Clydes' Ik Wei Chong and Yong Tong Ang say arbitration is becoming crucial tool to China-related disputes

New rules and India recognition will push arbitration into the mainstream in China

International arbitration in China is becoming a popular dispute resolution method, especially in contracts between Chinese and foreign parties on cross-border transactions.

Arbitration is proving favourable to litigation due to a number of factors. Litigation is still seen as unpredictable, with a limited reciprocal enforcement of foreign court judgments.

Foreign arbitral awards are more readily enforceable in China than foreign court judgments, and grounds for refusal are limited to the narrow procedural irregularity and public policy grounds set out in the New York Convention.

The special reporting system implemented for enforcement of foreign arbitral awards, although imperfect, has also helped promote a pro-enforcement environment.

CIETAC

The China International Economic and Trade Arbitration Commission (CIETAC) recently launched a revised version of arbitration rules (the 2012 rules) with the aim of better serving the needs of businesses engaged in international commerce and investment. CIETAC is by far the most reliable forum to resolve international commercial disputes. It has a relatively sophisticated set of arbitration rules and an extensive list of local and international arbitrators to choose from.

The 2012 rules became effective on 1 May 2012, and take into account current requirements and developments in international arbitration practice and procedure.

There are a number of changes. For the first time, the 2012 rules adopt the concept of consolidation of arbitrations. This is a welcome addition in view of the increased number of multi-party and multi-contract disputes over the last few years. It is believed that in the cases that are consolidated, the arbitral process will be more time-efficient and less costly.

Another aspect which makes arbitration in China more attractive to business will be that Mandarin is no longer the default language if the parties fail to agree on the language of arbitration. Where one party is Chinese and the other is not, CIETAC will now consider all the circumstances to decide the most appropriate language so that language will not be a barrier to effective and equitable disposal of the arbitral proceedings.

In order to make the process less disruptive certain time limits have also been changed. Under the 2012 rules parties should request to postpone an oral hearing within five days of the receipt of the notice of oral hearing.

In both the 2005 rules and the 2012 rules parties could entrust the CIETAC chairman to appoint the third arbitrator. In the 2005 rules, parties could recommend one to three arbitrators while in the 2012 rules it is now possible to recommend up to five arbitrators.

India

Another significant development has been the Indian Government's decision paving the way for the recognition and enforcement of Hong Kong and Mainland China arbitral awards in India.

India has confirmed that it will recognise China as a state to which the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards applies.

Previously there were about 46 countries to have been notified by the Central Government as convention countries for the purposes of the Arbitration Act.

While most of the major international arbitration centres were included in the convention countries list, China and Hong Kong had been a notable omission. Thus, parties to India-related contracts preferred to choose a place other than China and Hong Kong to arbitrate their disputes.

The notification of China and Hong Kong as a convention country now removes what was seen as a significant hurdle to the enforcement of arbitral awards rendered in China and Hong Kong in India, and it further enhances their appeal as a seat for international arbitration, particularly in matters with an India connection.

Practical considerations

Businesses need to consider a number of practical elements when arbitrating in China. One key element is ensuring that the arbitration clause is properly drafted, as China does not recognise ad hoc arbitration, unlike the laws of established arbitration centres in London, Singapore and Hong Kong.

For an arbitration clause to be valid in China, it needs to specify the particular arbitration institution before which any dispute is to be arbitrated (eg, CIETAC, Shanghai Arbitration Commission, China Maritime Arbitration Commission, etc). For example, a clause that merely says "all disputes are to be resolved by arbitration in Beijing" will be null and void as it does not specify the arbitration institution.

The outlook for China

Arbitration will continue to gain traction due to the relative ease in enforcing arbitration awards in fellow New York Convention countries as opposed to attempting enforcement of Chinese court judgments overseas.

The 2012 rules contain some new innovations such as suspension of the proceedings, consolidation of arbitrations and interim measures. These should increase the efficiency of CIETAC proceedings and make CIETAC arbitration more attractive to the international community.

The developments discussed represent some of the latest steps in China's aspiration to become an international arbitration centre rivalling the likes of London, Paris, Singapore and Hong Kong.

Certainly the local arbitration community is reservedly excited about the changes in arbitral enforcement, and rightly so, particularly if other cases follow to establish a track record of pro-foreign arbitration decisions. In light of these pro-arbitration developments, insurers and reinsurers will not be alone in feeling a strong sense of encouragement that arbitration is a suitable choice of dispute resolution mechanism for contractual dealings with China-based parties.

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