Dispute Resolution

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DISPUTE RESOLUTION BULLETIN

The CIETAC split: some implications and recommendations

Over a year has 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. 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); its second official name is the Shenzhen Court of International Arbitration (SCIA).

On 16 April 2013, CIETAC Shanghai was renamed the Shanghai International Economic and Trade Arbitration Commission (SIETAC); its second official name is the Shanghai International Arbitration Centre (SHIAC).

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 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.

However, enforcing SHIAC or SCIA awards outside Shanghai or Shenzhen may be far less certain. 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.

Recommendations

In light of the uncertainty brought about by the schism within CIETAC, 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.

In negotiating arbitration clauses going forward, parties should be cautious about relying on the CIETAC, SCIA and SHIAC model arbitration clauses without seeking legal advice.

- 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 going forward, 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.

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Changes to Swiss corruption laws on the horizon

Following recent controversy about the method of attribution of various large sporting events, the Swiss government has introduced a new bill to broaden the provisions of the Swiss Criminal Code relating to bribery and to the provision of improper advantages. Swiss companies and parties carrying on business in Switzerland will need to consider how the proposed changes may affect them.

Current situation

It is currently an offence under the Swiss Criminal Code to offer an undue advantage to a recipient who occupies a public office, is a civil servant, an arbitrator, or an agent of a public office, in order to influence the way that the recipient carries out their public duties.

It is also an offence to offer an undue advantage to a third party, a foreign civil servant or a member of an international organisation for that purpose.

An "undue advantage" can be either a monetary payment, or any sort of advantage which the recipient is not authorised to accept under the regulations relevant to them.

Both the recipient and the offeror are liable to be prosecuted and no complaint need be filed: the prosecuting authority will investigate any matter on becoming aware of the facts.

It is worth noting that corruption is one of the very few offences for which a company can be jointly prosecuted and found criminally liable with the individual offeror, if it is found not to have taken all reasonable and necessary organisational measures to prevent the offering of the bribe.

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Sentences for an individual can include a fine of up to CHF1.08 million or a prison term of three to five years, whilst a company may be sentenced to a fine of up to CHF5 million.

The situation is currently rather different if the recipient is in the private sector. If a recipient accepts a bribe as a director or employee of a private entity, although a variety of civil remedies are available, it will be a criminal offence only if it falls within the scope of the Unfair Competition Act, or if it can be classified as a criminal breach of trust. Unless there are serious grounds that lead authorities to believe that a criminal breach of trust has occurred, a matter will only be prosecuted if a criminal complaint is filed.

So far as we are aware, there have been only a handful of convictions for corruption in the private sector since the legislation under the Unfair Competition Act was introduced in 1986, mainly because employers seem to be reluctant to file criminal complaints against former employees. Prosecutions for corruption as a criminal breach of trust are also relatively rare because of the difficulty in producing sufficient evidence.

Outside the (relatively narrow) scope of the provisions outlined above, the offering and acceptance of an undue advantage to a person who is in the private sector is not currently illegal under Swiss law. The cost of providing an undue advantage which is not an offence can even be deductible as a necessary business expense in some circumstances.

Changes under proposed legislation

The proposed legislation will not significantly affect the current provisions of the Swiss Criminal Code in relation to those in public office. However, the changes in relation to bribery in the private sector will be marked.

Under the proposed legislation, it would become a criminal offence to offer an undue benefit to an employee, partner (of a partnership) or agent in relation to the acceptor's professional activities in order to bring the acceptor to breach their duty to act in the best interests of a third party, such as their employer.

This means that it would become an offence to offer a bribe to a recipient in the private sector, although only insofar as the aim is to get them to breach their duty of loyalty to a third party. If the recipient accepts a bribe but does not act in breach of that duty, then presumably no offence will have been committed.

The current requirements to bring the facts within the scope of the Unfair Competition Act or to show a criminal breach of trust, and for a criminal

complaint to be filed, would no longer apply. This means that the authorities would be able to prosecute both the offeror and the acceptor on their own initiative, as with public office offences.

Bribery within the private sector would be caught by the new legislation if an undue advantage is offered or accepted in Switzerland. Offering or accepting a bribe outside Switzerland could also be prosecuted in some circumstances.

As with the public office offences, a company could be jointly prosecuted and found criminally liable with the individual offeror, if it is found not to have taken all reasonable and necessary organisational measures to prevent the offering of the bribe. Penalties under the new legislation would include substantial fines for both individuals and companies and prison sentences for individuals.

The bill was submitted to parliament for an initial consultation which ended in September 2013. It may be modified before going to a vote, although any amendments are not expected to be significant. The new legislation is not expected to come into force before the end of 2014. If passed, it will bring Swiss corruption legislation closer in line with that in other jurisdictions, following recent international moves to criminalise corruption.

In the meantime, parties who may be affected should review their current business practices and/or organisational measures and consider whether they are likely to meet the requirements of the new legislation.

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Part 36 offers - what are they and how have they changed?

Part 36 offers were the subject of change in the Jackson reforms, which came into effect on 1 April 2013. This article will explain what Part 36 offers are, how and why they have changed and whether the changes are likely to have the intended effect.

What are Part 36 offers?

Part 36 offers are offers to settle made in accordance with Part 36 of the Civil Procedure Rules (CPR), by either a claimant or a defendant in court proceedings. They must be in a prescribed form and must set out the consequences (particularly as to costs) that the other party will face if it refuses to accept the offer. These consequences are intended to encourage the parties to settle their disputes before reaching court.

Relevant period

Under CPR 36.2, a Part 36 offer must specify a period of not less than 21 days for acceptance, following which specific costs consequences will apply (the relevant period).

A Part 36 offer can be accepted at any time (even after the relevant period) unless formally withdrawn in writing.

Claimant Part 36 offers before Jackson

Prior to the Jackson reforms, if a claimant made a Part 36 offer which was accepted within the relevant period, it was entitled to costs on the standard basis up to the date of acceptance. However, if the offer was rejected and the claimant subsequently obtained a judgment at least as advantageous as the terms of its offer, as well as costs on a standard basis until the expiration of the relevant period, it would also be entitled to costs on an indemnity basis and interest after that date.

A defendant's Part 36 offer has an arguably more significant effect. Normally a successful claimant will be entitled to its reasonable costs from the defendant. However, where the defendant makes an effective Part 36 offer, the claimant is entitled to costs only up to the end of the relevant period. Thereafter, the tables are turned and the claimant is required to pay the defendant's costs.

The new legislation is not expected to come into force before the end of 2014. If passed, it will bring Swiss corruption legislation closer in line with that in other jurisdictions, following recent international moves to criminalise corruption.

Impetus for change

In his final report, Lord Justice Jackson noted that the costs sanctions against a defendant rejecting a Part 36 offer were significantly less than the equivalent sanctions against a claimant. This was seen as a disincentive for defendants to accept a reasonable Part 36 offer.

The changes to claimant Part 36 offers introduced on 1 April 2013 were therefore intended both to level the playing field between claimant and defendant and to encourage settlement by giving claimant offers greater impact.

Post-Jackson - enhanced damages for claimants

If a claimant makes a Part 36 offer after 31 March 2013 that is not accepted, and at trial the claimant obtains a judgment at least as advantageous as the terms of its offer, the claimant will now be entitled to claim an additional sum - for damages in respect of a money claim or for costs in respect of a non-money claim. This is made at the court's discretion and is calculated at 10% on damages or costs up to £500,000 and 5% above £500,000 up to £1 million. This therefore effectively caps the enhancement at £75,000 for damages or costs.

Example

A claimant makes a Part 36 offer of £350,000 inclusive of costs which the defendant does not accept. The claimant later obtains judgment for damages in the sum of £420,000.

The claimant has therefore "beaten" the Part 36 offer. The claimant is now entitled to claim an additional sum of £42,000, being 10% of £420,000. Should the court exercise its discretion to award the additional sum, the claimant will receive a total of £462,000 (£112,000 more than if the defendant had accepted the Part 36 offer within the relevant period).

Conclusion

It remains to be seen whether the changes introduced by Jackson will in reality make parties more likely to settle. In high value litigation in particular, a sanction of £75,000 may not be sufficient.

It is also questionable whether this additional potential costs sanction faced by a defendant really puts defendant and claimant Part 36 offers on an equal footing, particularly in complex high value litigation.

Nevertheless, parties receiving Part 36 offers should consider them seriously, and within the relevant period, to ensure they are confident that their decision either way is made for the right reasons.

Claimants in litigation who have outstanding Part 36 offers made prior to 1 April 2013, and who wish to take advantage of the enhanced sanctions now available, may wish to consider withdrawing and re-issuing their offer.

For more information, please contact Daisy Rayner, Associate, on +44 (0)20 7264 8751, or daisy.rayner@hfw.com, or your usual contact at HFW.

Conferences and Events

International Arbitration Workshop

HFW Perth
30 October 2013
Presenting: Nick Longley, Julian Sher, Chris Lockwood

International Arbitration Seminar

HFW London
January 2014

For more information about either of these events, please contact events@hfw.com

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