

Kluwer Arbitration Blog

Interviews with Our Editors: China Insights from Dr. Li Hu of CIETAC

Arie C. Eernisse (Associate Editor) (Shin & Kim) · Sunday, April 12th, 2020 · CIETAC Hong Kong Arbitration Center

Dr. Li Hu is Deputy Secretary-General of China International Economic and Trade Arbitration Commission (“CIETAC”), Vice Chairman of China Maritime Arbitration Commission, and also Board Member of the Arbitration Institute of Stockholm Chamber of Commerce. He has authored several publications on dispute resolution in China and has served as arbitrator in over 120 domestic and international arbitration cases. We are privileged for this chance to interview Dr. Li for our Blog.

1. *We first want to know more about CIETAC’s phenomenal growth in the past decade. Please tell us what you think were the most important factors behind CIETAC’s success.*

We have seen a 125% increase in terms of the caseload and 605% increase in terms of the disputed amount between 2009 and 2019. CIETAC’s cases in 2019 involved parties from 72 countries/regions in the world, and covered 21 different types of disputes. Further, we had 66 cases where neither party was Chinese.

In my view, these are the most important factors for CIETAC’s growth: the CIETAC Arbitration Rules include modern innovations such as emergency arbitrator procedures, single arbitration under multiple contracts, as well as joinder provisions, but they also allow for the continued use of a unique and salient feature of Chinese arbitration – its combination of arbitration and conciliation. Further, CIETAC has made its panel of arbitrators more international so that non-Chinese parties may make their nomination with more and greater choices. The current CIETAC Panel consists of 1,439 arbitrators from 65 countries or regions, including 315 foreign arbitrators and 92 arbitrators from Hong Kong, Macau and Taiwan. Under the CIETAC Rules, it is also possible for the parties to nominate arbitrators who are not on the CIETAC Panel if the parties have such agreement in their arbitration clause. In 2019, 106 cases were conducted in English or in English and Chinese with 78 foreign arbitrators appointed. Further, the Chinese government adopted the Reform and Opening up Policy after 1978. Relevant policies, regulations, and laws were issued and updated to create a more favorable and stable environment for foreign investments in China. Chinese companies were also encouraged to make foreign investments especially under the recent Belt Road Initiative. The development of China-related international trade and investment has led to CIETAC flourishing.

2. *What accomplishments are you most proud of at CIETAC thus far?*

The first is the policy we adopt of continuously promoting the internationalization of CIETAC arbitration. CIETAC is always developing, modernizing and internationalizing its dispute resolution services while keeping some characteristics unique to Chinese arbitration. Since 1994 when I joined CIETAC, I have always done my best to promote the internationalization of CIETAC arbitration.

The second is arbitration-centered multi-ADR services, which have been provided since 2000, when CIETAC became authorized to resolve domain name disputes. (I was in charge of managing such disputes for CIETAC up to 2009.) This was CIETAC's first step toward providing other ADR services besides commercial arbitration. CIETAC multi-ADR services include mediation, construction dispute adjudication and online arbitration.

The third is the setting-up of CIETAC's overseas branch offices. In 2011, I was appointed to be responsible for establishing the CIETAC Hong Kong Arbitration Center, and in 2017 I proposed once again to create another two arbitration centers in Europe and North America. CIETAC Hong Kong Arbitration Center, European Arbitration Center and North American Arbitration Center are CIETAC's overseas branch offices, but they are also institutions established in accordance with local laws where the branches are set up. By setting up these overseas branch offices, CIETAC is aiming to materially internationalize its arbitration practice, and serve parties under different systems of law.

3. *What are the main developments at CIETAC that have been stimulated by the Belt and Road Initiative ("BRI") over the past few years?*

In the past few years, efforts have been undertaken to promote CIETAC arbitration under the framework of the BRI. Here are some examples:

First, we are widely strengthening cooperation with international and national ADR institutions and have signed cooperation agreements with more than 70 arbitration centers throughout the world.

Second, in order to formulate a flexible ADR mechanism and better serve the BRI, the Supreme People's Court ("SPC") included CIETAC in the SPC's Panel of Arbitration and Conciliation Institutions so that for the relevant international arbitrations conducted by CIETAC, the parties may enjoy direct support from the SPC for reviewing jurisdiction, granting interim measures, and setting aside or enforcing awards.

Third, according to the CIETAC Constitution, our Panel of Arbitrators is to be updated once again before May 2020. We are also considering initiating the revision process of the CIETAC Rules to respond to the latest developments in the past years and to meet the demands of the parties in the future.

4. *What do you think are the most unique aspects of arbitration in China compared to arbitration in Europe?*

The following four aspects of arbitration in China are the most unique when compared to arbitration in Europe:

Arbitration in China is more institutionalized. In China, the institutions have assumed some functions which are vested in the tribunals in European countries. Under Chinese Arbitration Law, it is not the tribunal but the arbitration institution that decides on questions of jurisdiction. The chairman of the institution decides on the challenge of an arbitrator, and the proper body that decides the interim measures is not the arbitral tribunal but the competent court. Similarly, if one of the parties to an arbitration applies for the preservation of evidence or property, the application can be made to the arbitration institution, which will then transfer such application to the competent court for decision in accordance with the applicable law. Under the CIETAC Rules, besides scrutiny of the draft award, in the absence of the agreement of the parties, CIETAC will also decide the language or seat of arbitration, which is different from the practice of some European countries where such functions shall be performed by the arbitral tribunal.

The case manager may serve as the tribunal secretary. CIETAC has been implementing the professional case manager system since its establishment in 1956. The CIETAC Rules, as well as its former editions, recognize the practice of case manager, who also performs the functions of the tribunal secretary. This is also the usual practice adopted for Chinese arbitration. As an assistant to the tribunal, the case manager is actually playing the natural role of the tribunal secretary.

The arbitrator may serve as the conciliator but not as amiable compositeur. In Chinese arbitration, the combination of arbitration and conciliation is a kind of practice popularly adopted where the arbitrator can serve as the conciliator to conciliate the case. This practice is confirmed by the Chinese Arbitration Law. In arbitration proceedings, pursuant to the request of a party or with the consent of both parties, the arbitrator may serve as the conciliator to conciliate the case. If the conciliation is successful and the parties have reached a settlement agreement, the claimant may request to withdraw the case, or the parties may jointly request that the arbitral tribunal make a consent award based on the settlement agreement. If the conciliation fails, the arbitration proceedings shall be resumed and the arbitral tribunal shall make the final award in due course. Such practice combines the advantages of arbitration and conciliation, and saves time and cost for the parties, and may allow the parties to maintain good relations for future cooperation. What is more important is that the consent award is more likely to be voluntarily enforced by both parties without a subsequent setting aside or enforcement procedure in the court. Such practice works well at CIETAC, and at least 15% of the average 2,375 cases annually awarded in the past five years have been concluded by such conciliation in arbitration.

On the other hand, in Europe, in accordance with the relevant domestic law provisions, by express authorization of the parties, the arbitrator may decide the case as *amiable compositeur*. Chinese laws keep silent on the issue and arbitrator must decide the case only in accordance with the law.

More attention is paid to documentary evidence than witnesses. Different from the practice in common law countries, Chinese arbitration – relatively speaking – emphasizes and pays more attention to documentary evidence than the witnesses if the documentary evidence by itself is sufficient to ascertain the case facts. In Chinese arbitration, the examination of witnesses, if necessary, is generally conducted in a simplified manner without the strict procedure of

examination, cross-examination and re-examination, and the oral hearing will often last only one or one-and-half days. The discovery and privilege system are not clearly and completely adopted by Chinese law, and Chinese arbitration therefore seldom involves such practice, although the exchange of evidence may occur before oral hearing.

5. As concluding remarks, please share with our readers your tips for next generation arbitration lawyers.

For the arbitration service, China has been and will continue to be a big market. Under the BRI, outward-focused Chinese enterprises need transnational assistance from international lawyers both in drafting legal documents and in resolving disputes. Foreign (non-Chinese) arbitration lawyers can benefit from knowing more about Chinese culture, which is gateway to understand China and Chinese people. I know that, for the big international arbitrations, the Chinese party is likely to have lawyers from at least one Chinese law firm and one international/offshore law firm to jointly serve as the legal counsel. It is common for Chinese legal professionals to be appointed as expert witnesses. It is helpful for the foreign lawyers to strengthen friendly cooperation with Chinese lawyers and Chinese arbitration community. Up to the end of 2019, there are 255 arbitration institutions in China, most of which are the institutions established after Chinese Arbitration Law of 1994, and they mainly deal with the domestic arbitrations. But among these, in practice, most of the foreign-related or international disputes are still submitted and will continue to be submitted to CIETAC for arbitration by the agreement of the parties. It can be said, at present, the international arbitration in China, to a large degree, means CIETAC arbitration. It is also necessary for foreign lawyers to know more about CIETAC arbitration. In my capacity of the Deputy Secretary General, I sincerely welcome more and more international arbitration lawyers to participate in CIETAC arbitration as legal counsel or arbitrators!

Thank you for your time and perspectives.

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