

Introduction To Arbitration Procedures And Mediation Of The PRC[†]

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Arbitration and mediation are two very common methods of dispute resolution. Historically, the PRC is not a litigious country. This article will explain the arbitration procedures and mediation in the PRC.

Part One: Special Features Of Arbitration In The PRC.

The ALPRC

The Arbitration Law of the PRC (“ALPRC”) is the first national law on arbitration in the PRC. It was enacted on 31 August 1994 and came into effect on 1 September 1995.

Like many other arbitration laws, a valid arbitration agreement is a prerequisite for arbitration in the PRC. An arbitration agreement excludes the jurisdiction of the courts.

A valid arbitration agreement shall include at least the following:

1. The expression of the parties’ wish to submit to arbitration;
2. The matters to be arbitrated; and
3. The arbitration commission selected by the parties.

An arbitral award shall be final and binding on both parties. Such an award can only be enforced by the courts.

Arbitration Commissions and Arbitration Rules

There are around 200 arbitration commissions in the PRC and all of them may hear domestic and foreign cases. Whilst each of these commissions has its own arbitration rules formulated in accordance with the ALPRC and the relevant Civil Procedures Law of the PRC, they have the same basic principles. The China International Economic and Trade Arbitration Commission (CIETAC) is the first international arbitration commission of the PRC and as of today, it is still handling most of the PRC international arbitration cases. Its arbitration rules are the most thorough and for this reason, in this article the CIETAC rules are used to illustrate the arbitration procedures of the PRC.

Foreign-related Arbitrations

A foreign-related arbitration is an arbitration with a foreign element. Usually it concerns a contract which was formed outside the PRC, or that its subject matter is located outside the PRC, or that it is a contract between a domestic party and a foreign party. Though a foreign investment enterprise (FIE, i.e. a sino-foreign joint venture, or a wholly foreign owned enterprise) has a foreign party, since it is formed domestically under Chinese law, it is regarded as a domestic enterprise and hence an arbitration between a FIE and a domestic party is not a foreign-related arbitration.

One of the noticeable features of the ALPRC 1994 is that it accords a foreign-related arbitration special treatment. Unlike a domestic arbitral award which can be revoked on either procedural or substantive grounds, a foreign-related arbitral award may only be revoked on procedural grounds. The same applies to the grounds for refusal of enforcement of an arbitral award.

Enforcement of Foreign Awards and Foreign-related Awards

The PRC is a member of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York, 10 June 1958 (“New York Convention”). Therefore foreign awards can be enforced in the PRC under the New York Convention.

Foreign-related arbitral awards are enforced in the same way as a domestic award, except that the grounds for refusing enforcement are more restricted as above mentioned.

According to the arrangement enacted in early 2000 concerning the mutual enforcement of arbitral awards between Hong Kong and Mainland China, a Hong Kong monetary award can be enforced in Mainland China and vice versa.

Part Two: Arbitration Procedures Under The CIETAC Rules.

Application for Arbitration

The Claimant’s authorized representative is to sign on the Request for Arbitration which should include:

- (a) the names and contact particulars of the Claimant and the Respondent;

[†]A contribution from the LESI Life Sciences Committee.

(b) evidence proving the existence of the arbitration agreement;

(c) the claim of the Claimant;

(d) the facts and grounds supporting the claim; and

(e) the relevant evidence supporting the facts.

The arbitration fee should be paid in advance to CIETAC according to its Arbitration Fee Schedule. In practice, the arbitration fee can be paid after the filing of Request.

Acceptance of a Case

If there is a deficiency in the formalities of the arbitration application, CIETAC will request the Claimant to rectify them. Thereafter, CIETAC will send a Notice of Arbitration to both parties, and at the same time the Request for Arbitration and its attachments as submitted by the Claimant, will be sent to the Respondent.

Statement of Defence

Within 45 days from the date of receipt of the Notice of Arbitration, the Respondent may file a Statement of Defence in writing with CIETAC. CIETAC may extend that time period if it believes that there are justified reasons, such as the complexity of the case so that the Respondent needs more time to prepare the defence. The Statement of Defence shall include:

(a) the names and contact particulars of the Respondent;

(b) the facts and grounds of the defence; and

(c) the relevant evidence supporting the defence.

The arbitral tribunal has the discretion to decide whether or not to accept a Statement of Defence submitted after the above time limit.

Failure to file a Statement of Defence to the claim or to the Respondent's counterclaim does not amount to admission of the facts mentioned therein. It will not affect the rights of the other party as long as the other party has filed its evidence since it still has the chance to provide its arguments to the arbitral tribunal during hearing.

Counterclaim

If the Respondent has a counterclaim, it must file it with CIETAC within 45 days from the date of receipt of the Notice of Arbitration. The arbitral tribunal may extend that time period if it believes that there are justified reasons.

When filing a counterclaim, the Respondent needs to pay an arbitration fee in advance according to the Arbitration Fee Schedule of CIETAC. In practice, the fee also can be paid after the filing of a counterclaim

If there are deficiencies in the formalities required for filing a counterclaim, the CIETAC will send the Statement of Counterclaim and its attachments to the Claimant for rectification. Thereafter, the Claimant may, within 30 days from the date of receipt of the Statement of Counterclaim and the attachment, submit in writing its Statement of Defence to the Counterclaim.

The arbitral tribunal has the discretion to decide whether or not to accept a Statement of Defence to the Counterclaim submitted after the above time limit.

Amendments of Claim or Counterclaim

A Claimant and a Respondent may respectively amend their claim and counterclaim if the arbitral tribunal considers that the amendment is not too late and will not delay the arbitral proceedings.

Cross-claims and third party claims are not allowed in an arbitration proceeding.

Composition of the Arbitral Tribunal

Arbitrators are normally chosen from the Panel of Arbitrators maintained by CIETAC; other arbitrators are allowed if they are approved by the Chairman of CIETAC.

The parties have to agree whether the arbitral tribunal should comprise one or three arbitrators. If the arbitral tribunal comprises three arbitrators, then within 15 days of receiving the Notice of Arbitration, the parties shall respectively nominate their own arbitrator. Unless they both agree on the third arbitrator who is to be the presiding arbitrator, the Chairman of CIETAC will appoint the third arbitrator within 15 days from the date of the Respondent's receipt of the Notice of Arbitration.

Disclosure by and Challenge of Arbitrator

If an arbitrator is aware of any circumstances which may lead to one or more parties to doubt his independence or impartiality, the arbitrator shall disclose these circumstances in writing. A party who then wants to so challenge the arbitrator shall submit the challenge in writing to CIETAC within 10 days from the date of receipt of the disclosure.

Apart from the above, a party may also challenge

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an arbitrator in writing within 15 days from the date of receipt of the Notice of Formation of the Arbitral Tribunal. However, if the reason supporting the challenge only came to its notice after the 15 day deadline, then the deadline is extended a further 15 days after such reasons become known, but in no event shall this deadline be later than the conclusion of the last oral hearing.

CIETAC shall promptly communicate the challenge to the other party, the arbitrator being challenged and the other members of the arbitral tribunal.

Where an arbitrator is challenged by one party and the other party agrees to the challenge, or the arbitrator being challenged withdraws from his/her office, such arbitrator shall no longer be on the arbitral tribunal. The decision of CIETAC is not required. In circumstances other than those specified above, the Chairman of CIETAC shall make a final decision on the challenge.

Service of Documents

All documents in relation to the arbitration may be sent to the parties or their representatives in person, or by registered mail or express mail, or by any other means considered proper by the Secretariat of CIETAC.

Conduct of Hearing

The arbitral tribunal shall conduct oral hearings. However, oral hearings may be substituted by examination of documents if the parties agree and the arbitral tribunal also considers oral hearings to be unnecessary.

The arbitral tribunal may adopt an inquisitorial or adversarial approach when examining the case. It may, if it considers it necessary to do so, issue procedural directions and lists of questions, hold pre-hearing meetings and preliminary hearings, etc.

Notice of Oral Hearings

The date of the first oral hearing shall be decided by the arbitral tribunal and notified to the parties by the Secretariat of CIETAC at least 20 days before the oral hearing date. A party having justified reasons may request a postponement of the oral hearing. However, such request must be communicated to the arbitral tribunal at least 10 days before the oral hearing date. The arbitral tribunal shall decide whether to postpone the oral hearing or not.

Confidentiality

Hearings shall be held in camera. If both parties request an open hearing, the arbitral tribunal shall make a decision.

Default

If the Claimant fails to appear at an oral hearing without showing sufficient cause, or withdraws from an on-going oral hearing without the permission of the arbitral tribunal, the Claimant is deemed to have withdrawn its Request for Arbitration. If there is a counterclaim, the arbitral tribunal shall proceed with the hearing of the counterclaim and make a default award.

If the Respondent fails to appear at an oral hearing without showing sufficient cause, or withdraws from an on-going oral hearing without the permission of the arbitral tribunal, the arbitral tribunal may proceed with the arbitration and make a default award. If there is a counterclaim, the Respondent is deemed to have withdrawn it.

Withdrawal

A party may withdraw its claim at any time before the arbitral tribunal is formed; otherwise, approval by the arbitral tribunal is required. If there is no counterclaim in the case, a party may file a request with the CIETAC to withdraw its claim and the case may be dismissed accordingly.

Representation

A party may be represented by its authorized representative who may or may not be a legally qualified person. A Power of Attorney for the authorized representative is required. The authorized representative can be of any nationality.

Evidence

Preservation of Property and Evidence

CIETAC has no power to make any order for preserving property or evidence. CIETAC will forward such an application to the competent court.

Production of Evidence

Each party shall have the burden to produce evidence to support its claim, defence or counterclaim.

The arbitral tribunal may specify a time period for the parties to produce evidence. The arbitral tribunal may refuse to admit any evidence produced after the period expired. If a party has difficulties to produce evidence within the specified time period, it may apply for an extension before the expiration of the period. The arbitral tribunal has the discretion to decide whether or not to extend the time period.

Investigation by the Arbitral Tribunal

The arbitral tribunal may undertake investigations and collect evidence when it considers necessary to do so, in which case the arbitral tribunal shall notify the parties to be present to witness its evidence investigation and collection. Failure of one party to

be present will not affect the evidence investigation and collection.

The arbitral tribunal shall, through CIETAC, forward the evidence collected by itself to the parties and give them an opportunity to examine it.

Expert's Report

The arbitral tribunal may appoint experts for clarification of specific issues of a case. Such an expert may be of any nationality.

The arbitral tribunal has the power to request the parties to produce to the expert any relevant materials, documents, or goods for checking or inspection.

Copies of the expert's report shall be forwarded to the parties, who shall be given an opportunity to make comments thereon. The expert has to explain its report if requested by a party or the arbitral tribunal to do so.

Examination of Evidence

All evidence submitted by a party shall be filed with CIETAC for transmission to the other party.

If a case is examined by way of an oral hearing, the evidence shall be exhibited at the hearing and examined by the parties.

If evidence is submitted after the hearing with the approval of the arbitral tribunal, the arbitral tribunal may require the parties to submit their opinions in writing within a specified time period.

Arbitral Award

Time Limits

The arbitral tribunal shall render an arbitral award within 6 months from the date the arbitral tribunal is formed. Such time period may be extended by the Chairman of CIETAC if he considers it necessary to do so.

Making an Award

If the arbitral tribunal cannot reach an unanimous opinion, which may happen if the opinions of the arbitrators are different from one another, the award shall be rendered in accordance with the opinion of the presiding arbitrator.

The arbitral award is final and binding upon both parties which is not appealable to another body or court.

Fees

The arbitral tribunal has the power to determine in the arbitral award the allocation of the arbitration fee and other expenses among the parties.

The arbitral tribunal has the power to decide in the award that the losing party shall compensate the winning party the expenses, including legal ex-

penses, reasonably incurred by it in dealing with the case.

Enforcement of Award

The parties must comply with the arbitral award within the time period specified in the award, usually it is 10-15 days from the date the party receiving the decision. If no time limit is specified in the award, the parties need to comply with the arbitral award immediately.

If the losing party fails to comply with the award, the other party may apply to a competent Chinese court for the enforcement of the award.

Revocation of an Award

A people's court shall revoke a foreign-related arbitral award if an applicant can prove one or more of the following:

1. That the parties have not reached a written arbitration agreement;
2. That the party against whom the application for enforcement is made was not given notice of the appointment of an arbitrator or for the inception of the arbitration proceedings, or was unable to present his case due to causes for which he is not responsible, such as force majeure.
3. That the composition of the arbitration tribunal or the procedure for arbitration was not in conformity with the rules of arbitration; or
4. That the matters dealt with by the award fall outside the scope of the arbitration agreement or something which the arbitral organ was not empowered to arbitrate, such as marriage, adoption or guardianship.

It can be seen that the grounds of revocation of a foreign-related arbitral award are about procedural or formality matters.

Part Three: Mediation in the PRC

Mostly mediation in the PRC is not an independent proceeding but is part of an underlying proceeding such as a legal or arbitration proceeding. It is a procedure to facilitate parties to come to a settlement the terms of which form part of the arbitral award of the arbitral tribunal or the mediation statement of the People's Court. In fact it is not uncommon for some judges to force parties to mediate.

There is no specific law about mediation in the PRC. There are no legal provisions relating to mediation procedures, time limits, formation of the mediation tribunal, obligation and rights of the parties etc. In practice, a party may put forward its terms of settlement either verbally or in writing to

the mediator. Subsequent response will be communicated to the mediator acting as a go-between. The mediator may hold meetings with the parties jointly or separately. Though the role of the mediator is important, he has no power to force the parties to come to an agreement. The Civil Procedure Law and the Arbitration Law does provide that the mediation statement issued by the People's Court and the arbitral award incorporating the terms of settlement can be enforced just like a judgment or ordinary arbitration award.

In addition, there is an independent mediation institution named "CCPIT/CCOIC Conciliation Center" ("CCC") in PRC. This institution is a permanent conciliation institution that assists the parties involved to resolve commercial and maritime disputes through conciliation. CCC was established in 1987 and over 40 sub-council conciliation centers have been set up throughout the PRC. Unified conciliation rules are applied by conciliation centers in different parts of the country, which are subject to the guidance of the CCC in their functioning. So far, CCC has taken up more than 4,000 cases involving different trades and over 30 countries and regions; over 80 percent of the cases have been successfully settled through conciliation.

Below is a brief introduction of the CCC rule.

The CCC rules

Acceptance of a Case

The CCC accepts a case on the basis of the conciliation agreement reached by the parties before or after the arising of the dispute, upon any party, both parties or multilateral parties' application.

If there is no conciliation agreement between the

parties then one party may apply for conciliation. CCC may accept the case but needs to ask the other party's opinion. If the other party does not confirm that he agrees to resolve the dispute through conciliation within 15 days from his receipt of the conciliation application filed with CCC by the applicant, it will be considered that the other party refuses to mediate.

Composition of the Conciliation Tribunal

The parties should choose a conciliator from the conciliator list maintained by CCC unless the parties stipulate otherwise.

Moreover each party may choose a conciliator unless the parties stipulate otherwise. The CCC may appoint a presiding conciliator if they consider it will benefit the conciliation.

Fees

When a party applies for conciliation, he needs to pay 50 percent of the conciliation fees to CCC in advance. If the other party agrees to mediation, he then needs to pay another 50 percent of the conciliation fees to CCC in advance.

The Mode of Conciliation

The conciliator tribunal may adopt the mode of conciliation that it believes will be most advantageous for reaching a settlement by the parties. There is a list of modes the conciliator tribunal may adopt; basically the conciliator tribunal may adopt any mode as long as it is not against the law.

If the parties reach a conciliation agreement, upon the request of the parties, the conciliator tribunal may make a conciliation decision based on the conciliation agreement. Unless for the purpose of execution or fulfillment, the contents of the conciliation decision should not be published. ■