International Arbitration

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The new CIETAC Arbitration Rules 2012: implications for arbitrations in the PRC

China International Economic and Trade Arbitration Commission (CIETAC) recently revised its Arbitration Rules ("the 2012 Rules"). This is the first major revision since 1 May 2005 ("the 2005 Rules").

The amendments come at a time when increasingly, CIETAC is chosen as the forum for alternative dispute resolution in international contracts between PRC parties and foreign parties. The number of CIETAC arbitrations involving foreign parties has increased significantly over the past decade.

The 2012 Rules came into effect on 1 May 2012. Some of the amendments which they have introduced will significantly impact on the conduct of future CIETAC arbitrations. They are intended to provide further powers to the arbitral tribunal and greater autonomy and flexibility to the parties in relation to their arbitration process, as well as to bring the CIETAC Rules in line with global best practice.

The amendments demonstrate CIETAC's intention to remain the leading arbitration centre for foreign-related arbitrations in China and to grow itself into a leading international arbitration institution. Some of the practical implications of the amendments set out in the 2012 Rules are considered in more detail below.

1. Place of arbitration

Under the 2005 Rules, the place of a CIETAC arbitration was deemed to be China in the absence of the parties' agreement. This has changed under the 2012 Rules, which provide that in the absence of agreement, CIETAC can determine the place of arbitration having regard to the circumstances of the case. In other words, the place of a CIETAC arbitration may now be outside of China. This may assist CIETAC's intention to expand its reach.

2. Language

Under the 2005 Rules, where there was no agreement on the language of arbitration, the default language was Chinese. This rule restricted the appointment of foreign arbitrators and created difficulties for foreign parties who required translators. Under the 2012 Rules, CIETAC now has the power to designate any other language as the language of the arbitration in the absence of agreement between the parties. This allows greater flexibility in arbitrations involving foreign parties, as well as the opportunity to use foreign arbitrators who may have specialised expertise or experience not available in the PRC.

3. Interim measures

Under PRC law, only the People's Court has the jurisdiction to make orders for the preservation of property or protection of evidence. The 2005 Rules and the 2012 Rules both provide for CIETAC to forward an application for conservatory measures to a competent Chinese Court. The 2012 Rules now also allow the arbitral tribunal, at a party's request, to order interim measures it deems *"necessary or proper in accordance with the applicable law"* and to require the requesting party to provide security for the requested measure. The order of an interim measure by the arbitral tribunal may take the form of a procedural order or an interlocutory award.

The introduction of a concurrent power in the tribunal to grant interim measures is in line with recent amendments to the procedural law in other jurisdictions such as Hong Kong (although the CIETAC Rules lack the detail of the new Hong Kong law). It remains to be seen whether this power will be used by parties where it may be more expedient and effective to seek an interim measure from the Chinese Courts, or whether the Chinese Courts will make orders for the preservation of property or protection of evidence where an arbitrator has the same power.

4. Summary procedure

Under the 2012 Rules, the threshold amount for the application of the summary procedure has been increased from RMB 500,000 yuan to RMB 2,000,000 yuan. The previous rule that a summary procedure arbitration would be transferred to the general procedure if the amount in dispute was increased above the threshold amount has been repealed. The 2012 Rules provide for the arbitration to remain subject to the summary procedure unless otherwise agreed by the parties. In line with changes to other international arbitration rules, this is intended to encourage the use of expedited arbitration processes in foreign and domestic arbitrations.

5. Appointment of arbitrators

The 2012 Rules have removed the previous requirement for parties to nominate their arbitrator exclusively from CIETAC's panel of arbitrators. This will allow flexibility where there are no arbitrators on the panel with the specialist expertise or experience required to resolve a particular dispute.

The 2012 Rules also spell out the factors to be considered by CIETAC in appointing arbitrators. These include the law as it applies to the dispute, the place of arbitration, the language of the arbitration and the nationalities of the parties.

The usual rule when appointing a panel of arbitrators is that each party will appoint their own arbitrator and the appointed arbitrators will then appoint a chairperson. Under the 2005 Rules, if one party failed to appoint within the relevant time limits, CIETAC's chairman would appoint their arbitrator but the other party was still able to appoint its own arbitrator. The 2012 Rules provide that if either party fails to appoint an arbitrator within the stipulated time, the Chairman of CIETAC will appoint all three members of the arbitral tribunal and designate one of them to act as the presiding arbitrator.

6. Administration of arbitrations subject to the rules of other international arbitration institutions

The 2012 Rules retain the usual provision that the parties shall be deemed to have agreed to arbitration in accordance with CIETAC's rules if they have agreed to arbitration by CIETAC.

However, they also provide for CIETAC to perform "relevant administration duties" where the parties have agreed to a modification of the 2012 Rules, or have agreed to using the rules of another institution.

This brings the 2012 Rules in line with other arbitration centres which allow the parties the flexibility of choosing a hybrid form of arbitration or to adopt the procedural rules of another arbitration institution. For example, in a case before the Singapore Court of Appeal, *Insigma Technology Co. Ltd v Alstom Technology Ltd (July 2009)*, the respondent filed a request for arbitration with the ICC but the claimant contended that the parties had agreed to submit the dispute to the Singapore International Arbitration Centre ("SIAC") and have SIAC administer the arbitration under the ICC rules. The Court held that the choice of a hybrid form of arbitration is a matter of agreement between the parties and is wholly consistent with the policy considerations of allowing parties freedom to adopt their own process of arbitration.

7. Additional or supplementary awards

After the rendering of an award, the arbitral tribunal is usually given the power to amend accidental slips or typographical errors. However, the tribunal is by that stage "functus officio" and is not entitled to render a further award in relation to any issues omitted from the arbitration. In Hong Kong, this was confirmed in *Shandong Hongri Acron Chemical Joint Stock Company Ltd v Petrochina International (Hong Kong) Corporation Ltd (November 2011)*. The Hong Kong Court of Appeal held that if the tribunal failed to deal with a particular point in its award because the point had not been put before it, it was not entitled to issue additional or supplementary awards to deal with the point out of time.

The 2012 Rules have attempted to address this principle by providing for:

- The correction of clerical, typographical or computational errors by the arbitral tribunal on its own motion or on request by a party to the arbitration.
- The arbitral tribunal to make an additional award on its own motion or on request by a party to the arbitration where any matter which should have been decided by the tribunal was omitted from the award.

8. Consolidation

There were no provisions in the 2005 Rules for consolidating arbitrations. The 2012 Rules provide for two or more arbitrations to be consolidated into a single arbitration by CIETAC or at the request of one party with the agreement of the other parties. In deciding whether to consolidate, CIETAC may take into account any factors it considers relevant including:

- Whether all of the claims in the different arbitrations are made under the same arbitration agreement.
- Whether the different arbitrations are between the same parties.
- Whether one or more arbitrators have been nominated or appointed in both arbitrations.

The new provision for consolidation is consistent with those of other international arbitration institutions, including the ICC. It allows the parties additional flexibility in having the same arbitral panel to determine a number of different disputes and allows CIETAC to manage a multiplicity of arbitration proceedings.

9. Suspension of arbitration proceedings

Previously, there was no ability to suspend arbitration proceedings in a CIETAC arbitration. The tribunal was required to render an award within six months from its appointment. This restricted the ability of the parties to suspend an arbitration process to allow for settlement negotiations.

Whilst the time limit has been retained, the 2012 Rules now allow the parties the flexibility to request a temporary suspension. Arbitration proceedings will resume as soon as the reason for the suspension disappears or the suspension period ends.

10. Arbitration and mediation (Med-Arb)

The Med-Arb procedure is perhaps one of the best known

processes within the CIETAC Rules. Although Chinese parties often participate in the Med-Arb Process, foreign parties are less receptive to it.

Under the 2012 Rules, if the parties wish to mediate their dispute but do not wish to have the mediation conducted by the arbitral tribunal, CIETAC may, with the parties' consent, assist them to resolve their dispute in a manner and procedure that it considers appropriate. This means CIETAC may appoint a separate mediator. This ability to opt-out of the Med-Arb process is likely to be welcomed by foreign users of CIETAC.

It may even be that the 2012 Rules are intended to restrict active participation by CIETAC in a mediation process relating to a CIETAC arbitration. In a Hong Kong decision, *Gao Haiyan v Keeneye Holdings Ltd (April 2011)*, the General Secretary of the Xi'an Arbitration Commission and one member of the arbitral tribunal (not the entire tribunal) assisted the parties through an attempted mediation process. The process failed and the arbitration continued.

Subsequently, the Hong Kong High Court refused to enforce the award on the basis that the tribunal was affected by an appearance of bias. The High Court's decision was overturned on appeal but the opportunity to appoint separate mediators under the 2012 Rules may be an attempt by CIETAC to deal with the apparent concern about bias which the Hong Kong Court indicated in its decision.

In 2011, CIETAC accepted 1,435 new cases, of which 470 were foreign related arbitrations. It remains to be seen whether the increase in flexibility offered by the 2012 Rules and the efforts to bring them in line with those of other international arbitration centres will make CIETAC a more attractive forum for foreign users of the arbitration process in China.

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Singapore arbitration: recent changes

In April 2012, the Singapore Parliament passed 2 bills which will implement changes to its arbitration laws. Like the recent changes to CIETAC arbitration considered in the previous article, and amendments to the rules of the Kuala Lumpur Regional Centre for Arbitration which will come into effect on 2 July 2012, this initiative is an example of both the increasing harmonisation of international arbitration practices and efforts by jurisdictions to make themselves more attractive to commercial parties as venues for international arbitration.

The bills were enacted and came into effect on 1 June 2012.

International Arbitration (Amendment) Act 2012

The first of the two acts is the International Arbitration (Amendment) Act, which amends the framework for international arbitration in Singapore. The main amendments are as follows:

1. Providing legislative support to "emergency arbitrators"

   An emergency arbitrator is one appointed prior to the constitution of the arbitral tribunal who has the power to award interim relief, such as interim injunctions. The Act gives emergency arbitrators the same legal status as a conventionally constituted tribunal. There was considerable pressure from the Singapore International Arbitration Centre (SIAC) to implement this change as SIAC had introduced an emergency

arbitrator procedure in its rules with effect from 1 July 2010. However, as it was previously unclear how the status and powers of emergency arbitrators compared to those of a fully constituted tribunal, there was real doubt whether an order or award of an emergency arbitrator was enforceable. This is therefore a welcome clarification. One significant consequence is that orders by an emergency arbitrator will be recognised and enforced by the Singapore courts, whether such orders are made in Singapore or abroad.

2. Relaxing the requirement that arbitration agreements be in writing

   The definition of "arbitration agreement" is to be broadened so that it includes agreements made by any means, provided that the agreement is recorded. It would cover, for example, agreements made orally or by conduct and subsequently recorded in writing (including by email), or by audio recording.

3. Giving the courts power to review negative jurisdictional rulings

   Previously the Singapore courts could only review positive jurisdictional rulings by tribunals - that is, rulings where a tribunal accepts that it has jurisdiction to hear a dispute. The Act extends the Singapore courts' powers to reviewing a tribunal's decision to refuse jurisdiction. This is in line with the position in other jurisdictions such as England and France.

4. Clarifying the tribunal's power to award interest

   The Act provides that tribunals are able to award simple or compound interest on both the principal claim and on costs awards.

Foreign Limitation Periods Act 2012

The second act is the Foreign Limitation Periods Act. This clarifies which country's limitation laws will apply to international disputes (both court proceedings and arbitration) heard in Singapore. It provides that the limitation laws will be those of the law governing the substantive dispute. By way of example, if a contract provides for English law as the governing law but the arbitration proceedings take place in Singapore, the relevant limitation periods will be determined by English law.

The purpose of the Act is to clarify the uncertainty currently existing under common law, where the limitation period can be determined by the seat of the arbitration (where limitation is considered a matter of procedural law) or by the governing law (where limitation is considered a matter of substantive law).

The Act also sets out two exceptions to the general rule. The first is where the application of the rule would conflict with public policy. The Act indicates when such a conflict would arise, being where application of the rule would cause undue hardship to a person who is, or might be, a party to the action. The second exception is that any provision of the applicable law which provides for a limitation period to be extended or interrupted during the absence of a party from any specified jurisdiction will be disregarded. This second exception will not apply if its application would conflict with public policy or cause undue hardship.

Conclusion

The number of disputes referred to arbitration in Singapore has increased dramatically over the past decade. Statistics from SIAC show that since 2000, new cases referred to SIAC have more than tripled, up from 58 in 2000 to 188 in 2011. One of the Singapore Ministry of Law's stated aims in introducing the latest changes was to ensure that Singapore remains an attractive venue for international arbitrations. They have been broadly welcomed by the arbitration community in Singapore.

The Acts bring Singapore's arbitration framework largely in line with those of the leading arbitration jurisdictions and organisations. Some aspects are potentially controversial, including the amendments relating to emergency arbitrators. However, this concept was recently introduced into the ICC Arbitration Rules. Other changes, such as the clarification of what constitutes an arbitration agreement and the tribunal's powers to award interest, are more straightforward but nonetheless necessary to reflect current arbitration practices and commercial realities.

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Determining the law of an arbitration agreement

Introduction

In the previous edition of IA Quarterly, Matthew Parish's article considered the importance of careful drafting in arbitration clauses, particularly because of the complex conflict of law issues that can arise. In *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA (16 May 2012)*, just such a situation arose, giving the English Court of Appeal the opportunity to decide whether under English law, the seat of arbitration or the substantive law of the contract should determine the law of an arbitration agreement. Despite receiving much judicial attention, with the seat of arbitration being preferred in more recent judgments, it is perhaps surprising that there has been no binding precedent on the point until now.

The different applicable systems of law

Under English law, several different systems of law may simultaneously apply to different aspects of a contract containing an arbitration agreement. This is because an arbitration agreement is considered to have an existence separate from that of the underlying contract under the doctrine of separability, which is codified in section 7 of the Arbitration Act 1996.

The different systems are as follows:

1. The substantive law of the underlying contract. This applies to the substantive issues in dispute, the rights and obligations of the parties.
2. The procedural or curial law, or lex arbitri. This law governs the arbitration procedure and the local courts' supervisory role. In most cases the procedural law will be that of the seat of arbitration.
3. The law governing the arbitration agreement. This law governs the interpretation, validity and effect of the arbitration agreement. This third system of law is the concern of this article.

The test in *Sulamérica*

In *Sulamérica*, the Court established a three limbed test to determine the law of an arbitration agreement under English common law, as follows:

1. Have the parties made an express choice of law to govern the arbitration agreement?
2. If not, have the parties made an implied choice?
3. If not, what law has the closest and most real connection with the arbitration agreement?

In applying the test, the Court did not simply rule that either the seat or the substantive law would prevail, as those seeking easy guidance might have hoped. It held that at the second limb stage, the substantive law would prevail over the seat as the determining factor of the parties' implied choice, in the absence of other factors against implying such a choice. The seat would be determinative only in the third limb, the connection test.

In *Sulamérica*, other factors came into play to affect the outcome of the second limb of the test, with the seat of arbitration prevailing at that stage.

The Court was then required to apply the third limb of the test. However, the priority given to the substantive law in the second limb is significant.

Key facts of *Sulamérica*

The case concerned an all-risk insurance policy for a hydro-electric project in Brazil (the "Policy"). The Brazilian parties were Enesa Engenharia SA ("Enesa") as insured and Sulamérica Cia Nacional de Seguros SA ("Sulamérica") as insurers. The Policy contained a Brazilian law and exclusive jurisdiction clause and an arbitration clause identifying London as the seat of arbitration. As is common in many contracts, the arbitration clause did not specify the governing law of the arbitration agreement.

Sulamérica commenced arbitration proceedings against Enesa in London, seeking a declaration of non-liability and material alteration in respect of the Policy. They also obtained an anti-suit injunction from the High Court in London, preventing Enesa from pursuing court proceedings in Brazil.

Enesa appealed, claiming that Sulamérica had invalidly invoked the arbitration agreement as (among other reasons) under Brazilian law, an arbitration can only be commenced with the consent of all parties. In response, Sulamérica claimed that the arbitration agreement was subject to English law and as such did not require the consent of both parties. The applicable law of the arbitration agreement was therefore a critical issue.

Historical developments

Before *Sulamérica*, there had been some tension between the competing

authorities as to whether the law of the arbitration agreement should be determined by the substantive law of the underlying contract or the seat of the arbitration.

The earlier authorities tended to favour the substantive law based on the assumption that, in the absence of an indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law.

More recent authorities have favoured the law of the seat of the arbitration. This shift in focus away from the underlying contract towards the seat of the arbitration reflects the Courts' willingness to give effect to the doctrine of separability and recognise that the arbitration agreement has characteristics distinct from the underlying contract.

In *Sulamérica*, the Court sought to amalgamate these two lines of authorities, rather than distinguishing one or the other.

Understanding the three limb test

The test requires a sequential qualitative assessment at each limb, based on the facts of each case, as follows:

1. Have the parties made an express choice? Only in the absence of an express choice will the Court look to the second limb of the test. However, it is rare that a contract will include an express choice of law to govern the arbitration agreement. The contract in *Sulamérica* is a typical example of this.

2. Have the parties made an implied choice? The second limb effectively establishes a rebuttable presumption that the substantive law of the underlying contract will indicate the parties' implied choice of law to govern the arbitration agreement. Choosing a different seat of arbitration will not of itself be enough to rebut this presumption. This is somewhat controversial, as it re-establishes the primacy of the substantive law of the contract, which is a departure from recent decisions in favour of the law of the seat of the arbitration.

   Whilst this aspect of the Court's decision might be seen as somewhat of a retreat from recent decisions, it is not a complete turnaround. The Court acknowledged that the seat is still the determinative factor at the third limb stage, in the connection test. Choosing a different seat of arbitration from that of the substantive law will still be a strong indication against implying the substantive law as the law of the arbitration agreement, but it will not be enough on its own to rebut the presumption that the choice of the substantive law of the contract by the parties represents an implied choice of the law of the arbitration agreement. At the second limb stage, the real issue is whether other factors are present to rebut the presumption in favour of the substantive law, in addition to a contrary choice of seat.

   In *Sulamérica*, the Court held there were other factors present. The substantive law of the contract (Brazilian law) was incompatible with the express wording of the arbitration agreement. Specifically, Brazilian law requires the parties' consent to arbitrate after a dispute had arisen. However, the arbitration agreement stated that the parties would proceed directly to arbitration should mediation fail.

3. What law has the closest and most real connection with the arbitration agreement? Only if no choice of law can be implied will the third limb of the test be applied.

   The Court dealt with this limb briefly in its judgment, agreeing that the law of the seat of the arbitration will have the closest and most real connection with the arbitration agreement. This was characterised as a strong presumption. However, it is difficult to see what other factors might outweigh the choice of seat as being determinative. Any such other factors must go to the connection with the arbitration agreement, rather than the parties' choice of law.

   As in *Sulamérica*, once the enquiry reaches the third limb of the test, the parties' choice of seat is very likely to be decisive.

   If there is no choice of seat in the contract and other factors exist, the third limb of the test could give rise to some interesting outcomes.

Conclusion

The English Court of Appeal has concluded that under English law, in the absence of any indication to the contrary, an express choice of substantive law for the underlying contract will be a "strong indication" of the parties' intention in relation to the law governing the arbitration agreement. In *Sulamérica*, as the

Master of the Rolls explained, the critical and decisive factor overturning that indication was that the express wording of the specific arbitration agreement was incompatible with the chosen substantive law for the underlying contract. As a result, the law of the seat of arbitration became determinative, applying the closest and most real connection test.

Whilst the position under English law is undoubtedly clearer following the decision in *Sulamérica*, it is still not absolute. The particular facts of a case may still influence the outcome under the three limbed test established by the Court.

As at the date of this article, the Supreme Court has no record of an appeal.

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Conferences & Events

ICC UK Arbitration Debate: Can non-lawyers make good arbitrators?
London
(17 July 2012)
Matthew Parish, Simon Congdon and Costas Frangeskides

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