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China Arbitration and Disputes Bulletin

Welcome to White & Case's monthly China Arbitration and Disputes Bulletin. This month's bulletin provides updates on international arbitration in the PRC and Hong Kong litigation.



New CIETAC Online Arbitration Rules

On May 1, 2009, the new "Online" Arbitration Rules (the "**Online Rules**") of the China International Economic and Trade Arbitration Commission ("**CIETAC**") came into effect. At this stage, it appears that the Online Rules are only available in Chinese.

The Online Rules are aimed primarily at e-commerce disputes, although parties are free to agree to use them for other types of disputes (Article 1).

CIETAC has delegated the administration of arbitrations under the Online Rules to its Online Dispute Resolution Centre (www.cietacodr.org), an organization under CIETAC specializing in resolving internet domain name disputes and e-commerce disputes etc. using online dispute resolution methods.

In general, the Online Rules are an abbreviated version of the "main" CIETAC Arbitration Rules (the "**Main Rules**"), and many of its provisions are modeled closely on the Main Rules, e.g. regarding the constitution of the tribunal. Article 54 of the Online Rules also provides that the Main Rules will govern matters not covered in the Online Rules (such as challenges to the arbitrators' appointment).

Notable features of the Online Rules include the following:

- The Online Rules (at Article 11(2)) expressly provide that a party (and its lawyers) must not unilaterally communicate with the tribunal members, and that all communications between the parties and the tribunal must go through the Secretariat. By comparison, the Main Rules are silent on this issue.
- There are elaborate provisions (in Chapter 2) regarding the *electronic* submission and transmission of documents, including the parties' memorials and evidence, and notices from the CIETAC Secretariat (the "**Secretariat**"). Indeed, the default modes of submission/transmission to be used by the parties and the Secretariat are email, Electronic Data Interchange, facsimile etc (although other traditional modes such as the post and courier may be used depending on the circumstances of the case). There are also provisions for deemed dates and times of receipt of electronically transmitted documents.
- In relation to electronically produced, transmitted and stored evidence, Article 29 sets out various factors to be considered by the tribunal in deciding the evidence's reliability. Factors include the reliability of the methods in producing, storing, and authenticating the evidence, as well as in maintaining its integrity. Article 29 also expressly states that a piece of electronic evidence using a reliable electronic signature has the same force and probative value as a document bearing a manuscript signature or company chop.
- Article 15 provides that CIETAC will use its reasonable endeavours to keep data communications secure and encrypted.

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- Article 31 gives a power to the tribunal, where necessary, to investigate and collect relevant evidence from electronic services suppliers, logistics companies and payment banks etc. The tribunal can request the parties, and the parties have a duty, to provide assistance for and cooperate with such investigations. Any evidence collected will be provided to the parties to give them an opportunity to comment.
- Unless the parties agree otherwise, the tribunal will normally decide the dispute on the papers only (i.e. without any oral hearing) (Article 32). Where an oral hearing is necessary, the default mode of hearing is by *video conference or other electronic means of communication* (although traditional in-person meetings can also be used depending on the circumstances of the case) (Article 33). Witness evidence can also be given by video conference (Article 36).
- There is also provision in Article 37 for *online mediation* of the dispute(s) in question (by video conference or other electronic means of communication, or by in-person meetings where appropriate).
- The Online Rules actually provide for three different procedures – the “main” online procedure, a “summary” procedure (mainly for disputes with a value of more than RMB 100,000 but less than RMB 1,000,000) and an “expedited” procedure (mainly for disputes with a value of RMB 100,000 or less).
- The main difference between the above three procedures is the timeframes involved. For example, in the main online procedure, the Respondent has 30 days from receipt of the notice of arbitration to submit its Defence (and Counterclaim, if any), the Claimant has 20 days after that to submit its Reply, and the tribunal should make its award within 4 months of its constitution. Under the summary procedure, the timeframes are 15 days, 10 days and 2 months respectively. Under the expedited procedure, the timeframes are 10 days, 5 days and 15 days respectively. Other aspects of the rules are the same for all three procedures.
- When submitting its request for arbitration, the Claimant has to pay the arbitration fee in advance. Appendix 2 sets out two scales of fees, one for domestic cases, the other for foreign-related cases. Fees are calculated by reference to the amount claimed by the Claimant (or, where this is inconsistent with the amount in dispute, the amount in dispute). For all cases, the fees start from a minimum of RMB 4,000. The top band of the fees for domestic and foreign-related cases are, respectively, RMB 606,500 plus 0.4% of the amount in dispute above RMB 100,000, and RMB 864,000 plus 0.4% of the amount in dispute above RMB 100,000. There is an additional RMB 10,000 initiation fee for foreign-related cases.

- The Online Rules also provide (in Appendix 1) a model online arbitration clause (in Chinese).

Injunction against former employee refused by Hong Kong Court of Final Appeal

On February 13, 2009, the Hong Kong Court of Final Appeal refused to grant an injunction against a former employee who acquired allegedly confidential and privileged information during his employment, to restrain him not merely from misusing or disclosing such information, but from being employed on matters to which such information may be relevant in his new job with an enterprise having interests adverse to those of his former employer.


The injunction was sought by PCCW, Hong Kong's largest fixed line telecommunications company, against its former General Manager of Regulatory Compliance, Mr. David Aitken. Mr. Aitken, an Australian-qualified lawyer, was employed by PCCW for a period of around 12 months, during which he had access to documents and meetings which revealed PCCW's strategy regarding fixed mobile interconnection charges (“**FMICs**”).

Mr. Aitken resigned, giving PCCW the notice required under his employment contract (the “**Employment Contract**”) and took up a position with his previous employer, CSL, Hong Kong's largest mobile operator.

The Employment Contract contained two relevant covenants:

1. an undertaking by Mr. Aitken not to “make use of, divulge or communicate to any person ... any of the trade secrets or other confidential information of or relating to [PCCW]”, a restriction which had no specified time limit; and
2. a restrictive covenant whereby Mr. Aitken undertook to refrain from taking employment in Hong Kong with any of PCCW's competitors for a period of three months after his employment with PCCW. PCCW agreed to waive the three month non-compete obligation when Mr. Aitken left PCCW to join CSL.

In May 2008, CSL produced a press release criticizing PCCW's strategy in relation to FMICs and naming Mr. Aitken as a contact. PCCW applied for, among other things, an injunction restraining Mr. Aitken from revealing confidential information regarding PCCW and from dealing with FMIC issues during the course of his work at CSL. Such issues amounted to around 70% of Mr. Aitken's work at CSL.



The Court balanced PCCW's desire for confidentiality against the public policy arguments against restraint of trade. It held that injunctions limiting Mr. Aitken's scope of work as requested by PCCW were too wide to be justified.

The Court also dismissed PCCW's argument that its confidential information was covered by legal professional privilege, and that its protection therefore over-rode any public policy considerations regarding restraint of trade. The Court held that the public policies underlying legal professional privilege were not relevant here, as the information was not sought to be disclosed under compulsory powers. Further, cases concerning legal professional privilege are in any event inapplicable here as Mr. Aitken was merely in the position of an employee, not a solicitor.

The Court explicitly declined to comment on the position that arises where an (in-house) lawyer that acts for one side in a contentious matter leaves to act for the other side in the same matter.

The judgment contains a useful summary of the law regarding the circumstances in which employers may restrain former employees from revealing trade secrets.

The Court also noted that confidentiality is much more strictly enforced by the Court in relation to information passed from a client to a solicitor. An employer consequently has a much lower expectation of confidentiality in relation to its employees, as is demonstrated by the courts' unwillingness to restrict an ex-employee's field of activity in the absence of an enforceable restrictive covenant.

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