

Changes to the CIETAC Arbitration Rules: Another step toward internationalisation

The China International Economic and Trade Arbitration Commission (CIETAC) has recently announced a revision to its arbitration rules ("2015 Rules"), which will come into effect on 1 January 2015.

CIETAC last updated its rules in 2012, but significant developments have occurred since then: its former Shanghai and Shenzhen Sub-commissions have declared their independence ("CIETAC Split"), and the CIETAC Hong Kong Arbitration Centre (CIETAC HK) has been established. The 2015 Rules address these developments, and are also receptive to new trends in international arbitration practice (for example, inclusion of provisions on emergency arbitrators). This note summarises the key changes in the 2015 Rules.

Special provision for CIETAC HK arbitration

Chapter VI of the 2015 Rules (Articles 73-80) contains special provisions applicable to cases accepted and administered by CIETAC HK. The following provisions are particularly noteworthy.

1. Unless otherwise agreed by the parties, an arbitration administered by CIETAC HK will be deemed to have its seat in Hong Kong and be governed by Hong Kong arbitration law. Further, an award rendered in such an arbitration will be considered a Hong Kong award (Article 74).
2. Regarding jurisdictional challenges, the Hong Kong specific provisions are more aligned with international practice than the generally applicable challenge provisions. The power to decide on jurisdictional challenges under Article 75 is vested with the tribunal (in contrast, the generally applicable provisions vest that power with CIETAC, which may delegate its power to the arbitral tribunal where necessary, see Article 6.1). The deadline for raising the jurisdictional challenge has also been brought forward to the time of submitting the first substantive defence (in contrast, the general provisions enable it to be raised no later than the first oral hearing (if any), see Article 6.4).
3. Pursuant to Article 76, the parties have more flexibility in nominating arbitrators not listed in CIETAC's Panel of Arbitrators, even without the parties' agreement to do so (such agreement is required under the general provisions, see Article 26.2). Nonetheless, such nomination is still subject to confirmation by CIETAC's Chairman.
4. Where Chapter VI applies, the tribunal is expressly permitted to grant any appropriate interim relief, subject to the parties' agreement otherwise (Article 77.1). This power is broader than the tribunal's power in Mainland-seated arbitrations, which will be discussed below.

Emergency arbitrator proceedings

Following the recent practice of other international arbitration institutions, the 2015 Rules provide for the appointment of an emergency arbitrator (Appendix III).

This new procedure must be placed in the context of Mainland arbitration laws. In Mainland-seated arbitrations, the scope of

an emergency arbitrator's power is limited. Under the PRC Arbitration Law and Civil Procedure Law, the PRC courts reserve exclusive powers to grant conservatory measures (including evidence preservation, asset preservation and those similar to mandatory or prohibitory injunctive relief) in support of arbitration. CIETAC is not permitted to decide a party's application for such conservatory measures. It must forward the application to the competent court. Nonetheless, as CIETAC pointed out in its press release, a Mainland-seated emergency arbitrator may still be able to grant interim relief that is not reserved by the PRC courts (it is to be seen which interim relief may fall within this category), or which may be enforced in other jurisdictions (e.g., Hong Kong). CIETAC has also highlighted that such emergency relief is a meaningful supplement to the court-mandated conservatory measures, especially for foreign parties, because, among other reasons, the document notarisation and legalisation requirements in court proceedings should be relaxed or waived in emergency arbitrator proceedings.

The emergency arbitrator proceedings are more likely to be used in cases administered by CIETAC HK (Article 77.2) or where the interim measures are to be enforced in Hong Kong. Pursuant to a recently inserted provision in the Hong Kong Arbitration Ordinance (Section 22B), with leave of the High Court, "any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order or direction of the Court that has the same effect."

Multi-party and multi-contract arbitration

With the increasing complexity of transactions, multi-party and multi-contract arbitration has become more common. To cope with this trend, the 2015 Rules have introduced new or updated provisions relating to (i) single arbitration under multiple contracts, (ii) joinder, and (iii) consolidation.

Single Arbitration under Multiple Contracts (Article 14)

Single arbitration under multiple contracts is permissible under the 2015 Rules if (1) the contracts involve a principal contract and ancillary contracts, or involve the same parties having a legal relationship of the same nature; (2) the disputes arise out of the same transaction or the same series of transactions; and (3) the arbitration agreements under these contracts are identical or compatible.

Joinder (Article 18)

A party may apply to join a third party to the arbitration proceedings based on an arbitration agreement that *prima facie* binds that third party.

If the additional party is joined before formation of the tribunal, arbitrators shall be nominated and appointed in accordance with the multi-party tribunal provisions (i.e. Article 29). If the additional party is joined after formation of the tribunal and requests to nominate or entrust the CIETAC Chairman to appoint an arbitrator, both sides shall go through the nomination/appointment process again in accordance with Article 29. Notably, under Article 29, if either side fails to jointly nominate or jointly entrust the CIETAC Chairman to appoint an arbitrator within 15 days from its receipt of the Notice of Arbitration, the CIETAC Chairman shall appoint all three arbitrators and designate one of them as the presiding arbitrator.

Consolidation (Article 19)

Under the old rules, the agreement of all parties was necessary to consolidate multiple arbitration proceedings.

In contrast, the 2015 Rules grant CIETAC the power to consolidate, even without party consent, provided that the claims in different proceedings are made under (i) the same arbitration agreement, (ii) multiple but identical or compatible arbitration agreements involving the same parties with legal relationships of the same nature, or (iii) multiple but identical or compatible arbitration agreements, under contracts consisting of a principal contract and ancillary contracts. In making this decision, CIETAC is required to consider all relevant factors, including the opinions of all parties and the correlation between the arbitrations concerned.

This revision reduces the risks of delays and added costs that result from one or more parties unreasonably resisting the consolidation of multiple arbitration proceedings.

Other notable changes

The 2015 Rules also contain the following changes:

1. In the event the arbitration agreement refers to a sub-commission whose authorisation has been terminated, the case will be accepted by the Beijing-headquartered CIETAC Arbitration Court (Article 2.6). This is intended to address jurisdictional uncertainties that have arisen as a result of the CIETAC Split.
2. Service by public notary, entrustment or retention are expressly permitted as acceptable service methods (Article 8.3).
3. The rules for the first time provide that subject to the other arbitrators' authorisation, the presiding arbitrator has the discretion to decide procedural matters (Article 35.5).
4. The summary procedure set out in Chapter IV now applies to cases in which the amounts in dispute do not exceed RMB 5 million (Article 56). The previous threshold was RMB 2 million.

Conclusion

The 2015 Rules are a significant step in CIETAC's continuing efforts toward internationalisation. The changes make CIETAC a more competitive option to parties who wish to adopt a set of procedural rules that have Chinese features but which also reflect international standards.

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