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Mixing and matching arbitration rules in mainland China – the pros and cons of using the UNCITRAL Rules in CIETAC arbitration

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In recent years, an increasing number of parties to arbitration clauses providing for CIETAC arbitration in mainland China have chosen to take advantage of Article 4.2 of the CIETAC Rules, which allows parties to adopt "other arbitration rules" as the applicable rules of the arbitration. The underlying reason for this trend is simple: Article 4.2 provides an apparent opportunity for the parties to limit the scope of intervention by CIETAC (which can be expansive) in the arbitral proceedings and increase the level of their own control. Parties contemplating relying upon Article 4.2 should nevertheless beware that the provision carries limitations and risks which should be understood before any decision to adopt it is made.

According to Chinese law, arbitration agreements which are made between Chinese parties (including foreign investment enterprises or wholly owned foreign enterprises) are required to specify a seat in mainland China. In turn, Chinese law also provides that arbitrations with a seat in mainland China must be administered by a Chinese arbitration institution (such as CIETAC, the Beijing Arbitration Commission and the Shanghai Arbitration Commission). Arbitrations administered by foreign institutions such as the ICC, and "ad hoc" arbitrations, are therefore not permitted to be conducted in mainland China.

CIETAC is one of the most popular choices of Chinese arbitration institutions for non-Chinese parties. Whilst CIETAC is a capable local institution, it does have a number of features with which non-Chinese parties are often unfamiliar and which are therefore sometimes perceived as drawbacks. One oft-cited issue is that CIETAC is probably one of the most "hands on" arbitral institutions to be found anywhere. It is for this reason that some non-Chinese parties may consider relying upon Article 4.2 to adopt the UNCITRAL Rules, which have of course been designed for ad hoc arbitration, as a way of limiting the level of CIETAC's involvement in the arbitration.

It is important that parties seeking to use Article 4.2 in this way bear in mind that the scope for CIETAC to cede administrative control to the tribunal is actually quite limited. This is clear from Article 4.2 itself, which provides that:

> [w]here the parties have agreed on the application of other arbitration rules, or any modification of these Rules, the parties' agreement shall prevail except where such agreement is inoperative or in conflict with a mandatory provision of the law of the

> place of arbitration.

The key word in Article 4.2 is “inoperative”, which is perhaps a misleading translation. It should in fact be read as “inconsistent” with both the CIETAC Rules and the broader CIETAC culture of hands-on or (depending upon your point of view) interventionist administered arbitration. This means that the UNCITRAL Rules will not apply where they conflict with either the letter of the CIETAC Rules or the way in which CIETAC operates in practice. The reference to a “conflict with a mandatory provision of the law of the place of arbitration” refers to any limitations imposed by Chinese law on the conduct of arbitrations, a point in case being the prohibition on the conduct of ad hoc arbitrations.

The type of administration which is adopted by CIETAC under the CIETAC Rules and as a matter of practice is, as we have mentioned, one that involves close involvement in most aspects of the arbitration. Because of the limited scope of Article 4.2, CIETAC will be unable to cede control of any its principal administrative functions (such as the commencement of arbitration, handling of correspondence, appointment, jurisdictional challenges, determination of arbitrators’ fees and time limits for the rendering of the award) to parties, tribunals or other bodies. Even where the UNCITRAL Rules are adopted, therefore, the arbitration will remain very much a CIETAC administered (rather than ad hoc) arbitration.

In addition to the limitations of the CIETAC/UNCITRAL model in practice, there is still some sympathy in China for the view that the mere adoption of the UNCITRAL Rules in a CIETAC arbitration constitutes sufficient grounds to challenge the arbitration as being ad hoc, and therefore illegal. The main support for this view appears to be based on the simple fact that because the UNCITRAL Rules are designed for ad hoc arbitration, their adoption will automatically convert the arbitration from a CIETAC arbitration into an ad hoc arbitration. This is not a very credible position if one considers how CIETAC operates and the limitations that Article 4.2 imposes on such arbitrations in practice. Such an interpretation would render Article 4.2 entirely nugatory, since the very act of the parties in seeking to rely upon it would invalidate their arbitration agreement. It seems sensible to presume that something more than the mere adoption of the UNCITRAL Rules in accordance with Article 4.2 of the CIETAC Rules would be needed to convert a CIETAC arbitration into an ad hoc arbitration. For example, the ceding to the parties, the tribunal or another body of one of the key administrative prerogatives of CIETAC referred to above might provide the necessary evidence of an invalid, ad hoc arbitration.

Whilst the most logical view is therefore that the CIETAC/UNCITRAL model does not in itself constitute ad hoc arbitration, there is nevertheless a real risk that it may give rise to a jurisdictional challenge. This risk is by no means theoretical – we are aware of at least one long-standing jurisdictional challenge to a CIETAC/UNCITRAL clause in China on these grounds.

In practice, this risk of jurisdictional challenge, combined with the limited scope for a meaningful expansion of party autonomy offered by Article 4.2, mean that it may make more sense for parties to stick with the traditional CIETAC model unless there are compelling reasons to adopt the CIETAC/UNCITRAL model. If parties do opt for the latter, they should do so with their eyes open as to the risks involved.

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