

Kluwer Arbitration Blog

Shanghai Free Trade Zone implements modern arbitration rules

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The China (Shanghai) Pilot Free Trade Zone (the “**FTZ**”) was launched in September 2013 with promises of relaxed controls in key areas such as foreign exchange and foreign investment. In the subsequent nine months, a raft of initiatives have included the liberalisation of offshore RMB financing and other cross-border investment and hedging transactions for entities registered with the FTZ and the opening up of the highly regulated e-commerce and value-added telecoms sector within the FTZ.

Where new business flows, disputes inevitably follow and the Shanghai International Economic and Trade Arbitration Commission (also known as the Shanghai International Arbitration Centre) (“**SHIAC**”) has facilitated the resolution of FTZ-related disputes in a commercially attractive manner by establishing under its auspices the FTZ Court of Arbitration in October 2013. Now, SHIAC has promulgated new arbitration rules with a modern suite of mechanisms for the conduct of international arbitration in the FTZ.

Arbitration in China

Among clients doing business in the PRC, and their advisors, concern has persisted over the effectiveness of arbitration agreements referring disputes to the former Shanghai and Shenzhen sub-commissions of the China International Economic and Trade Arbitration Commission (“**CIETAC**”). The effectiveness of such agreements and the enforceability of arbitral awards rendered by those former sub-commissions since their split from CIETAC in May 2012 has also been the subject of inconsistent decisions by local courts, necessitating the intervention of the Supreme People’s Court and casting doubt on arbitration clauses referring to CIETAC.

In the past two years, the two former sub-commissions (now known as SHIAC and the Shenzhen Court of International Arbitration (“**SCIA**”) respectively) have declared their independence from CIETAC and published their own sets of arbitration rules. CIETAC initially suspended and later terminated its authorisation to SHIAC and SCIA to accept and administer arbitration cases or to conduct any further arbitration activities in the names of CIETAC Shanghai and CIETAC Shenzhen.

The new FTZ Rules – a preferred option?

The FTZ Arbitration Rules (the “**FTZ Rules**”), which became effective on 1 May 2014, can be applied even to disputes which are not FTZ-related. In typical cases, the Rules apply if (i) the parties have agreed to refer their disputes to SHIAC and (ii) either the parties have elected to apply the FTZ Rules or there is a connection between the FTZ and the parties, subject matter of the dispute or legal facts that led to the establishment, change or termination of the parties’ civil and commercial relationships. However, parties can also agree (in their initial contract or ad hoc) to refer non-FTZ-related disputes to SHIAC or the FTZ Court of Arbitration, under the FTZ Rules.

Why would parties choose to do so? We examine below the key differences between the FTZ Rules and CIETAC’s existing Arbitration Rules which have been effective since 1 May 2012 (the “**CIETAC Rules**”).

Interim measures

Both the CIETAC Rules and the FTZ Rules provide that applications for conservatory measures under the laws of the PRC (and in particular the revised Civil Procedure Law) will be referred to the competent local court. The FTZ Rules expressly identify the measures available as: (a) property preservation measures; (b) evidence preservation measures; and (c) measures requiring a party to perform certain acts or prohibiting a party from performing certain acts.

However, parties with especially urgent applications under the FTZ Rules have the added option to request the formation of an “emergency tribunal” to deal with interim measures during the period after the commencement of arbitration and before the constitution of the full tribunal.

Parties who need interim measures under the FTZ Rules can also expect support from the local PRC courts, both when applying for the measures and at the stage of enforcement. On 4 May 2014, the Shanghai Second Intermediate People’s Court (the “**Shanghai No. 2 Court**”) issued its opinions on the implementation of the FTZ Rules (the “**Opinions**”). Amongst other matters, the Shanghai No.2 Court has fixed specific time limits for handling applications for, and enforcement of, interim measures in context of arbitrations under the FTZ Rules. Specifically, the Opinions provide that “*if a party applies for preservation before or during the arbitration, such application shall be immediately accepted*”, and that “*in urgent cases, if the corresponding requirements provided in laws are satisfied, a decision shall be made within 24 hours and then transferred for enforcement immediately*”.

Rules of Evidence

Unlike the CIETAC Rules which contain no provision on rules of evidence and merely empower the tribunal to specify the time period for production of evidence, the FTZ Rules allow parties greater flexibility to agree in advance the scope of evidence production (which is often the most costly element of the arbitral process) by providing that any such agreement shall prevail generally (Article 44.4).

Consolidation and Joinder of Third Parties

Like the CIETAC Rules, the FTZ Rules also allow consolidation of related arbitrations or arbitrations involving the same or similar subject matter into a single arbitration if all relevant parties agree, with the difference being that, under the CIETAC Rules, CIETAC will decide whether to consolidate whereas that decision will be taken by the tribunal under the FTZ Rules (Article 36).

On joinder of third parties, there is no specific provision in the CIETAC Rules. By contrast, the FTZ Rules provide for joinder in two contexts. The Rules draw a distinction between third parties who are bound by the same arbitration agreement and those who are not. Third parties falling under the former category can be joined (with or without their further consent) both before and after the constitution of the tribunal (Article 37). In the case of third parties falling under the latter category, they may be joined either on their own application or upon a joint application by the parties to the arbitration (subject to the third party's consent), if considered appropriate by the tribunal or the SHIAC Secretariat (Article 38).

Summary Procedures

The FTZ Rules provide for a similar “summary procedure” for small-value claims to that available from the CIETAC Rules, under which the dispute will be determined by a sole arbitrator and an award rendered within 3 months (rather than within 6 months under the standard procedure) (Articles 64 and 68.1). Under the CIETAC Rules, the relevant threshold is RMB2,000,000 whereas that under the FTZ Rules is RMB1,000,000.

In addition, under the FTZ Rules, there is an even faster-track procedure for claims not exceeding RMB100,000 in value. In such cases, the time limit for rendering an award will be further shortened to 45 days from the formation of the tribunal (Article 76.1).

Room for Clarification

The FTZ Rules are evidently designed to address the demands and expectations of modern international commercial arbitrations, more notably in respects such as emergency interim measures, joinder and consolidation. In this regard, the FTZ Rules reflect recent developments in the rules of other key offshore arbitral institutions such as the Hong Kong International Arbitration Centre, the Singapore International Arbitration Centre and the International Chamber of Commerce.

However, it is not entirely clear whether and, if so, how certain of the new powers conferred under the FTZ Rules will be exercised by SHIAC or enforced in the PRC Courts. For instance, the powers of the emergency arbitral tribunal to award interim measures may be viewed as inconsistent with the exclusive jurisdiction of the PRC courts under the Civil Procedure Law and even, perhaps, unnecessary if the Shanghai No. 2 Court can meet its performance commitments for interim measure applications. SHIAC's approach to joinder of objecting third parties will also be of interest. Although the FTZ Rules technically may apply to non-FTZ disputes, it is not clear what attitude SHIAC will take to any developing practise of using the FTZ as a neutral venue for disputes arising elsewhere in the PRC, or indeed, offshore.

Parties who contemplate seeking enforcement of arbitral awards in Hong Kong, should also note that, unlike CIETAC, SHIAC is not currently listed in the Hong Kong Arbitration Ordinance among the institutions to which the arrangement between the PRC and Hong Kong on reciprocal enforcement of arbitral awards would apply. Unless and until such practical ambiguities are clarified and the uncertainty over the enforceability of awards rendered by SHIAC addressed, it remains to be seen whether there are real benefits for parties to refer disputes for arbitration by SHIAC under the FTZ Rules, rather than by CIETAC under its rules.

Nevertheless, the prompt establishment of the FTZ Court of Arbitration and the FTZ Rules to facilitate commercial arbitration in the FTZ at an international standard is a welcome development

among the continuing steps to liberalise trade in this Shanghai enclave.


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