



CIETAC Announces Key Changes to Arbitration Rules

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I. INTRODUCTION

After two years of debate and several rounds of amendments, the China International Economic and Trade Arbitration Commission (中国国际经济贸易仲裁委员会) (CIETAC) has finalized revisions to its arbitration rules, which came into effect May 1, 2012 (the "Revised Rules").¹ The Revised Rules replace the prior rules which came into effect May 1, 2005 (the "Prior Rules"). The Revised Rules will increase party autonomy, reduce unnecessary expense, and bring CIETAC's rules and procedures into greater conformity with those of other major international arbitration providers. On balance, the Revised Rules should continue the process of increasing CIETAC's appeal as a respected forum for international dispute resolution.

Significant changes include:

- allowing CIETAC to designate a seat of arbitration outside of the People's Republic of China (PRC), in effect allowing non-PRC law to govern CIETAC proceedings;
- allowing arbitral tribunals to grant interim relief in aid of arbitration; and
- permitting arbitration to be held in languages other than Mandarin Chinese.

These changes address some of the Prior Rules' perceived shortcomings and are likely to help CIETAC raise its international profile.

II. REVISED RULES

Historically, foreign parties entering into commercial agreements with PRC counterparts have tended to opt for offshore arbitration whenever possible. PRC law made this difficult, however: under PRC law and judicial practice, only "foreign-related" disputes, i.e., those in which at least one of the parties is a non-PRC national or an offshore entity and/or the subject matter of the contract lies outside the PRC, could be decided outside of China.² Unfamiliarity with PRC law, as well as a perceived home court advantage for domestic parties in a market where state-owned enterprises play a major role in the economy, helps explain foreign parties' preference to conduct arbitrations outside China. The unavailability of interim measures (such as the freezing of assets, preliminary injunctive relief, and/or the preservation of evidence provided) under the Prior Rules provided an additional disincentive; whereas most major arbitration institutions permit tribunals (or the institution itself, prior to the seating of a tribunal) to grant such relief directly and without the need for judicial

intervention, the Prior Rules left a party seeking interim relief no choice but to seek such relief from a court, adding additional time and expense to the proceeding. As a result of these perceived shortcomings of CIETAC arbitration, foreign companies doing business in China often sought to arbitrate their disputes before established offshore arbitration providers, such as the Hong Kong International Arbitration Centre, Singapore International Arbitration Court, or the International Chamber of Commerce. The Revised Rules address these issues directly and should alleviate some of the more fundamental concerns about CIETAC arbitration, and make CIETAC more attractive to parties confronted with a choice between onshore arbitration and litigation.

The Revised Rules also appear to reflect CIETAC's awareness of increasing competition in the market for alternative dispute resolution services. According to Yu Jianlong, CIETAC's Deputy Director and Secretary General, the changes are a response to "rapid developments in the economy and the arbitration environment," where parties are making "new demands on CIETAC's arbitration services and hold new expectations" about the arbitration process. Accordingly, the Revised Rules are designed "to better satisfy users in this new economic environment and preserve CIETAC's dominant position in the arbitration services market."³

III. SUMMARY OF CHANGES

Arbitration outside of the PRC

Under the Prior Rules, absent an agreement among the parties, all CIETAC arbitration proceedings were seated in China, the only variable being the city (one in which CIETAC or any of its sub-commissions maintains an office) in which the arbitration would be held.⁴ In situations where "the parties have not agreed on the place of arbitration or their agreement is ambiguous," Article 7.2 of the Revised Rules permits CIETAC to select a seat in "another location having regard to the circumstances of the case." As the seat of arbitration decides the procedural law governing the proceedings as well as the court that will have jurisdiction over them, this change, at least on paper, marks a significant departure from prior practice. However, both under the Prior Rules as well as under the Current Rules, arbitration outside of mainland China is permissible only for foreign-related disputes. Moreover, even for such foreign-related disputes, it would be surprising if, absent the unanimous consent of the parties, CIETAC would in fact exercise this discretion to refer cases to panels abroad.

Interim Measures

Consistent with PRC law,⁵ the Prior Rules required CIETAC to refer a party's application for interim or conservatory measures to the PRC court having jurisdiction over the arbitration.⁶ Article 21.1 of the Revised Rules preserves this principle, stating that, where "a party applies for conservatory measures pursuant to the laws of the People's Republic of China, the secretariat of CIETAC shall forward the party's application to the competent court designated by that party in accordance with the law." In contrast, Article 21.2 authorizes the tribunal to "order any interim measure it deems necessary or proper in accordance with the applicable law, and may require the requesting party to provide appropriate security in connection with the measure."

For arbitration proceedings held within China, Article 21.2 should have limited impact, as under the PRC Arbitration Law and PRC Civil Procedure Law, the authority to preserve property and protect evidence remains with the relevant Chinese court.⁷ However, for arbitration proceedings held abroad under CIETAC authority, Article 21.2 should permit arbitrators to issue interim such relief without the need to refer the application to a court. Particularly in jurisdictions where local courts enforce interim orders, this provision constitutes a significant new power for CIETAC tribunals and should streamline arbitrations

under the Revised Rules by eliminating the need for pre-arbitral judicial proceedings, reducing cost and the overall length of the arbitration process.

Language of Arbitration

The Prior Rules mandated that, absent an agreement among the parties, the language of arbitration be Mandarin Chinese,⁸ significantly limiting the pool of potential arbitrators and parties' ability to retain counsel of their choosing. However, under the Revised Rules, the parties may agree on the language of arbitration and, in the absence of an agreement, CIETAC may select "any other language...having regard to the circumstances of the case."⁹ For disputes in which the underlying evidence is in a non-Chinese language, this change will serve to greatly expedite proceedings and reduce translation costs.

Other Changes

In addition to the foregoing changes, the Revised Rules include consolidation provisions permitting multiple arbitrations to be combined into a single proceeding under certain circumstances,¹⁰ promote the introduction of testimonial as well as documentary evidence,¹¹ and provide greater flexibility in the selection of arbitrators by eliminating the requirement that the parties select arbitrators exclusively from the CIETAC register of arbitrators.¹²

IV. CONCLUSION

Whether CIETAC will exercise the additional discretion granted by the Revised Rules, and whether PRC courts will uphold the expanded authority afforded CIETAC tribunals under them, remain open questions. Particularly if PRC courts prove receptive, the changes embodied in the Revised Rules will bring CIETAC more closely into line with other major international dispute resolution providers and instill greater confidence among foreign parties who have historically been wary of submitting to CIETAC arbitration companies doing business in Asia continue to face increased scrutiny by federal regulators for potential violations of the Foreign Corrupt Practices Act (FCPA).

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¹ CIETAC administers cases involving economic, trade and other disputes of a contractual or non-contractual nature, based on the agreement of the parties. Article 3.

² See Opinions of the SPC on Several Issues concerning the Implementation of the General Principles of the Civil Law of the PRC promulgated on 26 January 1998 (Article 178) and 14 July 1992 (Article 304).

³ Zhang Wei, "Interview with CIETAC Deputy Director and Secretary General of CIETAC: New Arbitration Rules Come into Force May 1," Xinhua weibo (January 1, 2012) available at http://news.xinhuanet.com/fortune/2012-04/05/c_122930514.htm.

⁴ Prior Rules, Articles 31.1-2. Although in theory the Prior Rules permitted parties to hold CIETAC-governed arbitration outside of China, this option was seldom exercised.

⁵ PRC Arbitration Law, Articles 28 and 68 and PRC Civil Procedure Law, Article 256.

⁶ Prior Rules, Articles 17-18.

⁷ *Id.*

⁸ Prior Rules, Article 67.1.

⁹ Article 71.1.

¹⁰ Article 17.

¹¹ *See, e.g.*, Articles 12.2 and 14.2(c).

¹² Article 24.2.

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