

"In the Zone": China introduces Pilot Free Trade Zone Arbitration Rules in Shanghai

Introduction

The Shanghai International Economic and Trade Arbitration Commission (**SHIAC**) has introduced a new set of arbitration rules for disputes related to the Shanghai free trade zone. These are the China (Shanghai) Pilot Free Trade Zone Arbitration Rules (the SFTZ Rules, or, the Rules),¹ effective on 1 May 2014. (Read our earlier briefing on the blueprint for the SFTZ Rules [here](#)).

The Rules are interesting as they are more extensive than SHIAC's own general arbitration rules or those, for instance, from China International and Economic Trade Arbitration Commission (**CIETAC**), as they address pre-arbitration relief, interim measures and emergency arbitrators.

The SFTZ Rules

With business comes rules, and, occasionally, also disputes. Although China's central bank has not yet published any detailed regulatory rules for the SFTZ,² the SFTZ Rules have been published by SHIAC and are intended to assist business parties by having an established channel to resolve commercial disputes "impartially, professionally and efficiently".³

The Rules are specially tailored resolve STFZ disputes and, in line with other recently revised arbitral rules of the Asia-Pacific region, are pro-arbitration. On 4 May 2014, the Shanghai No.2 Intermediate People's Court issued a series of 20 guidelines or opinions on the SFTZ Rules⁴ which were intended to demonstrate the Court's support for the Rules and address issues such as interim measures related to property, judicial review of arbitral awards, enforcement and challenges to proceedings.

Below we highlight the more significant features of the SFTZ Rules.

1. **The SFTZ Rules apply if parties have agreed to select SHIAC as the administering institution and the dispute relates to the Shanghai FTZ**

The SFTZ Rules apply if the parties have agreed to refer their disputes to SHIAC and where the parties, or the subject-matter to a dispute or the legal facts leading to the establishment, change or termination of a civil or commercial relationship, are "connected with" the SFTZ (Article 3.1). The rules can also apply to

¹ <http://www.shiac.org/English/FreeTradeZoneRuleEN.pdf>

² http://en.wikipedia.org/wiki/Shanghai_Free-Trade_Zone

³ *Ibid*, fn.1.

⁴ <http://www.shiac.org/English/ResourcesDetail.aspx?tid=39&aid=662&zt=3>

non-FTZ cases if parties so elect. The automatic application of the Rules to disputes with a connection to the SFTZ and which would otherwise be resolved under SHIAC's normal rules could lead to overlap and parties may consider explicitly incorporating or excluding them.

2. **Emergency arbitration is available before the tribunal is constituted**

In a first for Mainland Chinese arbitral rules, the SFTZ Rules provide for an emergency arbitral tribunal to be established if a party so applies during the period between acceptance of a case and the constitution of the tribunal. The emergency tribunal is given the power to issue interim measures. This power includes injunctions and temporary restraining orders or other measures (Articles 21-24). However, whilst the Rules theoretically allow for such interim relief, this conflicts with the exclusive jurisdiction of the Chinese Courts on such matters and so may not be practically enforceable without their support.

3. **Pre-arbitration interim measures**

The Rules also allow for a party to apply directly to the Court before commencing an arbitration for interim measures or a party may request assistance from SHIAC to do so (Article 19). As mentioned, the Shanghai No.2 Intermediate People's Court has issued a number of guidelines or opinions which suggest that the Court will support such interim applications.

4. **Interim measures expanded**

In addition to providing for the preservation of property and evidence (Article 18), parties are also permitted to apply for interim measures "requesting and/or prohibiting a party to perform" (for example, this would include injunctions and restraining orders) to the competent court where the interim measure is sought to be enforced. SHIAC will transfer the interim relief application to the Court, tribunal, or to the emergency tribunal for a ruling (Article 20). (Read our briefing on amendments to China's Civil Procedural Law [here](#)).

5. **"Open" panel of arbitrators**

Parties can appoint arbitrators from the panel of arbitrators or may recommend an arbitrator from outside the panel to be the arbitrator (Article 27). This rule is novel and contrasts with SHIAC's normal rules where agreement was needed to appoint an arbitrator from outside of the panel. The appointment of an outside arbitrator is subject to final confirmation by SHIAC.

6. **Consolidation and Joinder now permitted with consent**

Arbitrations that involve the same or same sort of subject matter can now be consolidated into a single arbitration upon a party's application and with consent of all parties. Separate awards will be given unless the parties request a joint award (Article 36). Third parties can be joined in an arbitration with their consent by a joint written application of the claimant and respondent or upon the third party's written application with the consent of existing parties (Article 38).

7. **Mediation encouraged**

There have been criticisms of the possibility for bias where an arbitrator who has been appointed to a tribunal also acts as a mediator between the parties in the same case ("med-arb"), a relatively common practice in Mainland China but not universally endorsed in other jurisdictions. To alleviate this issue, the SFTZ Rules specify that mediation is available to any party before the tribunal has been constituted and,

unless otherwise agreed to by the parties in writing, a mediator is not to act as an arbitrator in the arbitration proceedings (Articles 50.1 and 50.7).

8. **Amicable (or "Ex Aequo Et Bono") Awards allowed**

An equitable award, or an "ex aequo et bono" award, which means in Latin what is just and fair according to equity and good conscience, can be awarded by the tribunal under the Rules if agreed by the parties in the arbitration agreement, or the parties have reached consensus that such an award be rendered. This type of award is, however, subject to a condition that the award shall not contravene any "mandatory provisions of laws and public policy" - not defined in the rules - but perhaps is likely to be interpreted to mean according to the laws of the jurisdiction where the award is given and where it is able to be enforced. (Article 56).

9. **Small claims procedure application created**

The Rules give credence to small and medium size businesses: a chapter (Articles 71-78) is devoted to the procedure to be followed by parties when arbitrating small claims, defined under the rules to claims where the dispute does not exceed RMB 100,000.

Conclusion

It will be remembered that it was not so long ago, in 2012, that there was a major public rift between SHIAC and China's main arbitral body, CIETAC, which led to SHIAC splitting from CIETAC (Read our earlier briefing [here](#)).

Since then, SHIAC has worked hard to gain greater international credibility and the new SFTZ Rules are part of this effort. The Rules are pro-arbitration and innovative and may offer parties doing business in and outside the Shanghai FTZ an interesting new commercial option for resolving their disputes.

Contact

Cameron Hassall
Partner, Hong Kong

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

Kathryn Sanger
Consultant, Hong Kong

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

Romesh Weeramantry
Foreign Legal Consultant, Hong Kong

T: +852 2825 8938
E: romesh.weeramantry@cliffordchance.com

Thomas Walsh
Counsel, Seoul

T: +82 2 6353 8110
E: thomas.walsh@cliffordchance.com

Yu Bing
Counsel, Shanghai

T: +86 21 6335 0086
E: bing.yu@cliffordchance.com

Shi Lei
Registered Foreign Lawyer, Hong Kong

T: +852 2826 3547
E: shi.lei@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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

© Clifford Chance 2014

Clifford Chance

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

500989-4-4076-v0.9

Region-8000-P