



JONES DAY COMMENTARY

CIETAC ISSUES NEW ARBITRATION RULES: INTERIM MEASURES AND CONSOLIDATION AMONG THE HIGHLIGHTS

On February 3, 2012, the China Council for the Promotion of International Trade and the China Chamber of International Commerce revised and adopted the China International Economic and Trade Arbitration Commission (“CIETAC”) Arbitration Rules, which come into effect on May 1, 2012. Although not as extensive as the previous revision to the CIETAC rules in 2005, the 2012 edition certainly makes some significant improvements.

By way of background, it is important to remember that the Chinese concept of arbitration (as distinct from that in the international arbitration arena) has, at its heart, the notion of submission to a method of state-sponsored dispute resolution, somewhat different from the courts, but still ultimately deriving its authority from the state, not the parties. These Chinese state-sponsored arbitration institutions number more than 200, of which CIETAC is probably the most well known.

Given the increasing number of Chinese companies participating in global trade and investment, it is likely that the number and scale of disputes between Chinese enterprises and foreign companies will increase. However, the perception (at least in China) is that Chinese enterprises have not yet managed to fully understand the process of international arbitration. Accordingly, one of CIETAC’s objectives is to build and internationalize its “brand” by, among other things, modifying and improving its arbitration rules, carrying out more arbitration education and training, and diversifying and building up an influential group of arbitrators. It is likely, therefore, that over time, CIETAC will market itself not just as a Chinese arbitration institution, but as an international arbitration institution in competition with the International Chamber of Commerce (“ICC”), the London Court of International Arbitration (“LCIA”), the Hong Kong International Arbitration Centre (“HKIAC”), and the Singapore International Arbitration Centre (“SIAC”).

ARBITRATION IS GROWING IN CHINA

At a conference of arbitration practitioners in Guiyang on July 26, 2011, it was reported that nearly 80,000 arbitration cases were heard by 209 arbitration commissions in 2011, among which only 1,219 were foreign-related.¹ Therefore, cases involving Hong Kong, Macao, and other foreign-related cases represented only 1.6 percent of the total. Shen Sibao (沈四宝), chairman of the China Law Society and the China Academy of International Economic Law, and vice chairman of the China Academy of Arbitration Law, commented that it is necessary to improve the overall environment for commercial arbitration in China, including the rule of law, market credibility, and the quality of arbitration institutions and arbitrators.² The new CIETAC rules, therefore, represent a movement in the right direction.

CIETAC ALLOWS INTERIM MEASURES

This is the first time that the CIETAC arbitration rules have allowed an arbitral tribunal to grant interim measures. Previously, the rules required that where a party to a CIETAC arbitration applied for conservatory measures, such as preservation of property and preservation of evidence, the secretariat of CIETAC was required to forward that party's application to the competent court at the place where the domicile of the party against whom the measures was sought was located or where the property of that party was located (Article 17 of the 2005 CIETAC Rules). Therefore, neither CIETAC nor the arbitral tribunal had any power to order interim measures. In other words, there was no scope for even a recommendation by CIETAC or the tribunal.

Now, Article 21.2 of the revised CIETAC arbitration rules allows the arbitral tribunal, at the request of a party, to order any interim measure that it deems necessary or proper in accordance with applicable law. The interim measure may take the form of a procedural order or an interlocutory award. For example, an arbitral tribunal could grant a procedural order or make an interlocutory award to suspend or prohibit a party from carrying out certain acts, such as intellectual property infringement. Further, the arbitral tribunal is also empowered to require the requesting party to provide appropriate security in connection with the measure.

While this is a step in the right direction, there remain significant problems with enforcement. In particular, such orders or awards are not injunctions, and Chinese courts have no legal basis to enforce such interim measures. These problems stem from the Chinese Arbitration Law and the Civil Procedure Law, which require applications for property or evidence preservation to be forwarded to the courts (as was previously provided for in the old CIETAC rules).

This can be contrasted with the position under the English Arbitration Act 1996, where Section 42 expressly empowers the court to make an order requiring a party to comply with a peremptory order made by the tribunal. Similarly, in Section 44, the court has a range of supportive powers that it may exercise where the arbitrators themselves are unable to act (where, for example, they have not yet been appointed). China is currently revising its Civil Procedure Law, and it is to be hoped that the new provisions in the CIETAC rules will be given the necessary support and teeth in the revised Civil Procedure Law.

CIETAC's revisions also do not go as far as the Emergency Arbitrator provisions in the new ICC arbitration rules, which allow an Emergency Arbitrator to be appointed by the ICC at the request of a party applying for urgent interim or conservatory measures that cannot wait for the constitution of the arbitral tribunal. This is because CIETAC's rules allow the arbitral tribunal only to make the order or award, and do not address the issue of what happens in the event that no tribunal has been constituted, which is precisely what the new ICC rules seek to resolve.

Accordingly, while the new CIETAC rules on interim measures are an improvement on the previous position, further improvements are required, particularly in the absence of strong supporting legislation.

CONSOLIDATION OF ARBITRATIONS

This is another first for CIETAC, and it also follows changes made by the ICC to its rules earlier this year. Article 17(1) of the new CIETAC rules allows CIETAC to consolidate two or more pending arbitrations into a single arbitration where (a) it is requested by a party and all the parties agree, or (b)

CIETAC believes it is necessary and all the parties agree. Therefore, unlike the new consolidation provisions in the ICC rules, CIETAC can order consolidation only if the parties agree. This has the unfortunate consequence that one party can prevent consolidation.

Article 10 of the new ICC rules is a much fairer and more practical process insofar as it allows the ICC (at the request of a party) to consolidate two or more ICC arbitrations into a single arbitration where (a) the parties agree to that, or (b) all of the claims are made under the same arbitration agreement, or (c) the claims are made under different arbitration agreements but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the ICC finds the arbitration agreements to be compatible.

In deciding whether to consolidate the arbitrations, Article 17(2) of the new CIETAC rules allows CIETAC to take into account any factors it considers relevant in respect of the different arbitrations, including whether (i) all of the claims in the different arbitrations are made under the same arbitration agreement, (ii) the different arbitrations are between the same parties, or (iii) one or more arbitrators have been nominated or appointed in the different arbitrations. Factors (i) and (ii) largely accord with the conditions in the new ICC rules set out at (b) and (c) above, and factor (iii) is also referred to in the new ICC rules.

Finally, when the arbitrations are consolidated, they are consolidated into the arbitration that was commenced first, unless otherwise agreed by the parties. Again, the CIETAC rules mirror the new ICC rules.

The consolidation provisions are a major step forward for CIETAC but unfortunately do not go as far as the ICC, LCIA, HKIAC, and SIAC rules in containing joinder provisions.

APPOINTMENT OF ARBITRATORS

Article 28 of the new CIETAC rules provides that the Chairman of CIETAC, when appointing arbitrators, shall take into consideration (a) the law as it applies to the dispute, (b) the place of arbitration, (c) the language of arbitration, (d)

the nationalities of the parties, and (e) any other factors the Chairman considers relevant. The ICC rules are similar but go further by expressly stating that a sole arbitrator or the presiding arbitrator (in a three-member tribunal) shall be of a nationality other than those of the parties (unless none of the parties objects). CIETAC does not go this far, and this is unfortunate, particularly in the case of foreign-related arbitrations in CIETAC where one of the parties is not Chinese.

Further, in multiparty arbitrations, the new CIETAC rules provide that if any party defaults in appointing its party-appointed arbitrator (or if both parties fail to jointly entrust the Chairman of CIETAC to appoint), then the Chairman of CIETAC will appoint all three arbitrators.

SUSPENSION OF THE ARBITRATION

Again, for the first time CIETAC has included provisions dealing with the suspension of an arbitration. Currently, there are no rules governing the suspension of an arbitration, but in practice the CIETAC case manager has some discretion to suspend an arbitration before the appointment of the arbitral tribunal, if, for example, the parties are in settlement negotiations.³

The new rules clarify the position and expressly provide in Article 43 that the parties can request a suspension of the arbitration proceedings. The decision on the suspension shall be made by the arbitral tribunal or, in the case where the tribunal has not been formed, by the Secretary General of CIETAC. The arbitration proceedings will resume as soon as the reason for the suspension disappears or the suspension period ends, and the arbitral tribunal (or the Secretary General of CIETAC where there is no tribunal) is empowered to order resumption of the arbitration proceedings.

CONCILIATION

One of the more contentious practices in CIETAC arbitrations is the use of conciliation during the arbitration process. Both the old and the new CIETAC rules allow the arbitral tribunal to conduct conciliation during the arbitration proceedings. If the conciliation is successful, the parties may

request the tribunal to issue an award based on the settlement agreement concluded as a result of the conciliation. This is the traditional approach to dispute resolution in China, where the Chinese see the conciliator as the ideal arbitrator when the parties are unable to resolve their dispute amicably. Chinese tradition suggests that there is no need to have different people serve as conciliator and arbitrator, and in practice, CIETAC says that almost 50 percent of arbitration cases make use of conciliation by the arbitral tribunal,⁴ with CIETAC statistics suggesting that 20 percent to 30 percent of all CIETAC cases are settled by this method.

Most criticism of this hybrid arbitration/conciliation process arises when the conciliation is not successful. In this situation, the arbitral tribunal is often aware of prejudicial or confidential information imparted by one or both parties in the conciliation process. Conciliation may also reveal underlying interests that may not surface in arbitration. Critics of the CIETAC arbitration/conciliation process are therefore concerned that the tribunal may acquire information in attempting to bring about a settlement that should have no bearing on their decision as arbitrators, and it is unrealistic to expect a conciliator-turned-arbitrator to put these underlying issues aside when making a decision. The argument made is that if parties disclose their bottom line, that information cannot be erased but must inevitably affect the arbitration award. Thus, conciliation may pose both a serious impediment to the independent judgment of the arbitral tribunal and real risk for the parties.

This is sometimes referred to as a suspension of “natural justice,” one of the fundamental concepts of legal proceedings in common law countries. It has two basic tenets: (i) persons must be allowed to hear and answer an opponent’s case and (ii) any decision affecting a person must be made by a tribunal that is impartial and not biased. Critics are concerned that the private and confidential meetings held during the conciliation process can erode natural justice by removing the right of parties to respond directly to any accusations or information of the other party. Moreover, they fear that unchecked information obtained during private conciliation meetings may bias the final binding decision during the continuation of arbitration.

CIETAC is aware of this criticism and has therefore added a new provision in Article 45.8, which provides that where the parties wish to conciliate their dispute, but do not wish to have the conciliation conducted by the arbitral tribunal, CIETAC may, with consent of both parties, assist the parties to conciliate the dispute in a manner and procedure it considers appropriate. Thus CIETAC itself will undertake the conciliation and not the arbitral tribunal empowered with arbitrating the dispute.

THE LAW OF THE ARBITRATION

CIETAC has included a new provision dealing with awards and the choice of law for the dispute. Article 47.2 provides that the parties’ agreement shall prevail where they have agreed on the law as it applies to the merits of their dispute. However, in the absence of such an agreement, or where such agreement is in conflict with a mandatory provision of the law, the arbitral tribunal shall determine the law as it applies to the merits of the dispute.

This is an important provision because there are a number of areas where Chinese law is mandatory. For example, Article 126 of the Chinese Contract Law requires that Sino-foreign joint venture agreements must be governed by Chinese law. In addition, the Chinese Supreme People’s Court has issued an opinion on the application of law,⁵ which extends the applicability of Chinese law beyond the categories of contract expressed in Article 126 of the Contract Law.

In essence, a contract with a “foreign element” allows the parties to choose a law other than Chinese law. The term “foreign element” is not defined in the Contract Law. However, the Supreme People’s Court has issued a number of opinions discussing the definition of “foreign element.” As a result, the contract will have a foreign element if:

- At least one of the parties to the contract is a foreign entity;
- The object of the contract is located outside the People’s Republic of China; or

- The rights or obligations under the contract arise in, are modified in, or are terminated in a foreign country.

Given the above definition, at the very least one of the parties to a contract must be a foreign entity for the contract to be governed by a law other than the law of the People's Republic of China.

If this foreign element is not present or if the contract is a Sino-foreign joint venture agreement, for example, and the parties chose a foreign law for the resolution of disputes under the contract, then this agreement will be in conflict with a mandatory provision of the law. According to the new CIETAC rules, the arbitral tribunal will be empowered to determine the law that will apply to the dispute, in most cases Chinese law.

This is helpful because it allows the tribunal to make a determination as part of its award. The other alternative would be having to resort to obtaining an order from a Chinese court holding the arbitration agreement to be invalid pursuant to the opinion of the Supreme People's Court,⁶ in the event that domestic parties agree to submit a dispute without a foreign element to foreign arbitration.

SUMMARY PROCEDURE

The CIETAC rules provide for a fast track summary procedure. The jurisdiction for the summary procedure has now been increased from cases not exceeding RMB500,000 to cases not exceeding RMB2,000,000, a four-fold increase in the threshold for summary procedure cases. Accordingly, it is likely that more cases will now fall within the ambit of the summary procedure process and thus the three-month fast track process under the CIETAC Summary Procedure rules. This change is also consistent with the increased demand by arbitration users for expedited proceedings.

LANGUAGE OF THE ARBITRATION

Under the previous CIETAC rules, where the parties had not agreed on the language of the arbitration, the default language was required to be Chinese. The new CIETAC rules give CIETAC the power to designate any language, in the absence of party agreement, taking into account the circumstances of the case. This should ensure that a suitable language is adopted, taking into account the nationalities of the parties, for example.

Further, it is becoming common for CIETAC arbitration agreements to provide for dual-language proceedings. CIETAC has recognized this trend, and the fact that it usually increases the cost of the arbitration. Consequently, CIETAC has provided in Article 72.4 that it may charge the parties the extra and reasonable costs incurred where two or more languages are used.

CONCLUSION

The revised CIETAC rules are an attempt to further enhance CIETAC's international appeal and to build upon international practices and lessons learned from, for example, the ICC. However, a number of areas still require further work, including, most importantly, a revision of the Chinese Arbitration Law and the Civil Procedure Law in the case of interim measures. Nevertheless, CIETAC continues to move in the right direction and is becoming more established and recognized as an international arbitration institution.

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ENDNOTES

- 1 <http://news.cntv.cn/20110808/101947.shtml>.
- 2 <http://legal.people.com.cn/h/2011/0727/c226563-1765138596.html>.
- 3 Ideally, any application for suspension should come from both parties, but we have seen situations where a suspension is granted on the application of only one party.
- 4 Conciliation in China, Professor Tang Houzhi.
- 5 Opinion of the Supreme People's Court on Issues Concerning the Application of the Law in the Hearing of Foreign-Related Contractual Disputes Related to Civil and Commercial Matters.
- 6 Opinion of the Supreme People's Court on the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations.