

CIETAC's New Arbitration Rules 2012

Introduction

As from Tuesday 1 May 2012, a new set of arbitration rules ("**the New Rules**") will come into force for arbitrations administered by the China International Economic and Trade Arbitration Commission ("**CIETAC**"). The New Rules replace the existing Rules which have been in place since 1 May 2005 ("**the Old Rules**").

This article will examine highlights of the changes and raise some issues arising from the New Rules.

Overview

The Old Rules contain a total of 71 articles, divided into 6 chapters dealing with General Provisions, Arbitral Proceedings, Arbitral Award, Summary Procedure, Special Provisions for Domestic Arbitration, and Supplementary Provisions. The New Rules retain the same structure, with 6 chapters under the same names, but the number of articles has increased from 71 to 74 articles. Amendments are also made to a number of the articles.

The New Rules do not represent a radical overhaul as it did in 2005. Instead the New Rules build upon the experience of operating the Old Rules and represent a refinement of the Rules, including the addition of a number of interesting new features in the following areas.

- Conservator Measures and Interim Measures
- Interlocutory Award and Partial Award
- Combining Conciliation with Arbitration
- Seal of CIETAC
- Summary Procedure

Conservatory Measures and Interim Measures

One of the new features can be found at Article 21.2 of the New Rules, whereby the arbitral tribunal may order "*any interim measure*", and may order the provision of "*appropriate security*", in the form of "*a procedural order or an interlocutory award*".¹

¹ Article 21.2 of the New Rules provides that "*At the request of a party, the arbitral tribunal may 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. The order of an interim measure by the*

The express power to order interim measures was present in Article 15 of the 1956 version of CIETAC's Arbitration Rules². However, the express power was omitted from the 1988 version of CIETAC Arbitration Rules and subsequent versions.

This power can be contrasted with Article 21.1 of the New Rules, which provides that where a party applies for "*conservatory measures*", CIETAC shall forward the application to the PRC Courts³. Although conservatory measure is not defined in the New Rules, Article 21.1 is consistent with Article 256 of the PRC Civil Litigation Law which provides that applications for preservation of property shall be forwarded by foreign related arbitration institutions (such as CIETAC) to the relevant PRC Courts. Similar practice existed under the Old Rules.⁴

Accordingly, applications for conservatory measure such as preservation of property shall be dealt with by the PRC Courts (as required by the law and Article 21.1 of the New Rules), but applications for an interim measure may be dealt with by the tribunal (as per Article 21.2 of the New Rules).

The term "*interim measure*" is not defined under the Rules. Various writers have suggested that the power to order an interim measure gives the tribunal the power to make various orders before the issuance of the final award, such orders include disposal of perishable goods, prohibition against distribution of profits before the determination of disputes amongst joint venture parties, prohibition against a party from infringing intellectual property rights etc. However, it is not clear to what extent would an interim

arbitral tribunal may take the form of a procedural order or an interlocutory award."

² Article 15 of CIETAC's Arbitration Rules 1956 provides that "*The Presiding Arbitrator may, upon the application a party, order interim measures regarding the materials or property rights of a party, in order to protect the parties' rights.*"

³ Article 21.1 of the New Rules provides 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.*"

⁴ Under Article 17 and 18 of the Old Rules, applications for preservation of property and protection of evidence shall be forwarded by CIETAC to the PRC Courts.

measure given by the tribunal overlaps with an order for preservation of property given by the Courts.

Interlocutory Award and Partial Award

Article 44 of the Old Rules provides that an interlocutory award or partial award may be made by the arbitral tribunal before the final award.

However, under Article 48 of the New Rules, the arbitral tribunal may only render a partial award before the final award⁵. The reference to interlocutory award was moved to Article 21.2 of the New Rules (which empowered the Tribunal to order "any interim measure" in the form of "a procedural order or an interlocutory award").

The terms interlocutory award (中间裁决), partial award (部分裁决) and final award (最终裁决) are not defined under the Rules. Some writers have suggested that an interlocutory award is normally a temporary award which is not final. Such views are consistent with Article 21.2 of the New Rules whereby orders in the form of procedural order or interlocutory award are both allowed for interim measures. Adopting such logic, interim measures in the form of an interlocutory award may not be enforceable because it is not final. It may be prudent to consider issuing a partial award if appropriate.

Combining Conciliation with Arbitration

The New Rules preserve the practice under the Old Rules which permit the combination of conciliation with arbitration, otherwise known as med-arb or arb-med. Perhaps as a result of concerns that have been expressed by the international arbitral community regarding this approach, Article 45.8 of the New Rules provides an alternative for CIETAC to assist the parties to conciliate:

Where the parties wish to conciliate their dispute but do not wish to have conciliation conducted by the arbitral tribunal, CIETAC may, with the consent of both parties, assist the

parties to conciliate the dispute in a manner and procedure it considers appropriate

When CIETAC assists the parties to conciliate, the tribunal is not involved, in which case no issue would arise as to the impartiality of the tribunal being affected in the conciliation process.

However, the New Rules do not contain any details as to how CIETAC will assist in the conciliation. It would be useful for CIETAC to provide further guidance in the future.

Seal of CIETAC

The New Rules clearly stated that the seal of CIETAC shall be affixed on the arbitral award (see Article 47.4) as well other ancillary decisions by the tribunal, such as an additional award (see Article 52.3), a decision that the tribunal has no jurisdiction (Article 6.7 and 44.4), a decision to dismiss the proceedings due to withdrawal (see Article 44.3 and 44.4), a decision made pursuant to a settlement agreement between the parties (Article 45.6) etc.

Contrast the above with the Old Rules, whereby no express provision stated that the seal of CIETAC shall be affixed on an additional award.

The amendments under the New Rules are consistent with the Judgment rendered on 25 July 2011 by the Court of Appeal in Hong Kong in the case of Shandong Hongri Acron Chemical Joint Stock Co Ltd v PetroChina International (Hong Kong) Corporation Ltd CACV31/2011, whereby the Court of Appeal held that a letter stamped by the CIETAC Secretariat did not amount to an additional award. The role of CIETAC's Secretariat should be restricted to handling day to day work (as confirmed in Article 2.2 of the New Rules and Article 2.6 of the Old Rules).

Summary Procedure

Under Chapter 4 of the New Rules (ie Articles 54 to 61), the monetary threshold for Summary Procedure has increased from RMB 500,000 to RMB 2,000,000, and the deadline for requesting a postponement of an oral hearing decreased from 7 days to 3 days, although the timeframe for submitting statements of case remains unchanged.

The Old Rules provide that a sole arbitrator will hear a case under the Summary Procedure. In the drafting process, CIETAC considered the alternative of allowing a 3-arbitrator tribunal. However, Article 56 of the New Rules

⁵ Article 48 of the New Rules provides that "(1) Where the arbitral tribunal considers it necessary, or where a party so requests and the arbitral tribunal agrees, the arbitral tribunal may render a partial award on any part of the claim before rendering the final award. A partial award is final and binding upon both parties. (2) Failure of either party to implement a partial award shall not affect the arbitration proceedings, nor prevent the arbitral tribunal from making the final award."

followed the Old Rules and provides for a sole arbitrator, unless the parties agreed otherwise.

The New Rules will ensure that parties involved in relatively minor disputes may avail themselves of the expedited process under the Summary Procedure.

Miscellaneous Amendments

Other amendments introduced by the New Rules, include the following:

- The maximum number of candidates to be recommended by the parties for the purpose of choosing the presiding arbitrator has increased from 3 to 5 (Article 25.3).
- When appointing arbitrators, Article 28 of the New Rules expressly provides that the Chairman of CIETAC shall take into consideration the law as it applies to the dispute, the place of arbitration, the language of arbitration, the nationalities of the parties, and any other factor(s) the Chairman considers relevant.
- CIETAC may make a final decision as to whether an arbitrator may voluntarily withdraw from his/her office (Article 31). This addresses a concern that arbitrators have unilaterally withdrawn from appointments, leading to disruption of the process and additional cost.
- New provisions regarding the applicable law can be found, for example:
 - Article 5.3 - *Where the law as it applies to an arbitration agreement has different provisions as to the form and validity of the arbitration agreement, those provisions shall prevail.*
 - Article 47.2 - *Where the parties have agreed on the law as it applies to the merits of their dispute, the parties' agreement shall prevail. In the absence of such an agreement or where such agreement is in conflict with a mandatory provision of the law, the arbitral tribunal*

shall determine the law as it applies to the merits of the dispute.

- Under Article 43, the arbitral tribunal has the express power to order suspension of the proceedings.

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