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ICC and CIETAC arbitration: Convergence towards a fast, efficient and pragmatic arbitration?

Arbitration has become the most usual alternative dispute resolution method for international disputes, in particular in the field of international trade. In the world, the most important arbitration body in this area is indisputably the International Court of Arbitration of the International Chamber of Commerce ("ICC"), located in Paris. In China, the most important arbitration body is the China International Economic and Trade Arbitration Commission ("CIETAC").

As the expansion of international trade and investment introduces additional complexity to the business relationships between the various economic operators around the world, arbitration rules should improve the administration of cases, provide for a more transparent and predictable resolution of disputes, and meet the needs for interim and protective measures.

This is the context surrounding the adoption of new rules of

arbitration by the ICC in 2012 (“ICC Rules”) and by the CIETAC in 2015 (“CIETAC Rules”). It is interesting to note that there is a convergence, if not a similarity, between the amendments made to each of these two sets of rules.

In 2014, the ICC International Court of Arbitration has administered 791 applications for arbitration[1] while, for the same period, the CIETAC has administered 1610 cases, of which 387 were related to international business[2].

The comparative analysis of the changes made in the rules of these two institutions reveals the evolutions and innovations of the international arbitration conducted under the authority of the ICC and the CIETAC. Highlights are summarized below.

First objective: A faster and less expensive arbitration

Competence

The *prima facie* decision of the ICC International Court of Arbitration on the issue of jurisdiction has now become an exception. The arbitral tribunal will rule on its own jurisdiction, except if the Secretary General refers the matter to the Court for its decision.[3] The purpose of this change, which is entirely consistent with the *competence-competence* doctrine which allows the arbitrator to determine its own jurisdiction, is to streamline the proceedings and save both time and money.

In providing that the CIETAC has “*the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case*” and that it “*may, where necessary, delegate such power to the arbitral tribunal*”, the CIETAC Rules show no new development of the jurisdiction issue.[4] Yet, this authority to delegate to the benefit of the arbitral tribunal breaks with the very limited application of the *competence-competence* doctrine under Chinese law.[5] In practical terms, the circumstances making this delegation of power “necessary” are unclear.

Conduct of the arbitration

Requesting from the arbitral tribunal and the parties that they make “*every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute*”, the ICC Rules provide that “*the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties*”. [6] The arbitral tribunal has to convene a “*case management conference*” in order to consult the parties on the procedural measures that may be adopted and provide for examples of the most usual case management techniques.[7]

Still with a view to achieve greater efficiency, the CIETAC Rules confer to the presiding arbitrator, subject, however, to the authorization of the other members of the arbitral tribunal, the power to decide on the procedural arrangements for the arbitral proceedings, at his/her own discretion.[8]

It should also be noted that the never-to-be-exceeded cap to apply for the summary procedure is increased to 5 million yuan, as opposed to 2 million previously.[9]

Finally, the CIETAC Rules have established an "Arbitration Court" to replace the "Secretariat" for the case management. However, its functions and duties only relate to the "administrative" management of the case (including registration of cases, extensions of time, etc.) and are not comparable to those of the ICC International Court of Arbitration.

Costs and fees

In setting the arbitrator's fees, the ICC International Court of Arbitration shall take into consideration "*the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award*".[10]

And in making decisions as to costs, the arbitral tribunal may take into account "*the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner*".[11]

Second Objective: Responsive arbitration in emergency situations

The most important – and expected – development is the introduction of an emergency arbitrator procedure in these two new set of Rules: the parties may now request from the emergency arbitrator the adoption of "*interim or conservatory measures that cannot await the constitution of an arbitral tribunal*".[12]

For urgent interim or conservatory measures to be efficient, they have to be immediately ordered and enforced.

The parties can request, anytime, a state court and/or the arbitral tribunal once constituted to order such measures.[13] These two options may however be unsatisfactory in practical terms.

The constitution of an arbitral tribunal can indeed take several months, a period during which a party is likely to apply for urgent measures to preserve or collect evidence, freeze or prevent the dissipation of assets, prevent a damage to one's reputation or financial losses, oblige a supplier to continue providing supplies under a distribution agreement, etc. In this case, the party has no other choice but to turn to a national court. Yet, obtaining interim measures from a national judge is sometimes inadequate, if not impossible.

The ICC Rules and CIETAC Rules have therefore established the "emergency arbitrator". It is important to note that the ICC Rules on the emergency arbitrator are applicable only if the arbitration agreement has been

entered after the effective date of the Rules of Arbitration, i.e. after January 1, 2012, and does not exclude the application the emergency arbitrator provisions.[14] The new CIETAC Rules are applicable to the pending arbitrations.

This "emergency arbitrator" is to be appointed within a couple of days[15], and must issue his/her order within fifteen days[16].

Naturally, to be admissible, the application for emergency measures must be filed before the formation of the arbitral tribunal (CIETAC Rules) or prior to the transmission of the file to the arbitral tribunal (ICC Rules).[17] The application must set out the circumstances giving rise to the application, the emergency measures sought and the reasons why the applicant needs urgent interim or protective measures that cannot await the formation of an arbitral tribunal.[18]

In any case, the emergency arbitrator's orders do not bind the arbitral tribunal: the arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator.[19]

The new "emergency arbitrator" raises the issue of the enforcement of the interim or conservatory measures he/she could order. Practical experience shows that the interim or protective measures are most of the time enforced by the concerned party on a voluntary basis, which explains the fact that the issue of forced enforcement rarely arises. Forced enforcement seems impossible under Chinese law that confers exclusive jurisdiction to state courts with regard to interim or protective measures and does not provide any legal basis for the enforcement of such measures when ordered by someone else like the emergency arbitrator.[20] It seems unclear under French law that confers exclusive jurisdiction to state courts only with regards to preventive seizures (*saisies conservatoires*) and judicial liens (*sûretés judiciaires*) and provides a legal basis for the enforcement of arbitration "awards" only.[21] It should be noted that the Hong-Kong Arbitration Ordinance explicitly provides for the recognition and enforcement of the interim and conservatory measures ordered by the arbitral tribunal or the emergency arbitrator.[22]

Third objective: A multi-party arbitration

The increasing complexity of business transactions has necessarily an impact on the disputes that arise from or in connection with such transactions. The ICC and CIETAC Rules of Arbitration have introduced or supplemented provisions governing "complex" files.

Joinder of additional parties

The ICC Rules provide that it is up to the party wishing to join an additional party to the arbitration to submit its request for arbitration against the additional party.[23] No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. This joinder is subject to the abovementioned provisions on jurisdiction.

The CIETAC Rules provide that it is up to the party wishing to join the arbitration to submit its request.[24] A joinder is possible even after the arbitral tribunal has been constituted if the CIETAC deems it necessary, after having heard all parties, including the additional party. The CIETAC must be *prima facie* satisfied that there exists an arbitration agreement or arbitration clause to order the joinder of an additional party.

Consolidation

At the request of a party only, the ICC International Court of Arbitration may consolidate two or more pending arbitration proceedings governed by ICC Rules of Arbitration into a single arbitration under the following more flexible conditions[25] :

- if the parties have agreed to consolidation; or
- if all of the claims in the arbitration proceedings are made under the same arbitration agreement; or
- if the Court finds that several arbitration agreements are "compatible", i.e. the arbitration proceedings are between the same parties and the disputes in these proceedings arise in connection with the same legal relationship.

Similarly, at the request of a party (it is no longer possible for the CIETAC to initiate), the CIETAC may consolidate two or more pending arbitration proceedings governed by CIETAC Rules of Arbitration under the following similar conditions[26] :

- all of the claims in the arbitration proceedings are made under the same arbitration agreement; or
- the claims in the arbitration proceedings are made under multiple arbitration agreements that are identical or compatible, and such proceedings involve the same parties as well as legal relationships of the same nature; or
- the claims in the arbitration proceedings are made under multiple arbitration agreements that are identical or compatible, and the multiple contracts involved consist of a principal contract and its ancillary contract(s); or
- all the parties to the arbitration proceedings have agreed to consolidation.

Multiples contracts

The ICC Rules of Arbitration provide that claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement(s) under the ICC Rules of Arbitration.[27]

The CIETAC Rules of Arbitration also provide that a party may submit a single request for arbitration concerning disputes arising out of or in connection with multiple contracts, provided that[28]:

- such contracts consist of a principal contract and its ancillary contract(s), or such contracts involve the same parties as well as legal relationships of the same nature;
- the disputes arise out of the same transaction or the same series of transactions; and
- the arbitration agreements in such contracts are identical or compatible.

[1]http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/

[2] http://cn.cietac.org/aboutus/AboutUS4Read.asp

[3] Article 6(3) of the ICC Rules of Arbitration 2012.

[4] Article 6(1) of the CIETAC Rules of Arbitration 2015.

[5] V. Kubwiwana, "Application limitée du principe de compétence-compétence en droit chinois de l'arbitrage", *Journal de l'arbitrage de l'Université de Versailles*, n°1, Octobre 2013, 7.

[6] Article 22(1) of the ICC Rules of Arbitration 2012.

[7] Article 24 and Appendix IV of the ICC Rules of Arbitration 2012.

[8] Article 35 of the CIETAC Rules of Arbitration 2015.

[9] Article 56 of the CIETAC Rules of Arbitration 2015.

[10] Appendix III – Article 2 of the ICC Rules of Arbitration 2012.

[11] Article 37 (5) of the ICC Rules of Arbitration 2012.

[12] Article 29 and Appendix V to the ICC Rules of Arbitration 2012; Article 23 (2) and Appendix III to the CIETAC Rules of Arbitration 2015.

[13] Article 28 of the ICC Rules of Arbitration 2012; Article 23 (1) of the CIETAC Rules of Arbitration 2015. It should however be noted that under Article 1449 of the French Civil Procedure Code, « *The existence of an arbitration agreement does not prevent, insofar as the arbitral tribunal is not constituted, a party from requesting a state court to order interim or conservatory measures* ».

[14] Article 29 of the ICC Rules of Arbitration 2012.

[15] One day from the receipt of fees (Appendix III – article 2, of the CIETAC Rules of Arbitration 2015) or two days from the Secretariat's receipt of the application for emergency measures (Appendix V – Article 2 of ICC Rules of Arbitration 2012.

[16] Fifteen days from his/her appointment (Appendix III – article 6, of the CIETAC Rules of Arbitration 2015) or from the date on which the file was transmitted to him/her (Appendix V – article 6 of the ICC Rules of Arbitration 2012).

[17] Appendix III – article 1(2) of to the CIETAC Rules of Arbitration 2015; Article 29 of the ICC Rules of

Arbitration 2012.

[18] Appendix V – article 1 of to the ICC Rules of Arbitration 2012; Appendix III – article 1 of to the CIETAC Rules of Arbitration 2015.

[19] Article 29 of the ICC Rules of Arbitration 2012; Appendix III, article 6, of the CIETAC Rules of Arbitration 2015.

[20] Articles 28 and 46 of the Arbitration Law of the People's Republic of China, August 31, 1994.

[21] Articles 1449 and 1468 of the French Civil Procedure Code.

[22] Sections 22B and 61 of the Hong-Kong Arbitration Ordinance, Chapter 609.

[23] Article 7 of the ICC Rules of Arbitration 2012.

[24] Article 18 of the CIETAC Rules of Arbitration 2015.

[25] Article 10 of the ICC Rules of Arbitration 2012.

[26] Article 19 of the CIETAC Rules of Arbitration 2015.

[27] Article 9 of the ICC Rules of Arbitration 2012.

[28] Article 14 of the CIETAC Rules of Arbitration 2015.