

CIETAC Rules for Investment Arbitration

November 14, 2017

On October 1, 2017, the Investment Arbitration Rules of the China International Economic and Trade Arbitration Commission (“**CIETAC Investment Arbitration Rules**” or “**Rules**”) entered into force.¹

This is the first time a Chinese arbitral institution has adopted a set of rules specifically designed for resolution of international investment disputes.² The CIETAC and its parent body the China Council for the Promotion of International Trade drafted the Rules with the objective of developing an international investment arbitration practice in China.³

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

PARIS

Claudia Annacker

+33 1 40 74 68 00

cannacker@cgsh.com

Laurie Ahtouk-Spivak

+33 1 40 74 68 00

lachtoukspivak@cgsh.com

Amy Wen Wei

+33 1 40 74 68 00

wwei@cgsh.com

¹ The CIETAC Investment Arbitration Rules are available in the Chinese language on the Chinese Government’s website designated to the “Yi Dai Yi Lu” (Belt and Road) Program (<https://www.yidaiyilu.gov.cn/wcm.files/upload/CMSydylgw/201709/201709260955044.pdf>).

² CIETAC Explanatory Note Regarding the CIETAC Investment Arbitration Rules (Sept. 26, 2017) (“**CIETAC Explanatory Note**”) (<https://www.yidaiyilu.gov.cn/zchj/zcfg/29165.htm>).

³ *Ibid.*



1. Introduction

The CIETAC Investment Arbitration Rules coincide with a large increase in China's outbound investments, which by 2016 totaled US\$183 billion, making it the second largest country with overseas investments.⁴

China has evolved from an “*observer*” to an important “*participant*” in the contemporary international investment regime.⁵ China acceded to the ICSID Convention on February 9, 1990 and has concluded more than 140 international investment treaties.⁶ A number of investment arbitrations have been brought by Chinese investors⁷ and against China.⁸ The Rules thus fill a vacancy in Chinese

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*; United Nations Conference on Trade and Development, Investment Policy Hub: International Investment Agreements – China.

⁷ *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6 (decided in favor of the investor), *Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia*, PCA Case No. 2010-20; *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium*, ICSID Case No. ARB/12/29 (decided in favor of the State); *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30 (jurisdiction upheld, pending on the merits); *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20 (decided in favor of the investor, annulment proceedings pending); *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41 (pending); *Sanum Investments Limited v. Lao People's Democratic Republic*, ICSID Case No. ADHOC/17/1 (pending).

⁸ *Ekran Berhad v. People's Republic of China*, ICSID Case No. ARB/11/15 (discontinued); *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25 (decided in favor of the State); *Hela Schwarz GmbH v. People's Republic of China*, ICSID Case No. ARB/17/19 (pending).

regulation on international investment arbitration, and provide an optional forum for Chinese inbound and outbound investment disputes.

The CIETAC Investment Arbitration Rules consist of six chapters, including fifty-eight articles and two annexes,⁹ with the goal of “*enriching and developing the practice of investment arbitration in China, based on the latest international practice.*”¹⁰

The Rules apply to investment disputes between investors and States, inter-governmental organizations, or any other institution, organ, or other type of entity mandated by Government, or whose conduct is attributable to the State, which are referred to CIETAC arbitration by contract, treaty, law, regulation, or other instrument.¹¹

II. Unique Features

Two key features of the Rules are of special interest to practitioners and investors: (A) Culture-specific features and (B) transparency requirements.

A. Culture-Specific Features – Good Faith (“*Cheng Shi Xin Yong*”) and Mediation

Article 6 of the Rules (“*Cheng Shi Xin Yong*”) imposes an express obligation on all participants in an arbitration to act in good faith. This principle is common under Chinese law (*e.g.* it is present in China's Civil Code and China's Civil Procedural Code¹²), and is also reflected in CIETAC's commercial arbitration rules.¹³

Furthermore, Article 43 of the Rules allows the arbitral tribunal to itself mediate the case during the pendency of an investment arbitration.¹⁴ The mediation is confidential, and the tribunal has the

⁹ The two annexes are: a fee schedule for CIETAC Investment Arbitration, and a procedure for Emergency Arbitration.

¹⁰ CIETAC Explanatory Note.

¹¹ The CIETAC Investment Arbitration Rules, Article 2, indent 1.

¹² China's Civil Code, Article 4; China's Civil Procedural Code, Article 13.

¹³ The 2015 CIETAC Rules of Arbitration, Article 9.

¹⁴ The CIETAC Investment Arbitration Rules, Article 43(1).

discretion to conduct the mediation as it deems appropriate.¹⁵

If parties resolve their dispute via mediation, a settlement agreement is entered into;¹⁶ if not, the arbitral proceedings resume.¹⁷ During the mediation, parties can jointly request the replacement of one or more arbitrators.¹⁸ However, if not replaced, the same arbitrators who conduct the mediation will also preside over the arbitration.

Both Article 6 and Article 43 are unusual for international arbitration and indeed reflect certain characteristics in the country's legal culture and tradition – Chinese parties are often less contentious, and tend to prefer resolving their differences via negotiation and mediation, rather than litigating in front of courts or tribunals.

B. Transparency Requirements

The Explanatory Note accompanying the Rules emphasizes China's commitment to transparency, citing, for example, to the 2012 Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, under which China agreed to public access to hearings and documents in arbitral proceedings.¹⁹ The Explanatory Note also refers to China's "active participation" in the drafting of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.²⁰

Recognizing that investment arbitration may implicate matters of public concern, and taking particular note of the "legitimacy crisis" facing investment arbitration in the recent years,²¹ the

¹⁵ The CIETAC Investment Arbitration Rules, Article 43(2).

¹⁶ The CIETAC Investment Arbitration Rules, Article 43(4).

¹⁷ The CIETAC Investment Arbitration Rules, Article 43(6).

¹⁸ The CIETAC Investment Arbitration Rules, Article 43(6).

¹⁹ See e.g. 2012 Canada-China BIT, Article 28.

²⁰ CIETAC Explanatory Note.

²¹ *Ibid.*

CIETAC Investment Arbitration Rules contain specific provisions addressing features that are at the heart of these concerns: (1) confidentiality, (2) third-party funding, and (3) third-party submissions in investment arbitration.

1. Public Access To Hearings And Documents

The CIETAC Investment Arbitration Rules provide for public access to hearings and documents submitted in the arbitration, unless otherwise agreed by the parties.²²

2. Disclosure Of Third-Party Funding

Article 27 of the Rules requires that parties receiving funding disclose in writing, "without any delay," the existence and nature of the arrangement, together with the name(s) and address(es) of the funder(s) to the other disputing party, the arbitral tribunal, and the CIETAC Commission.²³ The tribunal may also specifically request such disclosure.²⁴ When deciding on costs for the arbitration, the tribunal may take into consideration the existence of a third-party funding arrangement, and whether the concerned party complied with the disclosure requirements.²⁵

3. Third-Party Submissions

Under the Rules, a Contracting Party to the applicable investment treaty, who is not a disputing party in the arbitration, may, after informing the disputing parties and the CIETAC Commission in writing, make submissions regarding the interpretation of relevant treaty provisions.²⁶ The tribunal may also invite a non-disputing Contracting Party to make such submissions, after consulting the disputing parties and based on the specific facts of the case.²⁷

Persons or entities who are neither parties to the dispute nor a Contracting Party to the investment

²² CIETAC Investment Rules, Articles 32 and 55.

²³ CIETAC Investment Arbitration Rules, Article 27(2).

²⁴ *Ibid.*

²⁵ CIETAC Investment Arbitration Rules, Article 27(3).

²⁶ CIETAC Investment Arbitration Rules, Article 44(1).

²⁷ *Ibid.*

treaty applicable in the arbitration may make submissions on particular issues, after informing the disputing parties and the CIETAC Commission in writing. The tribunal may again invite such submissions.²⁸

However, third-party submissions should not impair the arbitral proceedings, and the disputing parties should not be subject to unreasonable burden or unjust impairment as a result of these submissions.²⁹

...

CLEARY GOTTLIB

²⁸ CIETAC Investment Arbitration Rules, Article 44(2).

²⁹ CIETAC Investment Arbitration Rules, Article 44(11).