CIETAC Publishes Rules for Investor-State International Investment Arbitration

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On October 1, 2017, new international investment arbitration trial rules (**Chinese version**) (the "**Rules**") issued by the China International Economic and Trade Arbitration Commission ("**CIETAC**") became effective. The Rules mark China's first attempt to establish a domestic arbitral institution for international investment disputes. The Rules come at the same time as China's "Belt and Road" initiative, focusing on improving trade infrastructure on land from China to other countries in Asia, securing efficient sea trade routes and establishing a network of free trade zones and cultural exchanges. CIETAC may become the forum of choice for Chinese investors in future arbitrations with foreign States.

Background

Previously, CIETAC had established itself as China's leading arbitral institution for commercial disputes between private parties, and had not administered investor-State arbitrations.

International arbitration between a foreign investor and a host State requires an arbitration agreement. The agreement may take the form of a contractual provision (including in a legal stability contract or a subsequent arbitral agreement), but increasingly it is the result of a foreign investor accepting a State's standing offer to arbitrate disputes in international investment agreements, primarily in the form of bilateral investment treaties (BITs) and free trade agreements. International contracts, national legislation and international investment agreements that provide for international arbitration between foreign investors and host States typically identify an arbitral institution and/or rules for the proceedings in order to ensure that any disputes between the investor and State are not resolved by the State's legal system, which may or may not be independent from the political and executive functions of the State.

The World Bank's International Center for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law Arbitration Rules (or UNCITRAL Arbitration Rules),the Arbitration Institute of the Stockholm Chamber of Commerce (or SCC), and the International Chamber of Commerce International Court of Arbitration (or ICC) are common choices for resolving investor-State disputes.

Highlights of the Rules

CIETAC as the Arbitral Institution

According to the Rules, the choice of the Rules as the rules of investment arbitration and the choice of CIETAC as the arbitration institution are "bundled," that is, parties who agree to one are deemed to have agreed to the other. Arbitration requests will be submitted to a newly established Investment Dispute Resolution Center in Beijing. If the parties choose CIETAC's Hong Kong Arbitration Center as the arbitration institution or Hong Kong as the seat of arbitration, CIETAC's Hong Kong Arbitration Center may handle investment dispute arbitration cases brought under the Rules.

Preference for Appointment of Arbitrators from a Roster

Under the Rules, parties are required, by default, to appoint arbitrator(s) from a roster maintained by CIETAC specifically for investment disputes. If parties want (by agreement) to appoint arbitrators not on the panel, approval of the Chairman of CIETAC is required. This is consistent with CIETAC's panel approach in commercial arbitration, but is generally an outlier approach. Most well-known arbitration

institutions generally do not require parties to choose arbitrators from a roster. As CIETAC's roster has not yet been published, it remains to be seen how extensive and diversified it will be.

Third-Party Funding

The Rules expressly recognizes "third-party funding" and require that any third-party funding as well as the identity of the funder to be disclosed without delay to the other party, the tribunal and CIETAC (or its Hong Kong Arbitration Center). The tribunal is also empowered to order disclosure of information related to third-party financing. Moreover, when deciding on arbitration fees and other costs, the arbitral tribunal may consider whether the arbitration is funded by a third party. These provisions reflect the recent development of third-party financing in investment arbitration, and make the CIETAC Rules one of the few arbitration rules that expressly require disclosure of third-party funding and consideration of third-party funding in allocation of fees.

Scrutiny of Draft Arbitral Awards by CIETAC

The Rules require tribunals to submit a draft award to CIETAC for its review before a final award is issued. Upon review, CIETAC is permitted to draw the tribunal's attention to "certain points" in a draft, so long as it does not affect the independence of the tribunal. The Rules do not specify whom or which CIETAC body specifically will be reviewing draft awards. It remains to be seen how CIETAC will exercise such power, the nature of the "certain points" that may be raised, and to what extent such review will impact the decision-making and independence of the tribunal.

Publication of the Arbitration

Unlike most investment arbitration rules (including those at ICSID, SCC and ICC),[1] the default position of the CIETAC Rules allow CIETAC to disclose certain information concerning arbitrations unless the parties agree otherwise. The information subject to disclosure is extensive: it may include the commencement of arbitration, the memoranda of claimant and respondent, written statements of the parties, minutes of the proceedings, and orders, decisions and awards of a tribunal, with the exception of confidential or other protected information. These provisions of the CIETAC Rules were enacted to increase transparency of proceedings and the credibility of the institution. However, the default position of making proceedings public may be difficult for investors, given that investors typically prefer arbitral proceedings to proceed on a confidential basis. Further, it may be that publicity is equally if not more unwelcome for the State. So it may become common for parties to agree to no public disclosure.

Implications

- **CIETAC may become the forum of choice of Chinese investors in bringing arbitration against a foreign host State.** Whilst there had been only two publicly known claims filed against China to date, Chinese investors have asserted a total of five claims against other governments. This number is certain to increase with the increasingly active outbound investment activity by Chinese companies and individuals. With its convenient location and Chinese background, it is foreseeable that CIETAC may become the go-to forum for outbound Chinese investors.

[1] UNCITRAL Arbitration Rules have incorporated UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in 2013 ("**Rules on Transparency**"). The Rules on Transparency provide for publication of information and documents in the arbitration process, e.g., notice of arbitration, response to the notice of arbitration, statement of claims, and statement of defence. The Rules on Transparency can also be applied to investment arbitrations administered by institutions such as ICSID and SCC by agreement of the State parties to an investment treaty or by agreement of the disputing parties.

- **China may seek to include CIETAC arbitration as one of the dispute settlement mechanisms in its existing and future Bilateral Investment Treaties with foreign States.** Otherwise, CIETAC will only apply based on ad hoc agreements, which may be difficult to reach because foreign investors and States may prefer the more familiar and well-established arbitral institutions and rules over CIETAC.
- **It remains to be seen whether the jurisprudence of CIETAC investment arbitration will become an integral part of international investment law.** Although the jurisprudence of various investment arbitral tribunals do not have binding force on other tribunals, even including those within the same arbitration institution, arbitral tribunals generally will look to international investment law jurisprudence in decision-making. In that sense, each investment arbitration decision is not only a one-off fact-sensitive decision, but also becomes an integral part of the body of international investment law, particularly if the decision is written by well-known scholars in the field. CIETAC (and China) will be looking to see decisions made in cases administered by it become an integral part of international investment law.

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