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Use your noodle! Choosing the right international arbitration body in East Asia

Introduction

To coincide with the new China International Economic and Trade Arbitration Commission (**CIETAC**) Arbitration Rules which enter into force on 1 May 2012 and Clifford Chance's global arbitration practice being enhanced by two eminent arbitrators-Jason Fry, currently Secretary-General of the International Chamber of Commerce International Court of Arbitration (**ICC**), who will re-join us as Partner in our Paris office and co-head of the International Arbitration Group in September later this year, and Simon Greenberg, former Deputy Secretary-General of the ICC who has joined as Counsel in our Paris office- in this briefing we examine the importance of choosing the right international arbitration body, and look at some of the notable features of popular arbitral bodies in East Asia.

In East Asia today, an arbitration agreement is almost *de rigueur* for parties to cross-border transactions. When it comes time to draft such agreements parties face two choices: first, they can provide for *ad hoc* arbitration—that is, arbitration in which the parties establish their own procedural rules and assume administration of the arbitration; or second, they can provide for arbitration administered by, and adopting the rules of, any one of various professional international arbitral institutions. Sensibly enough, most parties take the second option. The obvious advantages to using a professional body's rules include heightened predictability as well as uniformity of arbitral procedures and awards. By corollary, an award is less prone to collateral attack when it comes to enforcement.

But as far as East Asian disputes are concerned, which arbitral institution should parties choose? To help make this choice easier, this briefing highlights significant features of those arbitral institutions playing an ever more prominent role in the resolution of East Asian disputes. Particularly, we focus on the **ICC**—arguably the most popular global arbitral institution—and three prominent regional bodies—the Hong Kong International Arbitration Centre (**HKIAC**), the Singapore International Arbitration Centre (**SIAC**), and **CIETAC**.

How important is the choice of arbitral institution?

At the outset, the choice of arbitral institution is arguably much less important to achieving a good arbitration than the choice of arbitrator(s). The arbitral institutions under discussion generally offer high quality services at competitive prices. But because top arbitrators tend to be mobile, the choice of arbitral institution will not necessarily influence the crucial issue of who the arbitrator(s) will be.

Notwithstanding the above, the choice of arbitral institution can have significant ramifications. For example, if parties cannot agree on an arbitrator (or the chair of a three-person tribunal), then typically the parties' designated arbitral institution will make the decision—the chosen arbitrator will usually be someone on its approved panel of arbitrators. For this reason, it is important to choose an arbitral institution with a deliberative appointments process and/or an extensive and varied panel. The ICC, HKIAC, and SIAC all have that. CIETAC too (considered below) has made significant strides of late and recently completed a review of its Panel of Arbitrators. As of May 2011, there are 998 arbitrators in CIETAC's

Key issues

- How important is the choice of arbitral institution?
- What services can parties expect from their designated arbitral institution?
- Key features of ICC
- Key features of HKIAC
- Key features of SIAC
- Key features of CIETAC

new Panel of Arbitrators. According to CIETAC, the new Panel improves the international character of CIETAC, enhances the overall objective quality of arbitrators, covers more professional categories, and draws from a wider geographic distribution.

In addition, with the exception of the ICC, the choice of arbitral institution generally determines the highly important issue of the "seat" of the arbitration, unless parties expressly agree otherwise. For example, where parties opt for a SIAC arbitration, but fail to designate the arbitral seat, the arbitration is deemed under SIAC rules to have a Singapore seat (unless the arbitral tribunal decides otherwise). The seat, often the default location for hearings, also determines which procedural law applies to the conduct of the arbitration and which court system, if necessary, exercises supervisory jurisdiction over the arbitral process. That local court system could be important if a party needs the court's assistance, for example, to compel a reluctant witness to give evidence, to replace a misbehaving arbitrator, or to consider an application to set aside an arbitral award.

What services can parties expect from their designated arbitral institution?

Arbitral institutions provide a wide array of services. At one extreme, some do little more than appoint arbitrators when the parties cannot agree, leaving the parties and the arbitrators to do all the practical work of administering the arbitration. At the other extreme, some employ a large administrative staff to co-ordinate the parties, their advisors and the arbitrators, and generally keep the process moving. They also exercise a quality assurance function over the arbitral process to ensure a high standard of award that makes for easy enforceability. Broadly speaking, the greater the role the institution plays, the greater its cost. The extent to which one wishes to pay more to have a more highly-managed arbitral process is a matter of individual preference. There are also significant differences between arbitral institutions, often subtle ones, including the services on offer and the cost.

International Chamber of Commerce International Court of Arbitration (ICC)

The ICC Court is based in Paris and has offices all over the world including Hong Kong and Singapore. It provides a highly-managed and flexible arbitral process service. It administers arbitrations under its own ICC Rules of Arbitration (**ICC Rules**) at any location (*i.e.*, any seat) selected by the parties. Parties, however, must file pleadings and all other paperwork at either the Hong Kong or the Paris offices, depending on which office is administering the case. As of 1 January 2012, the ICC has revised its arbitration rules. (*See* our earlier briefing on the "*New ICC arbitration rules*") Below are some important features of the ICC Rules.[1]

(a) ***Appointment of arbitrators.*** The ICC Court decides challenges to the appointment of arbitrators. (Article 14) The process works as follows: the objecting party must submit a written statement specifying the factual predicate for its challenge—typically allegations relating to a "lack of impartiality or independence" of a proposed arbitrator. Next the ICC will invite the parties and also the challenged arbitrator to submit written comments, before making any determination. In practice, this may involve multiple rounds of comments.

(b) ***Number of arbitrators.*** Where the parties have not agreed on the number of arbitrators, the ICC Court will appoint a sole arbitrator unless it appears to the ICC Court that the dispute warrants three arbitrators. (Article 12.2)

(c) ***Emergency arbitrators.*** The ICC Court can now appoint an emergency arbitrator before constitution

[1] See, generally, "*International Commercial Arbitration: An Asia-Pacific Perspective*", Cambridge University Press, 2011, Simon Greenberg, (former Deputy Secretary General of ICC Court, now Counsel at Clifford Chance), Christopher Kee and J. Romesh Weeramantry and also *"The Secretariat's Guide to ICC Arbitration*, *A Practical Commentary on the 2012 Rules of ICC Arbitration from the Secretariat of the ICC International Court of Arbitration",* J. Fry (Secretary- General of ICC Court, soon to re-join Clifford Chance) , S. Greenberg, F. Mazza, ICC Publication No. 729; see www.iccbooks.com and www.iccwbo.org

of the arbitral tribunal. (Article 29) This is a novel procedure that brings the ICC into line with other arbitral institutions such as the Stockholm Chamber of Commerce. Simply put, upon application, the ICC will appoint an emergency arbitrator within 2 days who must issue an Order within 15 days. The cost of this application is US$ 40,000. (Appendix V)

(d) ***Multi-party and multi-contract arbitration.*** The ICC Rules permit multi-party arbitration and multi-contract arbitration. (Articles 7-10) Significantly, Respondents may now "join" new parties before constitution of the arbitral tribunal.

(e) ***Jurisdictional objections.*** As with the rules of most arbitral institutions, jurisdictional questions are generally a matter for the arbitral tribunal. The ICC Court however retains a preliminary screening authority. Upon the Secretary General's referral, the ICC Court is tasked with deciding whether a there is a *prima facie* case for the existence of a valid arbitration agreement. (Articles 6.3-6.4)

(f) ***Scrutiny of arbitral awards.*** The ICC Court approves draft arbitral awards. (Article 33) The ICC Court reviews all awards to ensure that they meet the basic requirements for enforcement. To this end, the ICC Court may require modifications as to the form of the award and draw the arbitral tribunal's attention to issues of substance.

(g) ***Time limit for final award.*** The arbitral tribunal must render its final award within six months from the date of the last signature to the terms of reference, unless the ICC Court fixes a different time limit by reference to the procedural calendar of the case. (Article 30).

(h) ***Costs and fees.*** Unlike other rules which allow for negotiation, the ICC fixes arbitrators fees. Further, the ICC Court will fix an advance on costs to cover the fees and expenses of the arbitrators and the ICC administrative expenses for the claims which have been referred to it by the parties. (Article 36)

Significantly, the ICC Rules now expressly authorise an arbitral tribunal to penalise time-wasting. In making decisions as to costs, arbitrators are expressly invited to consider the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. (Article 37.5) Further, an arbitral tribunal may make decisions on costs at any time during the arbitral proceedings. (Article 37.3)

Hong Kong International Arbitration Centre (HKIAC)

In contrast to the ICC, HKIAC is generally regarded as providing more flexible arbitral services. In essence, HKIAC offers a low-cost "unmanaged" arbitration process using the UNCITRAL Arbitration Rules, and a more expensive managed process—an "administered arbitration"—using its own HKIAC Administered Arbitration Rules (**HKIAC Rules**). (*See* our earlier briefings on the "*New HKIAC Rules*" (in Chinese) and "*New Arbitration Law*" in English)

"Unmanaged" process. In the "unmanaged" process HKIAC offers parties *à la carte* services such as provision of facilities and assistance with the conduct of proceedings as required as well as secretarial or clerical assistance.

Managed process. Parties can also opt for a managed process whereby HKIAC coordinates the entire arbitration process in accordance with the HKIAC Rules. Although an administered arbitration entails greater institutional involvement in the arbitration process, it is still intended as a self-professed "light touch" process. Some of its salient features are outlined below.

(a) ***Appointment of arbitrators.*** HKIAC organises the appointment of a tribunal, and manages the proceedings until a tribunal is formed. HKIAC will confirm the appointment of arbitrators, and will adjudicate on any challenges to an appointment. (Articles 8-12) In ruling on any challenge, HKIAC applies the HKIAC Challenge Rules which provides for similar rounds of statements and comments as with the ICC Rules. Like the ICC Rules, arbitrators have a duty of

independence and impartiality. (Article 11.1)

(b) ***Number of arbitrators.*** The HKIAC Council will decide the number of arbitrators (one or three), if the parties fail to agree. (Article 6.1) And the HKIAC Council also has authority to appoint a presiding arbitrator in a three-person tribunal, where appointment cannot be agreed. (Article 8.1)

(c) ***No emergency arbitrators.*** Unlike the ICC Rules, the HKIAC Rules do not provide for the appointment of an emergency arbitrator or emergency measures before constitution of the arbitral tribunal. Parties must go to a court of competent jurisdiction for interim measures of protection before the arbitral tribunal has been established. After the arbitral tribunal has been established however, it may order any interim measure it deems necessary or appropriate. (Article 24.3)

(d) ***Expedited procedures.*** Subject to party consent, HKIAC has the procedural authority to determine that certain cases (that is, where the amount in dispute is less than US$ 250,000) should follow an expedited procedure with shortened time limits and a sole arbitrator, leading to an award within 6 months. (Article 38)

(e) ***Administration.*** HKIAC acts as a neutral conduit for communications between the parties and the arbitrators, and will provide any other required administrative support, including arranging hearing dates and rooms.

(f) ***Jurisdiction.*** Under the HKIAC Rules, an arbitrator may rule on its own jurisdiction. No appeal lies against the decision of the arbitral tribunal on the question of jurisdiction. (Article 16(3))

(g) ***Costs and fees.*** HKIAC will keep an account of the cost of the proceedings, and make sure any necessary advance payments are made by the parties. (Article 37) As to arbitrators' fees, HKIAC allows the parties to negotiate and agree their own rates with the arbitrators, but failing agreement it will set a fixed fee per arbitrator. The HKIAC Rules establish a range (representing a higher and a lower percentage of the amount in dispute) within which HKIAC will set a fee. The decision turns on factors such as the complexity and duration of the dispute. (Article 36)

(h) ***Enforcement.*** One reason for HKIAC's popularity relates to the enforceability of HKIAC awards. Hong Kong has adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention** or **Convention**) and Hong Kong arbitral awards are generally enforceable through the courts of other signatory countries. Since Hong Kong's return to Chinese sovereignty, the New York Convention no longer applies to enforcement of Hong Kong awards in mainland China and vice versa. Rather, enforcement is based on a reciprocal arrangement (entered into in 1999)—the Arrangement Concerning Mutual Enforcement of Arbitration Awards—which reflects the spirit of the Convention. This reciprocal arrangement has been incorporated into the Hong Kong Arbitration Ordinance. Sections 92-95 of the Arbitration Ordinance Cap. 609.

(i) ***Other considerations.*** HKIAC is a popular choice of arbitral institution for historical and cultural reasons. Hong Kong has had a long-standing role as a legal services provider to China. Hong Kong is regarded as a preferred seat for PRC-related disputes and is often acceptable to PRC and foreign parties. Hong Kong arbitrators are arguably more experienced with PRC-related disputes.

Moreover, HKIAC is well-connected to legal institutions in mainland China, which can informally assist enforcement of HKIAC awards. Some commentators argue that Chinese courts will more readily enforce a Hong Kong award than an award made elsewhere, particularly since China's Supreme People's Court (**SPC**) confirmed in December 2009 the enforceability of Hong Kong

arbitral awards (including *ad hoc* and ICC awards or any other foreign arbitral awards) (See "Notice of SPC on the Enforcement of Hong Kong Arbitral Awards in Mainland China": http://www.doj.gov.hk/eng/topical/mainlandlaw.htm).

Singapore International Arbitration Centre (SIAC)

SIAC generally takes a more active role in procedure than HKIAC, offering a highly managed arbitration process modelled on the ICC. This involves case management and financial management of the arbitration. Further, the Arbitration Rules of the Singapore International Arbitration Centre (**SIAC Rules**) give additional powers to SIAC in relation to the substance of the dispute.

(a) ***Appointment of arbitrators.*** A sole arbitrator is appointed unless the parties agree or propose otherwise or the Registrar considers that because of the quantum or complexity of the dispute, three arbitrators should be appointed (Article 6). The Chairman confirms any appointment. Parties are free to challenge arbitrators in much the same way as under the ICC and HKIAC Rules. (Article 11) Likewise arbitrators have a duty of independence and impartiality. (Article 10.1)

(b) ***Emergency arbitrator.*** Like the ICC, SIAC has the authority to appoint a temporary emergency arbitrator to consider an application for emergency relief before an arbitral tribunal has been constituted and, if appropriate, make an emergency order. (Articles 26.2-26.3, Schedule 1.)

(c) ***Scrutiny of awards.*** Also like the ICC, SIAC has a quality assurance and oversight role in the preparation of the award. Before issuing the award the arbitrators must first submit a draft award to SIAC. SIAC may then suggest modifications to the form of the award and may also draw attention to points of substance. The arbitral tribunal cannot issue an award until the SIAC Registrar approves its form. (Article 28.2) This oversight can be helpful to identify and resolve problems with an award that may hinder enforcement.

(d) ***Arbitrators' fees.*** SIAC calculates the fees payable to the arbitrators as a percentage of the amount in dispute (decreasing in percentage as the sum in dispute increases) just like the ICC. There is no option for the parties to negotiate a different fee with the arbitrators. (Articles 30-31)

(e) ***Expedited procedures.*** Like HKIAC, subject to party consent SIAC has the procedural authority to determine that certain cases (that is, where the amount in dispute does not exceed S$ 5,000,000) should follow an expedited procedure with shortened time limits and a sole arbitrator, leading to a summary award within 6 months. (Article 5)

(f) ***Jurisdictional objections.*** Like the ICC Court, SIAC can make *prima facie* jurisdictional determinations—that is, SIAC can decide whether there is a case as to the existence of a valid arbitration agreement. (Article 25)

(g) ***Privilege and confidentiality.*** SIAC Rules provide arbitrators with additional authority to determine issues of legal privilege. This power is in addition to those specified in the SIAC Rules and is not in derogation of the mandatory rules applicable to the arbitration (Article 24). Further, SIAC Rules contain strong confidentiality provisions. The parties and the tribunal are expected to treat all matters relating to the proceedings and the award as confidential. Any party or arbitrator shall not, without the prior written consent of all the parties, make disclosure to a third party save for certain matters prescribed by the SIAC Rules. (Article 35)

(h) ***Other considerations.*** As Singapore is a signatory to the New York Convention, Convention awards are recognised and enforced in Singapore. (*See* our earlier briefings relating to Singapore arbitration "*Singapore decision holds High Court has power to reconsider arbitral tribunal's findings on illegality*" and

"*Singapore High Court clarifies that arbitral awards shall not be set aside for alleged irrationality*") Furthermore, Singapore is a particularly popular choice of seat for India-related arbitrations. One reason relates to there being a significant number of Singaporean lawyers of Indian origin. But the principal reason is that not all arbitral awards are enforceable in India—Indian law requires that awards are issued in a Convention country that has been approved ("gazetted") by the Indian government. Recently, the Indian Government issued a notification which "gazetted" China (and through her, Hong Kong), which means that Hong Kong and mainland China arbitral awards are now enforceable in India. This is important for both Hong Kong and China and places them on par with Singapore as far as the enforcement of their arbitral awards in India are concerned. (*See* our briefing, "*Enter the dragon*" on the recent notification by India with respect to HK, Macao and China being declared territories to which the New York Convention applies for the purposes of enforcement in India of arbitral awards of those regions and country)

China International Economic and Trade Commission (CIETAC)

CIETAC is the best-known PRC arbitral institution and is poised to become one of the most active arbitration institutions in the world. CIETAC's rules and procedures are generally considered to be notably different from those institutions mentioned above. Some significant features of the recently revised CIETAC Arbitration Rules (**CIETAC Rules**) effective 1 May 2012, are addressed below.

(a) CIETAC generally administers arbitrations under its own rules. Theoretically, however, CIETAC can administer arbitration under non-CIETAC rules, unless these are "*inoperative or in conflict with a mandatory provision of the law as it applies to the arbitration proceedings*." (Article 4.3)

(b) ***Appointment of arbitrators.*** If parties are unable to agree to a sole arbitrator or the presiding arbitrators, it is incumbent on the CIETAC Chairman to make the relevant appointment. (Articles 25-27) Unlike for example the HKIAC Council (composed of senior arbitration lawyers from across Asia), CIETAC's approach to arbitrator appointments has generally been regarded with scepticism by foreign parties. The process is perceived as being less likely to result in the appointment of arbitrators with international experience. Further, despite CIETAC's rules on arbitral independence and impartiality (Article 22), it is common for foreign parties embroiled in CIETAC arbitration against PRC counterparties to voice complaints. Because of impartiality concerns, international law firms frequently advise their clients against agreeing to CIETAC arbitration unless the arbitration clause requires the appointment of a third country national as presiding arbitrator.

(c) ***Representation.*** Although the issue is being debated, CIETAC's present position is that international law firms should not represent a party in CIETAC arbitration under PRC law unless (i) a local Chinese law firm is also engaged as co-counsel; or (ii) international counsel submits a written opinion on the disputed PRC law issues from a local Chinese law firm or PRC law professor.[2] In practice, international firms frequently recommend retaining management of the case, and select a key individual from the PRC firm to take on a role akin to a barrister.

(d) ***Language of arbitration.*** Unless otherwise specified in the arbitral clause or agreed, CIETAC arbitration is conducted in Chinese. (Article 71). In effect, this may diminish the pool of

[2] http://cn.cietac.org/NewsFiles/NewsDetail.asp?NewsID=324

arbitrators with significant international arbitration experience and arguably arbitrators who fully appreciate the concerns of foreign parties. However, the revised Rules do permit the parties to agree on a different language e.g. English (Article 67(1)) and foreign national arbitrators may be chosen in addition to arbitrators from China. It is not uncommon for parties agreeing on a different language, e.g. English, to also agree that there be simultaneous translation into Chinese of the arbitral proceedings.

(e) ***Jurisdiction.*** In CIETAC arbitration, jurisdictional questions are typically determined by either CIETAC or the arbitral tribunal. The new CIETAC Rules suggest that even after a tribunal is constituted, CIETAC retains some authority to make a "*new decision on jurisdiction*." (Article 6.2) As to subject matter, CIETAC accepts cases involving economic, trade and other disputes of a contractual or non-contractual nature, based on an agreement of the parties. (Article 3) CIETAC will not accept family and administrative disputes as these are not arbitrable under PRC law.

(f) ***Conservatory and interim measures.*** In theory, CIETAC Rules now grant authority to the arbitral tribunal for discovery and interim relief, for example, injunctions/freezing orders. (Article 21) This brings CIETAC Rules in line with other international bodies. In practice, however, it may be difficult to obtain such relief with a CIETAC arbitration seated in Mainland China. Under PRC civil procedure law, authority to grant such relief is reserved to the competent Chinese people's court. But for CIETAC arbitrations seated outside Mainland China, an arbitral tribunal may order "*any interim measure it deems necessary in accordance with the applicable law*." (Article 21.2)

(g) ***Mediation/conciliation.*** Unlike the other arbitral bodies discussed, CIETAC Rules expressly permit a combination of conciliation and arbitration ("med/arb" or "arb/med") by the arbitral tribunal: "*With the consent of both parties, the arbitral tribunal may conciliate the case in a manner it considers appropriate during the course of the arbitration proceedings*." (Article 45). Parties can now under the new Rules also opt to conciliate their dispute without the involvement of the arbitral tribunal. However, although parties are not obliged to accept an arbitral tribunal's invitation to mediate, a common concern is that refusing the invitation may be viewed unfavourably by the arbitral tribunal and could perhaps damage the refusing party's prospects of success on the merits. Further, if the offer is accepted, the parties (or one of them) may be concerned that the arbitral tribunal will (although it is not entitled to do so) have regard to admissions made/ positions taken in the mediation/ conciliation in considering the substance of the dispute if no settlement is achieved.

The role played by arbitrators in the conciliation/mediation process has also generated controversy when it comes to enforcement of PRC awards. Some courts, including Hong Kong courts, have, on occasion, refused to enforce CIETAC awards (*See* our earlier briefing, "*Shenanigans in Shangri-la?*" highlighting the perils of "arb/med" –although it is noted that the case therein discussed on the issue of apparent bias, *Gao Haiyan v Keeneye Holdings Ltd & Anor* [2012] HKEC 514, was recently overturned on appeal by HK's Court of Appeal in *Gao Haiyan & Anor v Keeneye Holdings Ltd* [2012] 1 HKC 335).

On the whole, although some grey areas remain untested, the revised CIETAC Rules provide for welcome improvement to China's arbitration system.

Conclusion

There are advantages of each arbitral body identified above. Choosing the right arbitral body and seat of arbitration in East Asia will largely depend upon matters such as the type, complexity, and location of the dispute in question, the language preferred to be used by the parties, the selection and appointment process (or removal process) of the arbitrator(s), the degree of oversight and managerial assistance by the institution of the arbitral process required by the parties, the competence of and supervisory assistance offered by local courts, the applicability of any interim measures required, the ability to enforce the award and costs. Whichever international arbitration institution in East Asia is ultimately chosen, it is clearly wise to seek legal advice early on in the piece, at the drafting stage of a contract and if and as soon as a significant dispute surfaces.

Contacts

Martin Rogers
T: +852 2826 2437
E: martin.rogers@cliffordchance.com

Cameron Hassall
T: +852 2825 8902
E: cameron.hassall@cliffordchance.com

Patrick Zheng
T: +86 10 6535 4998
E: patrick.zheng@cliffordchance.com

Nish Shetty
T: +65 6410 2285
E: nish.shetty@cliffordchance.com

Diana Chang
T: +61 2 8922 8003
E: diana.chang@cliffordchance.com

Tim Grave
T: +61 2 8922 8028
E: tim.grave@cliffordchance.com

Ben Luscombe
T: +61 8 9262 5511
E: ben.luscombe@cliffordchance.com

Simon Greenberg
T: +33 1 4405 5114
E: simon.greenberg@cliffordchance.com

Kathryn Sanger
T: +852 2826 3404
E: kathryn.sanger @cliffordchance.com

William Langran
T: +852 2825 8804
E: william.langran@cliffordchance.com

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Clifford Chance, 28th Floor, Jardine House, One Connaught Place, Hong Kong

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