improve the efficiency of CIETAC arbitration cases and lower the cost to parties, says Fei. The summary procedure requires the arbitration to be conducted under a more compact timetable. As a result of the amendment, not only will the arbitral award involving a much larger amount of money be handed down more quickly, but the cases whose claims or counterclaims which are being changed to exceed the threshold amount will also now have the default position to continue the summary procedure. In other words, more CIETAC arbitrations will be conducted in an expedited manner under the amendment.

Additionally, the exchange of documents between the arbitral tribunal and parties will now not need to be routed through the CIETAC secretariat any longer. The 2012 rules now allow parties to directly exchange correspondence and documents by e-mail, copying CIETAC and the tribunal in the process and then following up with hard copies by courier. "This is one of the most useful revisions as it is so much more efficient," says Qin.

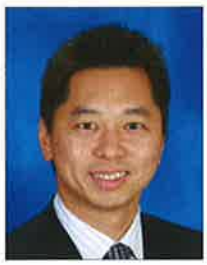
FLEXIBILITY

The new Rules also introduce greater flexibility for the parties to exercise party autonomy in deciding how an arbitration can be conducted, suggests So. They make explicit the power of CIETAC to administer arbitrations conducted in accordance with the arbitration rules of other arbitration institutions. This effectively means parties may choose a set of arbitration rules, other than the CIETAC arbitration rules,

to govern the arbitration while appointing CIETAC as the administrator of the arbitration.

"This is also intended to broaden the scope of CIETAC's role," says Rogers. However, he cautions that the assumption by one arbitration institution of the power to administer an arbitration under the rules of another institution is controversial. This was reflected by the ICC's amendment to its rules to clarify that it alone is authorised to administer arbitrations conducted under its rules. "Parties considering agreeing to CIETAC administered arbitration conducted under the rules of another institution should consider carefully whether there is any procedural advantage to be gained from doing so," he says.

Moreover, with the parties' agreement, CIETAC can now conduct mediation(s) during the arbitration process if the parties do not wish to get involved the tribunal. "This gives the parties maximum flexibility to adopt a mediation process with which they are comfortable, with a view to achieving a mutually agreeable settlement wherever possible," says Fei. Qin believes that the increase of party autonomy and discretion, as well as the empowerment of the tribunal, are the most meaningful changes to the Rules.



"IT IS A WELCOME CHANGE IN THE SENSE THAT THE REVISED RULES IMPROVE ON SOME OF THE SHORTCOMINGS OF THE PREVIOUS VERSION. BUT I THINK GIVEN THE OPTION MOST FOREIGN INVESTORS WILL STILL PREFER USING AN INTERNATIONAL ARBITRATION INSTITUTION OUTSIDE OF MAINLAND CHINA."

FRIVEN YEOH, O'Melveny & Myers

"Generally, we can see a trend towards more robust processes and strengthening of the role of the institution and the arbitral panel...CIETAC over the years has been adopting more and more rules in line with other international arbitration organisations," says Utterback.

IMPARTIALITY

It is quite common for arbitrators to suggest that parties try to reach a conciliation through a mediation process. But there has been an issue with the previous CIETAC rules with respect to their allowing arbitral tribunal members to conduct mediation during the arbitration. According to So, this naturally raised the question of impartiality, especially during the enforcement of the award.

"If the arbitrator also acts as a mediator, there is concern that confidential or even unrelated information provided during private caucus between one party and the arbitrator acting as mediator, may cloud the judgement of the arbitrator who has to rule on the dispute if the mediation fails," Yeoh explains. Theoretically, the roles of the mediator and the arbitrator would actually clash. This is because the mediator does not impose his or her decision on the parties, whereas the arbitrator's role is to probe into the case and make a binding award on the parties' dispute to see who is right and who is wrong.

To address that concern, CIETAC has now allowed the parties to express their wishes if they do not want the same arbitrator to act as the mediator. CIETAC will now also try to find other people who can mediate in the dispute. This way, the parties will be able to explore possible settlement without the involvement of any arbitrator in the tribunal.

Although the new Rules still allow the arbitral tribunal to conduct mediations, it would happen only with the agreement of the parties. Under the new Rules, it is CIETAC rather than the tribunal that has express power to assist the parties to conciliate, in which case any consent award given by the tribunal would be based on the conciliation through CIETAC rather than the tribunal. Thus, the consent award cannot be challenged on the basis of the impartiality of the tribunal being affected in the conciliation process, suggests Wong. Speaking in a similar vein, So concludes by saying: "Mediation conducted by the arbitral tribunal is very likely to decline."

INTERNAL DISPUTES

On the whole, the new Rules have been welcomed by legal practitioners and are being viewed as a positive step to modernise CIETAC procedures. It is interesting to note that they bring several provisions in line with international best practices. "The changes of the CIETAC arbitration rules are not just procedural changes. It reflects the mindset of CIETAC aiming to become more user-friendly to international users, and to expand its user base beyond mainland China and Asia," says So.

However, lawyers do not predict any dramatic change in terms of the number of cases going to CIETAC in the near future since it is already where the largest number of China-related cases are submitted.

Despite positive intentions, there will be a gradual implementation process for the new Rules. Only when this has happened can the full extent of the impact be determined. "We have to wait and see how the Rules are actually being applied in practice," says Qin.

However, the new Rules will still have limitations. One key omission is the appointment of an emergency arbitrator provision found in the SIAC and ICC rules. Such a provision enables parties to appoint an emergency arbitrator solely for the purposes of obtaining urgent interim measures before the arbitral tribunal is constituted, according to Yeoh.

"Parties considering CIETAC arbitration should, nevertheless, be aware of some of the idiosyncratic features of Chinese arbitration procedure, which is traditionally short form, offering little opportunity for witness examination or cross examination and inquisitorial in nature, led by the tribunal rather than the parties," says Rogers.

The most urgent issue for CIETAC, though, is the internal dispute with its sub-commissions who are unhappy about the new Rules. The conflict became public on April 30, when CIETAC's Shanghai office revealed its discontent with the new Rules and announced its intention of separating from its parent body. ALB

(Additional reporting by Artemisia Ng)