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Key changes to the CIETAC Arbitration Rules

Justin D'Agostino (Herbert Smith Freehills) · Wednesday, April 11th, 2012 · Herbert Smith Freehills

The China International Economic and Trade Arbitration Commission ("**CIETAC**") has recently published its revised Arbitration Rules, which will come into force on 1 May 2012 (the "**2012 Rules**"). This is the seventh revision of the CIETAC Rules since they were first published in 1956. Whilst the majority of the changes in the 2012 Rules are aimed at clarifying existing practice, a number of the developments may have a significant impact on the conduct of CIETAC proceedings in the future.

The publication of the 2012 Rules comes at a time when CIETAC's influence is perhaps greater than it has ever been. Whilst many alternatives exist, CIETAC maintains a dominant position in China, where PRC law restricts offshore arbitration in certain circumstances. Furthermore, even where offshore arbitration is available, there is an increasing trend amongst PRC parties to seek to negotiate CIETAC clauses (with a Mainland seat) in their international contracts. As explained further below, the new rules will allow CIETAC to increase its influence still further, providing for the administration of proceedings outside of Mainland China for the first time, and purporting to allow CIETAC to administer proceedings brought under the rules of other arbitral institutions.

Some of the major amendments include:

1. Arbitral tribunals empowered to grant interim measures in certain circumstances

Under the PRC Arbitration Law and the PRC Civil Procedure Law, the power to grant conservatory measures – including orders for the preservation of property or the protection of evidence – is reserved to the competent Chinese court. The current position under the CIETAC Rules, therefore, which is reflected in Article 21.1 of the 2012 Rules, is that, wherever a party applies for conservatory measures pursuant to the laws of the PRC, "*the secretariat of CIETAC shall forward the party's application to the competent court designated by that party in accordance with the law*".

Under Article 21.2 of the 2012 Rules, however, an arbitral tribunal may also now order "*any interim measure it deems necessary or proper in accordance with the applicable law*". This provision will apply, for example, in any CIETAC arbitration seated outside of Mainland China where the law of the seat permits arbitral tribunals to grant interim measures (such as in Hong Kong, where CIETAC has already announced plans to establish a new sub-commission later this year). It is also possible that Article 21.2 will apply to arbitrations in the Mainland wherever the type of interim relief sought falls outside of the exclusive jurisdiction of the Chinese Courts. It remains to be seen, however, whether Article 21.2 will be invoked in Mainland arbitration

proceedings and, if so, whether any interim measures granted by an Arbitral Tribunal can be enforced in practice.

2. Expert witnesses required to give oral evidence if called to do so by the Arbitral Tribunal

One feature of CIETAC arbitration which has attracted plaudits and criticism in equal measure is the limited use of witness evidence in some cases. Both the existing and new CIETAC Rules afford a broad discretion to the Arbitral Tribunal to conduct the proceedings "*in any way that it deems appropriate*". Article 42.3 of the 2012 Rules, however, now stipulates that expert witnesses must participate in any oral hearing and "*give explanations*" on their written reports if called to do so by the Tribunal. There is no similar provision for factual witnesses, but the new rules may nevertheless be of assistance in cases where the examination of experts would otherwise be limited.

3. New rules on consolidation

Currently, the CIETAC Rules make no provision for the consolidation of parallel proceedings dealing with related issues (whether between the same parties, or, for example, multiple parties under a suite of related contracts). The 2012 Rules now provide a mechanism for parallel proceedings to be consolidated into a single arbitration.

To some extent, the new CIETAC Rules mirror the provisions of the recently revised ICC Rules, which also contain detailed provisions on consolidation. Under both sets of rules, for example, consolidation will only be possible with the consent of all parties (Article 17.1 of the 2012 Rules and Article 10 of the ICC Rules). Equally, under both sets of rules, the decision as to whether to consolidate the proceedings will be taken by the institution rather than the Arbitral Tribunal. Unlike the ICC Rules, however, which provide clear guidance on the criteria which must be satisfied before any application for consolidation will be granted (Article 10, ICC Rules), the 2012 Rules provide a broad discretion to the CIETAC to take into account "*any factors it considers relevant*" in making the decision (Article 17.2). This may include: (i) whether all of the claims are made under the same arbitration agreement; (ii) whether the arbitrations are between the same parties; and (iii) whether one or more arbitrators have been nominated or appointed in the arbitrations (although this list is non-exhaustive). The introduction of consolidation provisions is to be welcomed: it can prove particularly useful in complex disputes involving multiple parties or multiple contracts. Users of CIETAC arbitration will therefore watch with interest to see how the institution exercises its discretion under the new Rules moving forward.

4. New rules for determining the seat of arbitration

Under the current Rules, where parties have not agreed on the seat of arbitration, it is deemed to be the city where CIETAC (or any of its sub-commissions) is located, namely a place inside Mainland China. The 2012 Rules now allow CIETAC to decide that the seat shall be a city other than the location of CIETAC (or any of its sub-commissions), which could be a city outside Mainland China (Article 7.2).

This is a significant change, at least on paper, given that the seat determines both the law governing the arbitration procedure and the courts which will retain supervisory jurisdiction over the arbitration. It remains to be seen, however, how often CIETAC will exercise its new discretion in favour of a seat outside of Mainland China.

It is worth noting, however, that arbitration outside of Mainland China is only permitted for "*foreign-related*" disputes. Whether a dispute is "*foreign-related*" is therefore a key question. The Supreme People's Court has published two judicial interpretations which indicate that disputes with one or more of the following three elements will be considered as "*foreign-related*" (and it should be noted that Hong Kong is deemed a "*foreign*" jurisdiction for these purposes): (i) at least one of the parties is "*foreign*"; (ii) the subject matter of the contract is or will be wholly or partly outside Mainland China; and (iii) there are other legally relevant facts "*as to occurrence, modification or termination of civil rights and obligations*" which occurred outside Mainland China.

5. Broader provisions on the language of the arbitration

Under the current Rules, in the absence of party agreement on the language of the arbitration, the arbitration must be conducted in Chinese. The 2012 Rules allow CIETAC to determine that the language of arbitration shall be "*any other language… having regard to the circumstances of the case*" (Article 71.1). This is a welcome development, particularly for disputes where all of the relevant documents (including the underlying contract) may have been written in a language other than Chinese. As with the other changes to the rules, however, only time will tell how often this discretion is invoked in practice.

6. Default provision for administration by CIETAC Beijing

Unlike many other arbitral institutions, CIETAC proceedings are administered by different "*sub-commissions*", located in various cities in Mainland China (and which will soon include a sub-commission in Hong Kong). Parties are advised to stipulate in their arbitration agreement which particular sub-commission they wish to administer their dispute. Previously, where the clause did not include any such designation, the party commencing proceedings was entitled to express a particular preference. The other party, however, had the right to object, which would occasionally cause delay as parties would often prefer for the dispute to be administered by different entities. The 2012 Rules, therefore, provide that if a CIETAC arbitration clause does not specify a particular sub- commission, CIETAC Beijing will administer the arbitration (Article 2.6). The new provision is welcome, and serves as a useful reminder that it is important to state the relevant CIETAC entity expressly and in full when drafting a CIETAC clause (and in this regard it is important to refer to the relevant sub-commission explicitly; a simple reference to "CIETAC arbitration in Shanghai" may not be enough and, under the 2012 Rules, may lead to the dispute being administered by CIETAC Beijing).

7. Use of other arbitration rules in CIETAC administered arbitrations

One potentially controversial development in the 2012 Rules concerns Article 4.3, which provides that: "*where the parties agree to refer their dispute to CIETAC for arbitration but have agreed on … the application of other arbitration rules*" CIETAC "*shall perform the relevant administrative duties*". In other words, CIETAC will not only administer ad hoc arbitrations under, for example, the UNICTRAL Rules, but will also administer proceedings commenced under the rules of other arbitral institutions. This potentially brings CIETAC into conflict with, for example, the ICC, which has recently amended its rules to make clear that only the ICC Court is authorised to administer ICC arbitration proceedings (Article 1(2) ICC Rules). It is best practice, in any event, to avoid arbitration clauses which seek to allow one arbitral institution to administer proceedings brought under the rules of another institution. This may not only lead to uncertainty in the conduct

of the proceedings, but can also expose the award to challenge (as evidenced by the case of *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24, where SIAC purported to administer a dispute brought under the ICC Rules).

8. Changes to the appointment of arbitrators in multi-party disputes

CIETAC has also amended its rules regarding the appointment of arbitrators in multi-party cases. Under the new Rules, where there are multiple claimants and/or multiple respondents in any proceedings, and the multiple claimants and/or respondents are unable to jointly nominate an arbitrator, CIETAC will appoint all members of the tribunal and designate the presiding arbitrator (Article 27.3). Previously, CIETAC would only appoint the arbitrator for the party in default. The objective of the new rule – which also reflects current practice at the ICC and SIAC (amongst others) – is to minimise the risk of a challenge to the arbitral award on the grounds of unfair treatment (as occurred in the well-known decision of the French Cour de Cassation in *Siemens AG/BKMI Industrienlagen GmbH v Dutco Construction Company*).

9. New provisions regarding mediation in CIETAC arbitrations

Article 45.8 of the 2012 Rules allows CIETAC to "assist" with the settlement of disputes through the process of mediation part-way through arbitral proceedings, if requested to do so by the parties. It is not yet clear how this rule will operate in practice, however, as the new Rules do not provide any indication of who will be responsible for the mediation (i.e. whether this is to be conducted by the administrative staff of CIETAC or whether professional mediators will be engaged by CIETAC on the parties' behalf).

It is common practice in China for arbitral tribunals to facilitate the settlement of disputes by way of mediation or conciliation. Under both the new and existing CIETAC Rules, arbitral tribunals have a wide discretion to conduct so-called 'arb-med' procedures in any manner they consider appropriate. Arb-med can be effective in helping parties to settle complex disputes at a relatively early stage, saving considerable time and costs as a consequence. Although many common law practitioners remain sceptical of such processes, they can work well in particular cases, albeit that an evaluative rather than facilitative mediation may be more appropriate depending on the circumstances of the dispute.

10. New criteria for the selection of arbitrators by the CIETAC Chairman

Article 28 of the 2012 Rules describes the criteria which the Chairman of CIETAC may take into consideration when appointing arbitrators in the absence of party agreement. In addition to the law of the contract and the place and language of the arbitration (and any other factors considered to be relevant), the Chairman will also be able to take into account the "*nationalities of the parties*". The 2012 Rules do not, however, require that the presiding or sole arbitrator be of a different nationality to the parties. If this is desirable, therefore, parties should make express provision for this in their arbitration agreements.

11. Increased threshold for CIETAC's summary procedure

Under the existing CIETAC Rules, parties may apply for a "*summary procedure*" (effectively a form of fast-track arbitration) if the amount in dispute falls below a certain threshold (currently RMB 500,000). Cases heard under the summary procedure will be determined by a sole arbitrator unless otherwise agreed by parties and the time limit for rendering an award is 3 months from the

constitution of the tribunal, as opposed to 6 months under the standard procedure.

Under the 2012 Rules, the relevant threshold for the summary procedure has been increased to RMB 2 million. Furthermore, if the amount in dispute later exceeds the threshold because of, for example, amendments to claims or counterclaims, the summary procedure will continue to apply unless otherwise agreed by the parties. This marks a departure from the existing Rules, where cases exceeding the RMB 500,000 threshold would automatically be transferred to the standard procedure unless otherwise agreed.

Conclusion

The changes introduced with the 2012 Rules seek to address the growing complexity of contemporary arbitration proceedings, affording parties greater autonomy and flexibility in some respects such as more freedom for parties to agree on the seat and language of arbitration, whilst also codifying and clarifying several important aspects of CIETAC's existing practice. The new Rules reflect CIETAC's ambition and its desire to compete with other major international arbitration institutions, all of which have witnessed a significant increase in China-related business over recent years.

Only time will tell how the new provisions will be applied in practice. Whilst many of the changes are welcome, it remains important to draft CIETAC arbitration clauses carefully. Amongst other things, it is important to make express provision for the language of the arbitration and the CIETAC sub-commission which will administer the proceedings (preferably Beijing or Shanghai, which have more experienced case administrators). In cases involving non-Chinese parties, it is also helpful to provide expressly that the sole arbitrator or chairman be of a nationality different from the parties and that the parties be permitted to appoint arbitrators from outside of the CIETAC panel.

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