Kluwer Arbitration Blog

Macau Ups Its Game: A Discussion on the New Arbitration Law 2019

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The Macau Special Administrative Region of the People's Republic of China ("**Macau**") has seen a dramatic decrease of foreign direct investment in the last few years. According to data from the Macau Statistics and Census Service, foreign direct investment dropped 79.9% in 2017 compared to 2016.

In order to attract more investment, Macau needs to strengthen its competitiveness and appeal to overseas investors, particularly amongst Lusophones. Legislative reform needed includes promulgation of investor-friendly legislation that incorporates best international practices, as well as modern and effective dispute resolution techniques for investment disputes. In this vein, Macau published a new arbitration law, Law no. 19/2019 (the "**New Arbitration Law**") on 5 November 2019, which will come into force on 4 May 2020.

The New Arbitration Law unifies the laws governing domestic and international arbitrations seated in Macau by replacing Decree-Law 29/96/M (for domestic arbitrations) and Decree-Law 55/98/M (for international commercial arbitrations). It also implements practices and standards in accordance with the UNCITRAL Model Law. A number of noteworthy developments are highlighted below.

Ability to opt into emergency arbitrator mechanism

The emergency arbitrator mechanism did not exist in the previous legislative regime. The New Arbitration Law allows parties to appoint an emergency arbitrator in their arbitration agreement or in any other subsequent agreement (Chapter 3 of the New Arbitration Law). The emergency arbitrator can deal with applications for urgent interim relief before constitution of the arbitral tribunal. Once constituted, the arbitral tribunal will take over from the emergency arbitrator.

Procedure for court's assistance in taking of evidence

Article 61 of the New Arbitration Law makes it clear that an arbitral tribunal, or any of the parties with the approval of the arbitral tribunal, may apply to the local courts for assistance with obtaining evidence from another party or even a non-party to the arbitration. The application shall

identify the facts that would justify such request, the issues to be covered by the evidence, as well as the documents to be presented and/or the persons to be questioned. The actual process of collecting the evidence will be run by the Macanese courts, which will then submit all information gathered to the arbitral tribunal. Previously, although Article 27 of the Decree-Law 55/98/M provided that an arbitral tribunal or any of the parties with the approval of the arbitral tribunal, could apply to the local courts for assistance with obtaining evidence, it did not explicitly provide for the taking of evidence with the courts' assistance in relation to a non-party.

Possibility to appeal an award before another arbitral tribunal

The previous arbitration regime allowed parties to a Macau-seated arbitration to appeal an award before a local court (Article 34(2) of the Decree Law 29/96/M). The New Arbitration Law has abolished that possibility and provided, as a pro-arbitration move, that arbitral awards are no longer subject to appeal before a local court (Article 67(1) of the New Arbitration Law). The only exception is where there is an agreement between the parties before the award is rendered that such award may be appealed to another arbitral tribunal (the "Appeal Agreement"). The New Arbitration Law does not determine the scope of the Appeal Agreement, for example, whether the scope of appeal would be limited to points of law or would extend to finding of facts. The parties must set out the scope and limits of such appeal in the Appeal Agreement, since failure to do so would render the Appeal Agreement null and void. The requirement that any appeal process must be agreed upon on specific terms will safeguard the finality of the arbitration process while preserving parties' autonomy.

The New Arbitration Law is not the only existing instrument that allow parties to appeal an award before a newly constituted arbitral tribunal. The Optional Appellate Arbitration Rules of the American Arbitration Association ("AAA") allow parties to agree on the possibility to appeal an award before a newly constituted AAA arbitral tribunal, which may then review decisions on the ground of "*an error of law that is material and prejudicial*", or "*determinations of fact that are clearly erroneous*" (Rule A-10). However, it is observed that parties in practice rarely agree to such appeal possibility before another arbitral tribunal. The effect of this feature of the New Arbitration Law in practice is uncertain.

Recognition and enforcement of interim measures issued outside Macau

The New Arbitration Law also provides that, the procedure for the recognition and enforcement by the local courts of interim measures issued by a foreign-seated tribunal, shall be the same as for interim measures issued by a Macau-seated arbitral tribunal (Article 44 of the New Arbitration Law). The additional requirements applicable to such procedure relate to the presentation of the original order for interim measures, or a certified copy of such order, to be accompanied by a translation into Chinese or Portuguese (*i.e.*, the two official languages of Macau) (Article 44 combined with Article 72 of the New Arbitration Law). This was not explicitly stated in the previous legislation.

Recognition and enforcement of arbitral awards issued outside Macau

The New Arbitration Law echoes the Chinese declaration of 19 July 2005 that the New York Convention shall apply to Macau. Consistent with such declaration, the New Arbitration Law allows for the recognition and enforcement of foreign arbitral awards and lists specific limited grounds for refusing recognition and enforcement (Chapter 8 of the New Arbitration Law), which are the same grounds as those set out in the New York Convention. Once an arbitral award is recognized, the courts can enforce it pursuant to regular civil procedural laws.

The mutual recognition and enforcement of arbitral awards between Mainland China and Macau remains unchanged under the New Arbitration Law. Pursuant to the Supreme People's Court Arrangement between the Mainland and the Macau Special Administrative Region on Reciprocal Recognition and Enforcement of Arbitration Awards, Mainland Chinese awards are enforceable in Macau and vice versa.

Obligation to publicize arbitral awards involving public administration

In line with international practice, the New Arbitration Law does not preclude arbitrability of disputes involving public administration. Whilst the previous statutory regime did provide for the arbitrability of disputes involving the public/government sector, Article 77 of the New Arbitration Law provides greater transparency by requiring the Government of Macau, through the Directorate of Justice Affairs, to publish online all arbitral awards related to (i) an administrative contract, (ii) liabilities of government authorities or its officials arising from acts of public management, or (iii) property rights or legally-protected interests.

Comments

The enactment of the New Arbitration Law is an important step for Macau's development into a viable and preferred seat of arbitration between Chinese- and Portuguese-speaking parties. From the perspective of the Lusophone business community, the fact that Portuguese is one of its official languages may gain Macau an advantage over nearby jurisdictions such as Hong Kong. Although the New Arbitration Law has made significant progress in promoting Macau as a pro-arbitration venue, it arguably still falls short in a number of respects.

Firstly, in comparison with the Hong Kong Arbitration Ordinance (Cap. 609) which expressly adopts UNCITRAL Model Law provisions (although with modifications and supplements), Article 7(2) of the New Arbitration Law simply provides that UNCITRAL Model Law can be used in support of interpretation of the New Arbitration Law. Whilst the distinction may not be obvious at first glance, it offers arbitral tribunals and Macanese courts a wider discretion when interpreting the New Arbitration Law which may potentially lead to inconsistent decisions.

Secondly, the New Arbitration Law has not incorporated some of the recent arbitral developments such as provisions addressing third-party funding. Third party funding was made possible in Hong Kong in February 2019 (see discussion in an earlier post).

Thirdly, the New Arbitration Law does not expressly deal with several practical issues that may arise during the course of an arbitration. These include the general and specific powers of an arbitral tribunal, the death of an arbitrator, provisions relating to the award of costs and interest,

and provisions governing the liability of an arbitral tribunal.

Lastly, as discussed earlier on the Blog, the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region enables Chinese courts to grant interim measures in respect of Hong Kong-seated arbitrations that are administered by qualifying institutions. Under such Arrangement, a party to an eligible arbitration against a Chinese counterparty would have in its toolkit the possibility of attaching assets, requesting injunctions, and preserving evidence in Mainland China through the Chinese national courts. However, the same possibilities are currently not available with regard to Macau-seated arbitrations.

For the time being, whilst the New Arbitration Law is undoubtedly a significant step forward for Macau, there remain gaps in its legislative setting that are yet to be closed.

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