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Asian private equity and international arbitration: key current issues

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Asian private equity and international arbitration: key current issues

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Summary

IN SUMMARY

This article provides a review of the recent Hong Kong court decisions concerning whether courts considering a winding-up petition should defer to arbitration agreements governing the underlying dispute giving rise to alleged insolvency. Following a Court of Final Appeal decision considering the closely related context of forum selection clauses, the first instance courts took divergent views as to the applicability of that decision to arbitration agreements. However, recent Court of Appeal decisions have confirmed that arbitration agreements should be given deference, aligning Hong Kong's approach with that of other pro-arbitration jurisdictions. We also share insights on the impact of varying confidentiality regimes in Hong Kong, Singapore and mainland China on parties' ability to disclose information regarding arbitrations to investors and other stakeholders, as well as our views on why arbitration in mainland China is becoming a more prevalent choice for private investors.

DISCUSSION POINTS

- Developments in how Hong Kong courts deal with insolvency winding-up petitions when there is a dispute related to the underlying debt subject to an arbitration agreement
- Practical difficulties faced by private equity firms and conglomerates in Asia arising from confidentiality obligations in international arbitration
- Recent trends leading to more arbitration agreements selecting mainland China as the seat of arbitration

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REFERENCED IN THIS ARTICLE

- Hong Kong International Arbitration Centre Administered Arbitration Rules 2018
- Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules 6th Edition
- Arbitration Law of the People's Republic of China
- China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules
- *CIETAC 2023 Work Report and 2024 Work Plan*
- Hong Kong Arbitration Ordinance (Chapter 609 of the Laws of Hong Kong)
- *Re Lam Kwok-Hung Guy (Guy)* [2023] HKCFA 9
- *Re Simplicity & Vogue Retailing (HK) Co Ltd* [2024] HKCA 299
- *Re Shandong Chenming Paper Holdings Ltd (Re Shandong)* [2024] HKCA 352
- *Sun Entertainment Culture Limited v Inversion Productions Limited (formerly known as TNC Productions Limited)* [2023] HKCFI 2400

OVERVIEW

In this article, we review the long-awaited decision ***Guy*** from Hong Kong's highest court on the issue of how Hong Kong courts should handle winding-up petitions where a dispute regarding the underlying debt is subject to an exclusive jurisdiction clause and subsequent decisions from lower courts where the debt was subject to arbitration agreements instead of exclusive jurisdiction clauses. Despite many commentators believing ***Guy*** would result in more certainty and deference to arbitration agreements, the trial courts issued split decisions on the issue. That split is now resolved by two recent Court of Appeal decisions, confirming that arbitration agreements should be given deference. We then briefly explore practical considerations that companies, private equity firms, private investors and conglomerates must consider as they relate to the varying confidentiality regimes for arbitration in Asia. Finally, we briefly describe why mainland China should not be overlooked as a centre for international arbitration.

RECENT DEVELOPMENTS IN THE HONG KONG COURTS' HANDLING OF INSOLVENCY WINDING-UP PETITIONS WHERE A DISPUTE REGARDING THE UNDERLYING DEBT IS SUBJECT TO AN ARBITRATION AGREEMENT

The Hong Kong Court of First Instance (CFI) has statutory jurisdiction to hear a petition filed by an unpaid creditor to wind up a company on the ground that the company is unable to pay its debts. Generally, the CFI would exercise its discretion to make a winding-up order unless the debtor could show that the debt was bona fide disputed on substantial grounds. A winding-up order, if issued, would then put the insolvent company into liquidation for the benefit of all its creditors.

The exercise of the CFI's discretion in making a winding-up order becomes complicated when a dispute giving rise to the alleged indebtedness is subject to an arbitration agreement. The issue is whether the petition should be stayed or dismissed pending determination of the disputed debt by way of an arbitration.

In the previous editions of this article, we analysed the diverging and evolving opinions of Hong Kong judges in the CFI and Court of Appeal (CA) on this issue. One school of thought, led by the CFI decision in ***Re Southwest Pacific Bauxite (HK) Ltd*** (***Lasmos***),[1] in line with the pro-arbitration approach adopted in the English Court of Appeal[2] and the Singapore Court of Appeal,[3] is that the petition should generally be stayed or dismissed in favour of arbitration except in exceptional circumstances (eg, abuse of process). On the other hand, a number of Hong Kong cases, including the CA decision in ***But Ka Chon v Interactive Brokers LLC (But Ka Chon)***,[4] held that the parties' arbitration agreement is only one of the factors to take into account when the court exercises its discretion. Under this approach, while an arbitration agreement is given considerable weight, the court will only stay or dismiss the petition in favour of arbitration if the debtor shows that the debt is bona fide disputed on substantial grounds.

Against this backdrop, in last year's edition, we reviewed the CA decision ***Re Lam Kwok-Hung Guy*** (***Guy***).[5] In that case, a creditor filed a bankruptcy petition based on an unpaid debt under a loan agreement that contained an exclusive jurisdiction clause. The CA dismissed the bankruptcy petition in deference to the exclusive jurisdiction clause. The majority of the CA (G Lam and Barma JJA) held that an exclusive forum clause should ordinarily be given effect and therefore the petition should be dismissed or stayed unless there are strong reasons to the contrary. The third judge (Chow JA) did not agree with this approach. The petitioner appealed the CA decision to the Court of Final Appeal (CFA), the highest court in Hong Kong.

On 4 May 2023, the CFA handed down its long-waited decision in ***Guy***,[6] unanimously dismissing the appeal and affirming the CA's ruling.

In this article, we will examine the CFA decision and the subsequent case law, and see how the CFA ruling, in the context of the exclusive jurisdiction clause, has been considered by lower courts in Hong Kong when handling insolvency winding-up petitions where the debt dispute is subject to an arbitration agreement.

The CFA Decision In Guy

The petitioner in ***Guy*** entered into a credit and guarantee agreement with a borrower controlled by the debtor. The debtor personally guaranteed the payments due and owed by the borrower. The agreement contained an exclusive jurisdiction clause in favour of New York for the purpose of all legal proceedings arising out of, or relating to, the agreement. The petitioner claimed that there had been defaults in repaying the loans and presented the bankruptcy petition. The debtor opposed the petition, contending that there was no event of default and that the petitioner should have first commenced proceedings in New York to establish the debtor's liability under the agreement because of the exclusive jurisdiction clause.

There was no dispute as to the general propositions, or the 'established approach', in relation to a petition on the ground of insolvency without involvement of the exclusive jurisdiction clause or arbitration agreement, that (1) the debtor bears the burden of demonstrating a bona fide dispute on substantial grounds in respect of the debt and (2) the petitioner will ordinarily be entitled to a bankruptcy order (or in the case of corporate insolvency, a winding-up order), if the debt in issue is not subject to a bona fide dispute on substantial grounds.

On that basis, the CFA took further note of the petitioner's public policy arguments in support of Hong Kong courts overseeing the insolvency proceedings, including the dispute regarding the debt, being that there was the 'strong' public interest in an orderly system of fairness to all creditors, including, for example, the reversal of preferences and undervalue transactions, and the scheme of ***pari passu*** distribution.[7] The debtor contended that the CFA should endorse a consistent approach across ordinary actions and insolvency proceedings by giving effect to exclusive jurisdiction clauses unless there are strong reasons to the contrary.

After hearing submissions from both sides, the CFA made the following observations:

- while the determination of whether the debt is bona fide disputed on substantial grounds is part of the court's jurisdiction, it is a threshold question, because if the debt is disputed, the engagement of the bankruptcy process is on hold;[8]
- the threshold character of a dispute about indebtedness allows the court, by exercising its discretion, to decline to exercise the jurisdiction to determine that question;[9] and
- the exercise of discretion to decline jurisdiction to determine the bona fides and substance of a debt dispute requires consideration of multiple factors, including the public policy interest in holding parties to their agreements and the public policy underpinning the legislative scheme for bankruptcy jurisdiction.[10]

The CFA reasoned that because the test for determining that threshold question is 'broadly similar' to the test used in summary judgment proceedings in an ordinary action for debt,-[11] by looking into the threshold question, the court would undertake the equivalent of a

summary judgment determination, assuming the jurisdiction to decide a question that the parties had agreed would be determined in another forum.[12] Meanwhile, the significance of the legislative public policy consideration was much diminished in ***Guy*** as the petition was brought by one creditor and there was no evidence of a creditor community at risk should the petition be dismissed and the dispute resolved pursuant to the exclusive jurisdiction clause.-[13]

Therefore, the CFA held that the established approach is not appropriate where an exclusive jurisdiction clause is involved.[14] The CFA further held that 'in the ordinary case of an [exclusive jurisdiction clause], absent countervailing factors such as the risk of insolvency affecting third parties and a dispute that borders on the frivolous or abuse of process, the petitioner and the debtor ought to be held to their contract'.[15]

While the CFA confirmed that the majority in the CA decision was correct in its approach,-[16] it made an explicit reservation that it was not necessary in that decision to explore the interaction of an arbitration clause and the statutory jurisdiction of the CFI in bankruptcy or insolvency.[17]

Post-Guy, The CFI Issued Divergent Decisions Regarding The Impact Of Guy To Arbitration Agreements

Shortly after the CFA decision in ***Guy***, on 30 May 2023, Linda Chan J issued her judgment in ***Re Simplicity & Vogue Retailing (HK) Co Ltd*** (***Re Simplicity***).[18] In this case, the debtor did not pay a debt that was due and payable under a bond instrument and a corporate guarantee. Although the winding-up order was made because the debtor failed to file its evidence in time to oppose the petition, the judgment nevertheless addressed the debtor's arguments assuming there was a proper basis for the court to consider them. One of the debtor's arguments was that there were arbitration agreements in both the bond instrument and the corporate guarantee and therefore the dispute over the debt should be referred to arbitration, citing the decisions in ***Lasmos*** and ***Guy***.

Linda Chan J held that the ratio in ***Guy*** only applied to exclusive jurisdiction clauses, not arbitration agreements, and that as far as an arbitration clause was concerned, the CFI's approach should be guided by the principles stated in CA decisions such as ***But Ka Chon***.[19] Her Ladyship commented that 'I do not read the CFA judgment as laying down any general rule that if the agreement which gave rise to the petitioning debt contains an arbitration clause and there are no supporting creditors to the petition, the court must dismiss or stay the winding-up petition.'[20] The debtor has appealed against the winding up order.

A few months later, in August 2023, Harris J took a different view in his judgment ***Re Shandong Chenming Paper Holdings Ltd (Re Shandong)***.[21] The winding-up petition was filed on the ground of non-payment of an arbitration award in respect of which leave had been given to enforce it as a judgment in Hong Kong. The company opposed the petition on the ground that it had advanced a cross claim by way of another arbitration and the cross claim was in excess of the first arbitration award. The petition was ordered to be stayed.

Harris J concluded that the same principles and approach applied to the exclusive jurisdiction clause in ***Guy*** should apply to arbitration agreements.[22] In particular, Harris J held that the ***ratio*** of the CFA decision (ie, 'in the ordinary case of an [exclusive jurisdiction clause], absent countervailing factors such as the risk of insolvency affecting third parties and a dispute that borders on the frivolous or abuse of process, the petitioner and the debtor

ought to be held to their contract'), should be equally applicable in the ordinary case of an arbitration agreement.[23] The petitioner appealed Harris J's decision.

In September 2023, DHCJ Le Pichon expressed her view in ***Sun Entertainment Culture Limited v Inversion Productions Limited (formerly known as TNC Productions Limited)***.*[24]* Her Ladyship held that the company failed to show a proper basis for staying or dismissing the insolvency winding-up petition, despite the fact that whether the debt was enforceable depended on the construction of a loan agreement that contained an arbitration agreement.

DHCJ Le Pichon was of the same opinion as Linda Chan J in that the CFA decision in ***Guy*** is applicable only to exclusive jurisdiction clauses and not to arbitration agreements.[25] In her view, the basis for ***Guy*** was extending the approach to exclusive jurisdiction clauses from ordinary actions to winding-up and bankruptcy proceedings, rather than adopting the *Lasmos* approach.[26]

The CA Has Held Guy Applies To Arbitration Agreements

On the same date, 23 April 2024, the CA, consisted of the same justices (Hon Kwan VP, Barma JA and G Lam JA), handed down their decisions in ***Re Simplicity***[27]and ***Re Shandong-***.[28] In both decisions, the CA discussed in length the CFA decision in ***Guy***, and held that the approach laid down in ***Guy***, although in the context of an exclusive jurisdiction clause in favour of a foreign court, should apply by analogy where the dispute over the petition debt is subject to an arbitration agreement.[29] In particular, the CA stated that 'having regard to the statutory framework protective of arbitration, there is apparently an even stronger case for upholding the parties' contractual bargain that disputes falling within the scope of an arbitration clause should be resolved by arbitration.'[30]

In ***Re Simplicity***, the petitioner further submitted that a genuine intention to arbitration is fundamental to engaging the public policy in holding the parties to their agreement to arbitrate disputes, and therefore must be demonstrated by the debtor.[31] In response, the CA noted that it is not onerous to demonstrate a genuine intention to arbitrate, and even if no steps were taken according to the arbitration clause, the court could still exercise its discretion in an appropriate case to grant a short adjournment for the debtor to commence arbitration and require an undertaking from the debtor to proceed with the arbitration with all due dispatch.[32] The CA further noted that, if no progress is made during the adjournment, the court could consider lifting the stay and proceed to exercise its jurisdiction on the petition debt.[33] However, in the circumstances of this case, the CA found that there was no useful purpose in an adjournment as the company did not file any evidence in opposition to the winding-up petition and did not comply with the condition for an extension of time to do so.[34] The CA also found that, in this case, the existence of an arbitration agreement, an indication of the debtor's intention to commence arbitration (which was not filed as evidence in opposition) and the debtor's failure to satisfy the statutory demand did not constitute sufficient and proper evidence to indicate that the petition debt was disputed and that the dispute would be referred to arbitration.[35] The appeal in this case was therefore dismissed.

In ***Re Shandong***, while the appellant accepted that the approach in ***Guy*** applies by analogy to a case where the petition debt is disputed and the dispute falls within an arbitration agreement, it was submitted that***Guy*** does not apply to cross-claims because, inter alia, ***Guy*** is only concerned with the threshold question of whether the petitioner has ***locus standi*** to present the petition (ie, whether the debt was***bona fide*** disputed on substantial grounds), whereas for cross-claims, the petitioner is recognised to have ***locus***.[36] The CA disagreed and held

that although strictly speaking a cross-claim does not affect the petitioner's standing to petition as a creditor, it has been the settled approach of the courts in Hong Kong to treat cross-claims in the same way as disputes regarding a disputed debt giving rise to the petition, regardless of whether the cross-claim constitutes a set-off against the debt.[37] Applying the principles in ***Guy***, the CA held that '[w]here the cross-claim is subject to an arbitration clause, as in the present case, for the court to enter into its merits and determine that there is no genuine and serious cross-claim, or one that is of substance, would be against the parties' agreement.'[38] The appeal in this case was dismissed.

These recent CA decisions confirm that the principles laid down by the CFA in ***Guy*** apply to arbitration agreements, bringing Hong Kong's position on this subject in line with those of other pro-arbitration jurisdictions (eg, the United Kingdom and Singapore).

Meanwhile, it is still important for any company facing debt disputes to understand and fully appreciate the uncertainty, particularly when setting the litigation strategy, that having an arbitration agreement may not save the company from a winding-up petition on the ground of insolvency.

CONFIDENTIALITY OBLIGATIONS IN INTERNATIONAL ARBITRATIONS

Arbitration is often preferred as a dispute resolution method because of its confidentiality. This is especially significant in venture capital, private equity investments and other highly competitive industries where parties typically wish to avoid publicity that could damage their reputation, lead to loss of financing or other business opportunities, and risk revealing investment strategies, business secrets or other sensitive information to competitors.

However, in certain circumstances, it may be necessary or desirable for parties to an arbitration to disclose information relating to the arbitration of non-parties. For example, an arbitration that exposes a portfolio company to substantial contingent liability could be material information for its shareholders and the shareholders' stakeholders (eg, the investors of a venture capital (VC) or private equity (PE) fund). General partners or managers of VC and PE funds may need to disclose a pending or prospective arbitration to fulfil their fiduciary duties to investors (who themselves may have fiduciary obligations to their own investors). Moreover, investment funds themselves generally consist of disparate legal entities, raising questions regarding whether, for example, details of an arbitration involving one entity of a fund can be shared with members of the firm that have no connection to that entity. The need to share information about arbitrations with non-parties is also apparent when a subsidiary of a conglomerate is party to an arbitration. In particular in Asia, for many conglomerates, decision-making is centralised at headquarters. Significant investment-related information (such as a major arbitration) of a subsidiary needs to be reported to the senior management or board of headquarters, even if investments are carried out by separate legal entities within the group and there may be many layers of shareholding between headquarters and the entity involved in the arbitration. Similarly, state-owned enterprises are often required to report information concerning state-owned assets to their parent company.

These situations all highlight the need to be familiar with the scope of confidentiality that applies to arbitral proceedings. Within Asia, popular arbitration seats, including Hong Kong, Singapore and mainland China have adopted very different approaches to confidentiality that impact the permissible scope and content of any disclosures. Hong Kong imposes the most

stringent restrictions, which prevent disclosure of 'any' information relating to an arbitration to any non-party (other than a government body, regulatory body, court or tribunal, and even then, in very specific circumstances). By contrast, Singapore permits disclosure if, among others, it is for the purposes of complying with the laws of any state (which govern fiduciary obligations and often govern reporting obligations within conglomerates). In mainland China, the courts have recognised that information in connection with an arbitration may be disclosed to substantial shareholders. To avoid potential collateral disputes regarding breaches of confidentiality, investors should be acutely aware of each of these jurisdictions' approaches to arbitral confidentiality.

Hong Kong

Hong Kong is one of the few jurisdictions that has codified confidentiality obligations in legislation. The Hong Kong Arbitration Ordinance (Cap 609) provides that, with limited exceptions, 'unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to the arbitral proceedings under the arbitration agreement' (section 18). Legislative materials shed no light on the scope of information covered, such as whether 'any information' includes the existence of the arbitration itself.[39] Article 45 of the 2018 HKIAC Administered Arbitration Rules (the HKIAC Rules) provides for similar confidentiality obligations and exceptions.

Both the Arbitration Ordinance and the HKIAC Rules permit disclosure 'to any government body, regulatory body, court or tribunal' where the party is obliged by law to make such disclosure. But this exception places parties to arbitration in a significant grey area. Many commentators have opined that this exception permits publicly listed companies to disclose a material arbitration to investors because such disclosure is required by law, and disclosure is ordinarily made through filings with a regulatory body (eg, the Hong Kong Exchange or the United States Securities and Exchange Commission). It is unclear, however, on what basis private companies can disclose information about a material arbitration to its investors. One possibility is to assume shareholders are not distinct from the company that is party to the arbitration, but that would run counter to the basic tenant of company law that shareholders are distinct from the company. Moreover, when it comes to VC and PE fund investors, if disclosure is permitted by a company to a shareholder fund, whether that shareholder fund is permitted to disclose to its own investors is unclear. Similarly unclear is how a member of a conglomerate or state-owned enterprise that is a party to an arbitration can report to decision makers at headquarters without violating confidentiality obligations.

Singapore

The Arbitration Rules of the Singapore International Arbitration Centre (6th edn, 2016) (the SIAC Rules) provide that, unless otherwise agreed by the parties, all matters relating to the proceedings, including the existence of the proceedings, shall be confidential (Rules 39.1 and 39.3).[40] Under the SIAC Rules, disclosure to a third party is allowed for the purpose of complying with the laws of 'any State which are binding on the party making the disclosure' (Rule 39.2(d)).[41] Thus, a party to an arbitration subject to the SIAC Rules would be permitted to make disclosures regarding the arbitration to investors regardless of whether the party is a public or private company, so long as the disclosure is in compliance with the laws binding on that party. This affords private companies, fund managers, members of conglomerates and state-owned enterprises a clear basis to disclose information about a material arbitration to investors or headquarters, as the case may be, as fiduciary and other duties to disclose information to stakeholders are generally governed by law.

Unlike Hong Kong, this obligation of confidentiality does not have statutory footing. However, the Singapore courts have held that independent of arbitration rules, there is an implied obligation of confidentiality as a matter of law due to the private nature of arbitral proceedings,[42] although the exact scope of the duty of confidentiality is to be evaluated in the circumstances of each case.[43] The Singapore courts have yet to adopt or recognise the Rule 39.2(d) exception as a freestanding legal principle. A court or tribunal applying Singaporean law would have to assess the appropriate level of confidentiality required: for instance, whether an arbitrator may disclose the existence of an arbitration without obtaining the parties' prior consent will depend on the terms of the arbitration agreement and the customs and practice in the relevant field.[44]

Mainland China

Article 40 of the Chinese Arbitration Law requires arbitration be conducted in private, but also allows it to be public if the parties agree and if no state secrets are involved. The accepted view is that article 40 only requires the arbitral hearing to be conducted in private and does not require information relating to the arbitration to be kept confidential.[45]

Article 38 of the China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules (the CIETAC Rules) imposes an additional requirement on the parties and other participants in an arbitration that is held in private to 'not disclose to any outsider any substantive or procedural matters relating to the case.' The scope of article 38 has been interpreted narrowly. The Chinese courts have dismissed applications to set aside an arbitral award for breaches of article 38 of the CIETAC Rules where the disclosure was made to a third-party funder.[46] In the same cases, the Chinese courts have explained that the purpose of confidentiality in arbitration is to prevent disclosure to the public in order to protect commercial secrets and the public image of the parties, and therefore disclosure to 'relevant persons' such as decision makers of a party and shareholders holding material interests, is also permissible.[47] Although the Chinese courts did not provide an exhaustive list of such 'relevant persons', this should provide some comfort to companies who disclose information regarding arbitrations to their investors, parent companies and the like.

Practical Considerations

In most Asian jurisdictions, parties are free to agree on procedural matters, including confidentiality. When negotiating an arbitration agreement, one should carefully evaluate the confidentiality obligations imposed by the laws of the applicable seat and rules selected by the parties and consider whether any deviation is required to accommodate the specific needs of the parties. For example, parties may agree on the scope of disclosable information disclosure and recipients of such information (which may include their direct and indirect investors and other stakeholders) in the arbitration agreement. Where parties have failed to reach an agreement, and the party seeking to disclose information about the arbitration faces uncertainty as to whether such disclosure would result in a breach of confidentiality, it would be prudent to apply to the tribunal or the supervisory court for directions.

WILL CHINA BE A HUB FOR INTERNATIONAL ARBITRATION IN ASIA?

There has been much ink spilt concerning whether Hong Kong or Singapore is a better jurisdiction for arbitrating private investment disputes. In recent years, the trend has been that the Singapore International Arbitration Centre features a larger volume of new arbitrations, while arbitrations filed with the Hong Kong International Arbitration Centre on

average have significantly more money at stake. The conversation, however, should not leave out mainland China. We foresee that more international arbitrations will be seated in mainland China in the years to come due to a confluence of two primary factors: (1) the evolving nature of private equity investment in China and (2) efforts to improve mainland Chinese arbitral institutions.

As to the former, we have observed that there are currently more emerging growth companies in mainland China focusing on raising funds from domestic investors (both private and state-owned) than there have been in years past. The reasons for this can be explored in another forum, but the practical consequences to foreign investors looking to make investments in China-based start-ups is that they are more often faced with making investments into a China-based investment structure instead of an offshore structure. With this comes Chinese law-governed contracts and China-based arbitration agreements. Foreign investors are being told there is no room to negotiate these provisions because other investors (based in China) participating in the funding round have already agreed, and there is an insufficient basis for those investors to have disputes arbitrated offshore because of insufficient 'foreign factors' to justify such arbitration under domestic law.[48] Foreign investors in this situation are left with the choice of accepting Chinese arbitration or declining the investment altogether. For those who go forward with the investment, it is worthwhile to obtain a working understanding of how arbitration in China differs from international arbitration in other jurisdictions, as well as the substantive differences between relevant Chinese law and the law of more familiar jurisdictions.

As to the conduct of arbitrations in China, much effort has been made to align the rules to international standards. On 5 September 2023, CIETAC issued the 2024 version of the CIETAC Rules, which became effective on 1 January 2024, and which are more aligned with the rules of major international arbitration centres. Some of the notable amendments reflected in the 2024 CIETAC Rules include:

- encouraging digitalisation and the use of AI in arbitration proceedings;[49]
- enhancing the ability of parties to seek interim measures from courts outside of mainland China;[50] and
- setting a cap on fees for domestic cases by no longer charging arbitration fees for the portion of disputed amounts that exceed 3 billion yuan.[51]

More importantly, there was an attempt to align with the international principle of competence-competence by delegating the power to determine the tribunal's jurisdiction to the arbitral tribunal.[52] This power was previously vested in the arbitration commission or the court. In addition, the arbitral tribunals are reportedly more frequently adopting common law approaches in CIETAC arbitral proceedings, such as cross-examination, which is uncommon in traditional Chinese court proceedings.[53] These changes are a welcome development, and we look forward to observing how they are applied.

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Endontes

[1] [2018] 2 HKLRD 449.

[2] *Salford Estates (No. 2) Ltd v Altomart Ltd (No. 2)* (*Salford*) [2015] Ch 589.

[3] *AnAn Group (Singapore) Pte Ltd v VTB Bank (public Joint Stock Co)* [2020] SGCA 33, [2020] 1 SLR 1158.

[4] [2019] 4 HKLRD 85.

[5] [2022] 4 HKLRD 793.

[6] [2023] 4 HKC 93.

[7] [2023] 4 HKC 93, paragraph 63.

[8] [2023] 4 HKC 93, paragraph 98.

[9] [2023] 4 HKC 93, paragraph 100.

[10] [2023] 4 HKC 93, paragraphs 101 to 104.

[11] [2023] 4 HKC 93, paragraphs 35.

[12] [2023] 4 HKC 93, paragraph 102.

[13] [2023] 4 HKC 93, paragraph 102.

[14] [2023] 4 HKC 93, paragraph 105.

[15] [2023] 4 HKC 93, paragraph 105.

[16] [2023] 4 HKC 93, paragraph 107.

[17] [2023] 4 HKC 93, paragraph 91.

[18] [2023] HKCFI 1443.

[19] [2023] HKCFI 1443, paragraph 35.

[20] [2023] HKCFI 1443, paragraph 36.

[21] [2023] 6 HKC 81.

[22] [2023] 6 HKC 81, paragraph 4.

[23] [2023] 6 HKC 81, paragraph 5.

[24] [2023] HKCFI 2400.

[25] [2023] HKCFI 2400, paragraphs 40 and 41.

[26] [2023] HKCFI 2400, paragraphs 40 and 41.

[27] [2024] HKCA 299.

[28] [2024] HKCA 352.

[29] [2024] HKCA 299, paragraph 37; [2024] HKCA 352, paragraph 23.

[30] [2024] HKCA 299, paragraph 37.

[31] [2024] HKCA 299, paragraph 41.

[32] [2024] HKCA 299, paragraph 42.

[33] [2024] HKCA 299, paragraph 42.

[34] [2024] HKCA 299, paragraph 43.

[35] 2024] HKCA 299, paragraph 45.

[36] [2024] HKCA 352, paragraphs 23 to 24.

[37] [2024] HKCA 352, paragraphs 28 to 31.

[38] [2024] HKCA 352, paragraph 43.

[39] See Legislative Council Brief: Arbitration Bill (LP 19/00/3C Pt 38) 'clause 18 prohibits the disclosure of information relating to arbitral proceedings and awards made in those arbitral proceedings' at page 172.

[40] Consultation Draft of the 7th Edition of the SIAC Rules further clarifies that confidentiality is a continuing obligation (see proposed Rules 59.1 and 59.3).

[41] See also Rule 59.3(d) of the SIAC Rules Consultation Draft (7th edn) which contains the same provision.

[42] *CZT v CZU* [2023] SGHC(I) 11 at section 41; and *International Coal Pte v Kristle Trading Ltd & Anor* [2008] SGHC 182 at paragraph 82.

[43] *International Coal Pte v Kristle Trading Ltd & Anor* [2008] SGHC 182 at paragraph 84.

[44] See *Halliburton Co v Chubb Bermuda Insurance Ltd & Ors* [2020] UKSC 48; [2021] AC 1083 at paragraph 92.

[45] SeeAnnotations and Companion to the Arbitration Law of the People's Republic of China published by the China Legal Press at page 42.

[46] See (2022) Jin 04 Min Te No. 369 and (2022) Su 02 Zhi Yi No. 14. The 2015 and 2024 versions of article 38 of the CIETAC Rules are identical. It should be noted that the legality of third-party funding in mainland China is uncertain.

[47] (2022) Jin 04 Min Te No. 369 at page 8.

[48] Question 83 of *Answers to Practical Questions on Foreign-related Commercial and Maritime Adjudication Issues (Supreme People's Court, Fourth Civil Trial Division, December 2008).*

[49] See Articles 8.2 and 37.5 of the CIETAC Rules.

[50] See Article 23.1 of the CIETAC Rules.

[51] See Annex II of the CIETAC Rules.

[52] See Article 6 of the CIETAC Rules

[53] *CIETAC 2023 Work Report and 2024 Work Plan-News-China International Economic and Trade Arbitration Commission*.

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