International Arbitration

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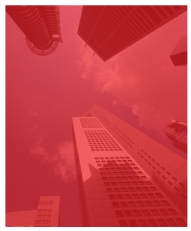
INTERNATIONAL ARBITRATION QUARTERLY



Welcome to the September edition of our International Arbitration Quarterly Bulletin.

In the first article of this edition, Associate Fergus Saurin from our Hong Kong office considers new rules issued by the Supreme People's Court of the People's Republic of China on how to deal with arbitrations affected by the schism within CIETAC in 2012 and assesses how effective they will be.

Next, we have two articles looking at how different jurisdictions approach challenges to the enforcement of arbitration awards. First, Partner Chris Lockwood from our Melbourne office looks at a recent decision by the New South Wales Court of Appeal, *Aircraft Support Industries Pty Ltd v William Hare UAE LLC* (11 August 2015), which deals with both a challenge on the grounds of breach of natural justice and whether partial enforcement of an award is permissible under Australian law. Singapore Partner Chanaka Kumarasinghe then reviews a decision of the Singapore High Court, *Coal & Oil Co LLC v GHCL Ltd* (12 March 2015) which also deals with a challenge on the grounds of breach of natural justice, as well as clarifying the meaning of Rule 27.1 of the 2007 SIAC Rules.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this bulletin, or your usual contact at HFW.

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Arbitration in China: the final chapter of the CIETAC schism

In a recent and welcome judicial interpretation, the PRC Supreme People's Court (SPC) has sought to resolve the uncertainty for parties involved in PRC arbitration caused by the 2012 schism within the China International Economic and Trade Arbitration Commission (CIETAC). This schism resulted in CIETAC's Shanghai and Shenzhen sub-commissions breaking away from CIETAC and forming their own independent arbitral institutions. The interpretation, which many would argue was somewhat overdue, directly addresses the primary areas of uncertainty created by the schism and, provided it is properly and consistently applied, ought to mark the conclusion of what has been a challenging chapter in PRC arbitration.

In May 2012, the landscape of Chinese institutional commercial arbitration was thrown into disarray when the Shanghai and South China sub-commissions of CIETAC (CIETAC Shanghai and CIETAC South China) declared independence from CIETAC in Beijing and became independent arbitral institutions officially endorsed by their respective municipal governments.

Subsequently, on 16 April 2013, the breakaway Shanghai sub-commission renamed itself the Shanghai International Economic and Trade Arbitration Commission (SIETAC or 上海国际经济贸易仲裁委员会). Its second official name is the Shanghai International Arbitration Centre (SHIAC or 上海国际仲裁中心). On 22 October 2012, the breakaway South China sub commission renamed itself the South China International Economic and Trade Arbitration Commission (SCIETAC or 华南国际经济贸易仲裁委员会). Its second official name is the Shenzhen Court of International Arbitration (SCIA or 深圳国际仲裁院).

In the meantime, CIETAC Beijing created new sub-commissions in Shanghai and Shenzhen called, once again, CIETAC Shanghai and CIETAC South China.

This created considerable confusion and uncertainty for parties who had agreed "CIETAC Shanghai" or "CIETAC South China" in their arbitration clauses. In the event of a dispute, should their arbitration be governed by the now independent SIETAC and SCIETAC, or by the new CIETAC Shanghai and new CIETAC South China?

The concern, which soon proved to be well-founded, was that respondent parties would use the uncertainty as to which arbitral institution had jurisdiction to determine the dispute in order to delay or frustrate arbitration proceedings and/or as a barrier to enforcement.

The SPC attempted to address these difficulties on 4 September 2013 when it issued a notice requiring that disputes arising out of the CIETAC schism and heard before the PRC courts should be reported to the SPC before being rendered. This procedure was somewhat similar to a pre-existing system in the PRC, whereby decisions relating to the enforcement of foreign or foreign related arbitration awards are referred to the corresponding Higher People's Court and thereafter the SPC before being rendered.

Whilst this procedure ensured a degree of higher judicial oversight, it did not guarantee the consistency of decisions, nor did it provide a set of transparent rules for the determination of such disputes. It also further incentivised respondents looking to delay proceedings to make jurisdictional challenges because the decision in relation to the challenge would have to go through the potentially time consuming reporting procedure.

The procedure was a step in the right direction, but it fell some way short of resolving the problems created by the schism and providing parties with the certainty and security they would normally expect from opting for institutional arbitration.

These ongoing difficulties prompted the Shanghai Higher People's Court, the Jiangsu Higher People's Court and the Guangdong Higher People's Court to seek directions from the SPC as to how to deal with jurisdictional issues arising out of the CIETAC schism.

In response, on 15 July 2015 the SPC published the Reply of the Supreme People's Court at the Request of the Shanghai and other Higher People's Courts for Instructions on Cases Involving the Judicial Review of Arbitral Awards Made by the CIETAC and its Former Sub-Commissions[1] (the Reply).

The Reply, which took effect on 17 July 2015, mandates which arbitral institution should exercise jurisdiction and in what circumstances. In the case of an arbitration agreement that selects "CIETAC Shanghai" or "CIETAC South China" as the arbitral institute, the following rules apply:

1. If the arbitration agreement was entered into *before* the corresponding institution changed its name, it should be referred to SIETAC or SCIETAC (as the case may be) who will have jurisdiction over the matter.
2. If the arbitration agreement was entered into after the institution changed its name but before 17 July 2015, it should be referred to

1 Fa Shi [2015] No. 15

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the corresponding new CIETAC sub-commission.

However, if the dispute is referred in the first instance to SIETAC or SCIETAC, and the respondent does not object to the jurisdiction at the outset, it cannot later apply to nullify the award on the grounds that SIETAC or SCIETAC did not have jurisdiction.

3. If the arbitration agreement was entered into *after* 17 July 2015, the new CIETAC sub-commission will have jurisdiction.

The Reply also lays down the following rules in respect of historic cases:

1. Where an institution accepted the case *before* 17 July 2015, its jurisdiction may not be overturned by the courts unless a jurisdictional challenge was brought in the PRC Court before the first oral hearing in the arbitration proceedings. If a challenge was brought *before* the first oral hearing, then the institution's jurisdiction may be overturned (even if the institution has previously determined that it does have jurisdiction) and in determining whether to overturn the jurisdiction the PRC Court will apply the rules set out above.

2. Where an institution accepted the case *before* 17 July 2015 and it has rendered an award, the award may not be challenged at the enforcement stage.

3. Where more than one institution (i.e. CIETAC and one of its former sub-commissions) accepted the case *before* 17 July 2015, if none of the parties apply for a jurisdictional determination before the oral hearing, the institution that first accepted the case shall have jurisdiction over the case. If a challenge was brought before the first oral hearing, then its jurisdiction may be overturned and in determining whether to overturn the jurisdiction the PRC Court will apply the rules set out above.

The Reply is a sensible and pragmatic response to the uncertainty created by the schism within CIETAC. It provides a clear set of rules for deciding jurisdiction and enforcing awards for the vast majority of parties affected by the schism. As such, it is to be welcomed.

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Challenging enforcement of an award and partial enforcement in Australia

A recent decision of the New South Wales Court of Appeal has confirmed that the Australian courts have the power to partially enforce a foreign arbitral award. The decision in *Aircraft Support Industries Pty Ltd v William Hare UAE LLC*[1] is seen as further evidence of the pro-enforcement stance being adopted by the Australian courts in proceedings where attempts are being made to challenge or resist enforcement of awards on grounds of public policy and breach of natural justice.

Background to the dispute

William Hare UAE LLC (William Hare), entered into a construction subcontract with Aircraft Support Industries Pty Ltd (ASI), an Australian Company, to perform work at the Abu Dhabi International Airport. The subcontract provided for disputes to be governed by the rules of the Abu Dhabi Chamber of Commerce and Industry, seated in Abu Dhabi. The agreement was governed by UAE law. A dispute arose in relation to the final payment due and the payment of retention monies. A final arbitration award was issued in May 2013 ordering ASI to make two payments of US$797,500 in respect of the retention monies and US$50,000 for a discount offered by William Hare to ASI in the final accounting between the parties (the Award).

William Hare sought to enforce the Award in New South Wales under section 8(2) of the International Arbitration Act 1974 (Cth) (IAA). ASI resisted enforcement on the grounds that it would be contrary to public

1 11 August 2015


policy under section 8(7)(b) of the IAA as there had been a breach of natural justice in connection with the making of the Award. Section 8(7A) of the IAA provides that the enforcement of an award would be contrary to public policy if a breach of the rules of natural justice occurred in the making of the award.

The first instance decision

At first instance, the court applied the decision of the Full Court of the Federal Court in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*[2] and accepted the statement in that case that: *"no international award should be set aside unless, by reference to accepted principles of natural justice, real unfairness and real practical injustice has been shown to have been suffered…in the conduct and disposition of a dispute in an award"*.

The court rejected the claim that there had been a denial of natural justice to ASI in respect of the claim for the retention monies and rejected ASI's argument that section 8(7A) of the IAA posed a restriction on circumstances where a foreign award could be enforced in part, pointing out that the *"principles of severance have been applied to arbitral awards for centuries"*. The court noted that permitting severance in cases where there was no injustice was an approach consistent with other jurisdictions. The court therefore held that part of an arbitral award could be severed under the IAA and so ordered that the Award could be enforced to the extent that it related to the retention monies.

However, the court declined to enforce the Award relating to the discount of US$50,000. It held that there had been a failure by the tribunal to provide natural justice to ASI in circumstances where there was an absence of any statement in the arbitration by William Hare that the claim for that amount was still being maintained and where the parties were not invited by the tribunal to address them on that claim. If the tribunal took the view that the claim remained open to be dealt with then fairness dictated that the tribunal should give notice to the parties.

ASI appealed.

The Court of Appeal decision

ASI argued that the whole of the Award should not be enforced because of the failure to accord them natural justice in respect of part of the Award – the US$50,000 claim. The Court of Appeal rejected this. In order to succeed, ASI had to demonstrate real practical unfairness and real practical injustice and no attempt had been made to do so. Further, the tribunal had given adequate reasons for its decision.

ASI submitted that it was not open to the court to partially enforce an award under section 8 of the IAA. They argued that unlike section 8(6), section 8(7) of the IAA makes no provision for partial enforcement and so by implication, partial enforcement was unavailable under section 8(7). The Court of Appeal rejected this argument. It found that the wording of section 8(7) did not expressly, or by necessary implication, impose a restriction upon the circumstances in which an award can be severed. Rather, in its terms the section clarifies the circumstances in which an award can be said to be contrary to public policy.

The Court of Appeal also affirmed the decision of *Jacobs JA in Evans v National Pool Equipment*[3] that not since before the time of King James I has an award which was void in part been considered to be void altogether. It also cited with approval the statement in Russell on Arbitration[4] to the effect that, provided the bad portion is clearly separate and divisible, the residue of the award can be enforced[5].

The Court of Appeal noted that this was an approach that has been adopted in overseas jurisdictions, including cases involving the enforcement of awards under the New York Convention such as *Nigerian National Petroleum Corporation v IPCO (Nigeria) Ltd*[6].

That case involved the enforcement of an award under the Arbitration Act 1996 which, like the IAA, made provision for a foreign award to which the New York Convention applied to

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CHRIS LOCKWOOD, PARTNER

2 [2014] FCAFC 83, ALR 307

3 (1972) 2 NSWLR 410

4 Russel on Arbitration – A Treatise on the Power and Duty of an Arbitrat and the Law of Submissions and Awards (8th ed 1900)

5 See also *CAN 006 397 413 Pty Ltd v International Movie Group (Canada) Inc* ['1997] 2 VR 31

6 (No 2) (2009) 1 LLR 89


be enforced and which contained provisions in identical terms to those contained in the IAA. As was pointed out in TCL Air Conditioner it is essential to *"pay due regard"* to decisions in other countries *"where their laws are either based on or take their content from international conventions or instruments such as the New York Convention and the Model law"*.

In endorsing the decision of the Full Court of the Federal Court of Australia, the Court of Appeal concluded that it would be surprising if an act designed to assist international trade and commerce by enforcement of foreign awards was required to be construed to take away a centuries old power to partially enforce awards where no injustice flowed as a result.

Conclusion

If it was not clear before, it should now be readily apparent that to challenge an international arbitration award before the Australian court as being contrary to public policy by reason of a breach of natural justice under section 8(7) of the IAA will continue to be very difficult.

At the very least, and for a court to decline to enforce an award under section 8(7) of the IAA, it will be necessary to show that a breach of natural justice has caused real practical unfairness and real practical injustice to the party resisting enforcement – which will be a high threshold not easily overcome.

This case also confirms that partial enforcement of an award remains an available option in Australia.

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hfw Challenging enforcement of an arbitral award in Singapore

Losing parties in arbitrations sometimes attempt to have adverse arbitral awards set aside on the basis of alleged breaches of natural justice and/or public policy. In Singapore, widely considered an arbitration friendly jurisdiction, the courts have consistently set an extremely high threshold for setting aside an arbitral award on those grounds. A recent example is found in *Coal & Oil Co LLC v GHCL Ltd*[1], which has also clarified the meaning of Rule 27.1 of the 2007 SIAC Rules (Rule 27.1).

Background

The parties had entered into an agreement for the supply of coal (the Agreement) which included an arbitration clause. A dispute arose and arbitration proceedings began in May 2009. Oral hearings closed and reply submissions were filed on 17 August 2012. On 14 March 2014, 19 months after the plaintiff had made its reply submissions, the tribunal issued its award (the Award) in favour of the defendant.

The plaintiff made an application to set aside the Award on the following grounds:

1. The issuance of the Award was in breach of the parties' agreed procedure (Art. 34 (2)(a)(iv) of the UNCITRAL Model Law (the Model Law)).
2. The Award was in conflict with public policy (Art. 34(2)(b)(ii) of the Model Law).
3. There was a breach of natural justice (S. 24(b) International Arbitration Act).

The grounds of the application all rested on the same two factual premises:

1. The tribunal's alleged failure to comply with Rule 27.1.
2. That the 19 month delay constituted an "inordinate delay".

Breach of agreed procedure

Rule 27.1 provides that *"the Tribunal shall submit the draft award to the Registrar within 45 days from the date on which the Tribunal declares the proceedings closed".*

The tribunal in this case had not declared the proceedings closed. The key question was whether Rule 27.1 should be construed as imposing a duty on the tribunal to declare the proceedings closed, or as conferring a mere power. The plaintiff's argument was that Rule 27.1 obliges the tribunal to first declare the proceedings closed before issuing a draft award. Since the tribunal had failed to declare the proceedings closed, the Award must be set aside.

The court found that Rule 27.1 conferred on the tribunal a power and not a duty to declare the proceedings closed, for the following reasons:

1. First, such an interpretation would be consistent with the drafting history of the SIAC Rules. Further, the imposition of such a duty might encourage hasty tribunals to close proceedings prematurely, thereby denying parties of adequate opportunity to present their case.
2. Second, the declaration of closure is essentially a case management tool. Imposing a duty on the tribunal to declare proceedings

1 [2015] SGHC 65

closed would therefore *"elevate a case-management tool into a condition precedent for the release of an Award"*.

3. Third, the plaintiff's construction of Rule 27.1 was *"not commercially sensible"* given that the drafters of the SIAC Rules were mindful of the need to avoid impeding the arbitration process with pointless formalities.

4. Fourth, the construction that Rule 27.1 imposes a duty to close proceedings would render Rule 21.5 superfluous.

In considering whether a breach of an agreed procedure would warrant the setting aside of an award, the court found that the procedural breach complained of must be a material breach and not of an *"arid, technical or trifling nature"*. The plaintiff's complaint was *"precisely the sort of arid procedural objection that would not occasion the setting aside of an award"*. The court's particular difficulty with the complaint was that the plaintiff had not demonstrated why the failure to declare closure was of such critical importance that non-compliance justified the setting aside of the Award.

Turning to the 19 month delay, the court noted that the 2007 SIAC rules do not provide for any time limits for the release of arbitral awards apart from those in Rule 27.1. Therefore, the assertion that the Award was out of time was untenable as the 45-day time limit under Rule 27.1 did not begin to run until the tribunal declared the proceedings closed - which it did not do.

Conflict with public policy

The plaintiff argued that an act of the tribunal which is contrary to the agreement of the parties and/or the 19 month delay were in direct conflict with public policy. The court disagreed. The

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CHANAKA KUMARASINGHE, PARTNER

alleged procedural breach governs only the conduct of the arbitration and does not have wider public ramifications. In relation to the delay, the court cited the case of *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd*[2] where a 10 year delay in issuing an arbitration award was not a sufficient basis for setting aside the award. It followed that a 19 month delay could not possibly be a sufficient basis. The court added that if it found the delay intolerable, the plaintiff ought to have applied under Art 14 of the Model Law for the mandate of the arbitrator to be terminated (before release of the Award).

Breach of natural justice

The plaintiff argued that a breach of natural justice had occurred as the plaintiff was not given the chance before the Award was issued to submit that it should not be issued, and that the *"inordinate"* delay of 19 months in issuing the Award was an obvious *"procedural irregularity"*.

2 [2001] at SLR(R) 510

Again, the court rejected the plaintiff's arguments. It found that the first argument was "seriously misconceived" as there could not have been any breach of Rule 27.1 prior to the release of the Award. Further, contrary to the case cited by the plaintiff, the 2007 SIAC Rules do not contain any right for the parties to appear before the tribunal on the issue of an alleged breach of Rule 27.1.

With regard to the delay, the court found that the delay did not impair the plaintiff's right to a fair hearing given that the Award was based on the submissions tendered by August 2012.

Conclusion

This case clarifies the interpretation of Rule 27.1, it imposes a power and not a duty on an arbitral tribunal to declare proceedings closed before issuing an award. This clarification, and the court's comments generally about procedural objections, should discourage those hoping to challenge enforcement of an award on the basis of a breach of Rule 27.1, or non-material procedural breaches.

Further, it underlines the extremely high threshold required before the Singapore courts will set aside an arbitral award on the grounds of a breach of natural justice and/or public policy. It will do so only in egregious cases where the error is *"clear on the face of the record"*.

Parties can continue to feel confident of the pro-arbitration stance of the courts when arbitrating in Singapore.

For more information, please contact Chanaka Kumarasinghe, Partner, on +65 6411 5314, or chanaka.kumarasinghe@hfw.com, or your usual contact at HFW. Research conducted by Jason Ow, Trainee Solicitor.

Conferences and events

ICC Task Force on Emergency Arbitrators
Paris, France
24 September 2015
Attending: Costas Frangeskides

LEADR-IAMA Congress
Melbourne, Australia
25 September 2015
Presenting: Nick Longley

6th Asia Offshore Energy Conference (AOEC)
Jimbaran, Indonesia
30 September – 2 October 2015
Attending: Richard Jowett, Sam Wakerley and Paul Aston

HFW Conference:
Current Trends in the Indian Market
Mumbai, India
14 October 2015
Presenting: Damian Honey, Paul Dean, David Morriss, Ashwani Kochhar, Paul Wordley, Alistair Mackie, Brian Perrott and Hari Krishna

Enforcing Arbitration Awards with Injunctions and Imprisonment Orders
Geneva, Switzerland
15 October 2015
Presenting: Chris Swart, Katie Pritchard and Michael Buisset

C5's Forum on International Trade Disputes
Brussels, Belgium
20-21 October 2015
Presenting: Folkert Graafsma

CIARB Centenary Celebrations
Sydney, Australia
23-24 November 2015
Attending: Nick Longley, Amanda Davidson, Carolyn Chudleigh and Christopher Lockwood

FIDIC Users' Conference
London, UK
1-2 December 2015
Presenting: Michael Sergeant and Max Wieliczko

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