New CIETAC Arbitration Rules 2012

The newly revised arbitration rules of the China International Economic and Trade Arbitration Commission (“CIETAC”) will come into effect on 1 May 2012. Amendments made to the existing rules, which had been in place since 2005, will bring about changes adding to the international character of CIETAC, currently one of the busiest arbitration institutions in the Asia Pacific region. We highlight below the significant amendments resulting in the CIETAC Arbitration Rules 2012 (the “New Rules”) and the practical implications of these amendments.

Applicable arbitration rules

The existing rules allow parties to modify the CIETAC rules as applied by agreement. The New Rules not only retained this provision, it also allow the parties to choose arbitration rules other than the CIETAC rules, when opting for a CIETAC administered arbitration (Article 4(3)). This provides more flexibility for the parties to decide how the arbitration is to be conducted, subject to the mandatory provisions of the law governing the arbitration proceedings.

The law governing the arbitration agreement

The New Rules continue to require an arbitration agreement to be in writing to be valid. It also includes that the law governing the arbitration agreement shall prevail if it contains different requirements as to the form of the arbitration agreement and the effect of such agreement (Article 5(3)).

It is not always clear from a typical arbitration clause which set of law governs the agreement to arbitrate. The general presumption is that an arbitration clause is governed by the same law which the parties chose to govern the contract containing the arbitration clause. However, where the agreement to arbitrate is set out in a separate submission agreement in the absence of an express choice of law clause, the usual assumption is that the law of the seat of arbitration governs the agreement to arbitrate. In order to avoid satellite disputes on the effect and validity of an arbitration agreement, parties should consider making an express choice on the law governing the arbitration agreement.

The seat of arbitration

Article 31 of the existing rules states that the seat of arbitration could be chosen by the parties by written agreement, failing which, the location of CIETAC or its branch would be designated as the seat of arbitration. The New Rules allow parties to agree to the seat of arbitration, without requiring such an agreement to be a written agreement (Article 7(1)). Further, CIETAC is empowered to determine the seat of arbitration based on the facts of the case, which may be a place other than the location of CIETAC or its branch (Article 7(2)). The award shall be deemed to be made at the seat of arbitration (Article 7(3)).

The seat of arbitration of an arbitration conducted under the New Rules may be a place in China where CIETAC does not have a presence, it may even be a place outside the territory of China. Therefore, it is important for parties to bear in mind these issues when negotiating an arbitration agreement regarding
the seat of arbitration. Although the New Rules do not require the choice of the seat of arbitration to be in writing, clear expression of the parties’ choice would avoid unnecessary disputes. An arbitration agreement should designate the seat of arbitration, especially when the parties are selecting a set of arbitration rules other than the New Rules to govern a CIETAC administered arbitration.

Interim Measures

The New Rules maintain the existing procedure whereby CIETAC will submit applications under PRC law for preservation of evidence or property to the relevant PRC Court (Article 21(1)). It also confers additional power on arbitral tribunals constituted under the New Rules to grant interim measures under other applicable laws (Article 21(2)). This caters for the situation where the law governing the arbitration proceedings is not Mainland Chinese law.

Stay of arbitration proceedings

The existing rules do not currently provide for options to stay a proceeding, but it does require that an award be made within 6 months of the constitution of the arbitral tribunal. This is retained in Article 46 of the New Rules. The new Article 43 allows parties to apply for a stay of the arbitration proceedings. Proceedings may also be stayed if there are circumstances warranting a stay. Parties may be allowed greater control over the progress of the arbitration proceedings despite the time limit on rendering an award imposed by the rules. The arbitral tribunal will decide the start and lift of a stay, and the Secretariat of CIETAC will decide the same before the constitution of the arbitral tribunal.

This new provision may be subject to abuse and cause delay in the proceedings, particularly when there are no known recourse to appeal a tribunal’s decision to stay an arbitration proceeding.

Med-Arb

The current regime allows the arbitral tribunal to conduct mediation. This approach is controversial as it raises questions of apparent bias and fair hearing given the contrasting roles of mediators and arbitrators. The New Rules allow parties to an arbitration to attempt mediation without engaging the arbitral tribunal (Article 45(1)). Arbitral tribunals are now required to obtain the agreement of both parties to conduct med-arb (Article 45(2)).

The amendments serve to avoid future challenges to award made by arbitral tribunals which were involved in med-arb, especially in light of the recent case of Gao Haiyan v Keeneye Holdings Limited, where the applicant sought to enforce a Mainland Award in Hong Kong, which was rendered after mediation conducted by members of the arbitral tribunal failed. With the flexibility of negotiating on its own or appointing mediators other than the appointed arbitrators, parties to a CIETAC administered arbitration will in the future be more inclined to attempt mediation.

Supplementary awards

Arbitral tribunals are required to follow the same requirements for making an award when rendering any supplementary awards under the new Article 52. This clarifies the uncertainty under the existing rules. It will help to avoid the questions of the effect of supplementary awards during enforcement, as was discussed in the Court of Appeal judgment in Shandong Hongri Acron Chemical Joint Stock Company Limited v Petrochina International (Hong Kong) Corporation Limited.

 Expedited procedure

Article 54 of the New Rules increases the maximum amount in dispute applicable for the expedited procedure from RMB 500,000 to RMB 2,000,000. Parties will benefit from the raised monetary limit as more arbitrations administered by CIETAC will be eligible to be dealt with through the summary route which would involve simpler procedure and takes shorter time to conclude a case.

Conclusion

Amendment to the CIETAC arbitration rules is apt in the changing arbitration landscape in the Asia Pacific region. It remains to be seen how the New Rules will be applied and its effects on CIETAC administered arbitrations generally. CIETAC will strive to maintain its position as the prime choice of arbitration institution in Mainland China and evolve to become a user-friendly international arbitration venue.
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