ICC and CIETAC Arbitration Practice Comparison —Case Study Note 1

Wantao Yang

One of the most important negotiated points by parties in contract negotiations is the dispute resolution clause. If parties agree on arbitration, they often negotiate which arbitration institution or arbitration rules will apply in resolving potential disputes.

Over the past ten years, there has been an increase in various activities by arbitration institutions around the world to compete for influence in international dispute resolution. Undoubtedly, each arbitration institution has its own characteristics and parties will always have their own preferences. However, some have posited that there is a general trend of convergence among different arbitration institutions in terms of practices and rules. If true, such a convergence would hopefully make the selection of arbitration institutions and arbitration rules less of a critical and contested issue for parties in contracts negotiations.

Comparative studies can be used to examine whether and to what extent such convergence is occurring. Specifically, such studies can review: (i) the rules of different arbitration institutions, and (ii) the actual practices of those arbitration institutions. The first category is relatively easier to examine than the second because arbitration rules are publicly available. However, comparing the actual practices of individual arbitration institutions will be extremely difficult. Actual practices are not always reflected in written documents of arbitration institutions. Even if they are, such documents may be internal and not available even to parties, let alone to the general public. For an outsider, it is extremely difficult (if not impossible) to obtain such files and related information. In addition, even if one or two files were made available (generally this would be on a selective basis by arbitration institutions for their own reasons), any comparison of cases by different arbitration institutions would have limited use because the sample cases would be different each with its own unique set of facts and procedural circumstances.

Fortunately, I have had the chance to be involved in a commercial dispute that has been heard before two different arbitration institutions. The dispute arose from an automobile business cooperation contract, a CKD and Agency Agreement. An arbitration proceeding was initiated before the ICC ("**ICC Arbitration**") based on the arbitration clause in the CKD and Agency Agreement by Parties A, B, C and D （which are affiliated companies） against Party E. Party E reserved its objection to the arbitration based on, among others, the argument that the arbitration clause is invalid. Party E also contended that there were a few "smaller" sales contracts executed during the performance of the CKD and Agency Agreement that contained CIETAC arbitration clauses. Nevertheless, Party E participated fully in the ICC Arbitration. The Terms of Reference ("**ToR**") signed by all parties provided that a

partial award would address, among others, *"whether the claims against supply and delivery of CKD Parts and After-sale Services……shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration?"*

A partial award was rendered in favor of Parties A, B, C and D. In addressing the above issue, the ICC tribunal found, among other things, that

> *"the binding sales contracts between the Parties are reflected in the Proforma Invoices, the Letters of Credit and the Commercial Invoices and that the four Sales Contracts submitted by the Respondent did not become operative and do not bind the Parties".*

The Tribunal also found that

> *"As I have found above that the four Sales Contracts were never legally formed and did not become operative, there is no need for the tribunal to address the question as to whether or not they were ever validly executed. However, as a good deal of time was devoted to this issue by the Parties and for completeness, the tribunal has addressed the issue below.*
> *…*
> *…the tribunal finds that the Respondent could not have objectively believed that Mr. [M] had the authority or apparent authority to enter into the four Sales Contracts and the tribunal finds that Mr. [M] did not have the authority to enter into the four Sales Contracts."*

The Tribunal therefore determined that the claims against the supply and delivery of CKD parts and after-sale services should not be submitted to CIETAC. Sometime after the issuance of the ICC partial award, Party E initiated a separate arbitration with CIETAC against Parties B, C and D based on those "smaller" sales contracts ("**CIETAC Arbitration**"). Party E wanted CIETAC to declare those "smaller" sales contracts (including the CIETAC arbitration clauses) valid. Apparently the purpose of Party E's CIETAC arbitration is to create a CIETAC award conflicting with the findings in the ICC award, thus creating a possible hurdle for enforcement of the ICC partial award and a future final ICC award[1].

Since these two cases involved basically the same parties, arose from a single project business transactions, and involved (or will involve) almost the same procedural and substantive issues, the two cases constitute the perfect pair of samples to study different practices between ICC arbitration and CIETAC arbitration.

There expect to be a series of notes that will examine the differences of practices by

[1] Party E only paid the CIETAC arbitration fees to CIETAC after the ICC Arbitration final hearing was completed, about then months well after the issuance of the ICC partial award.

ICC and CIETAC. This is the first note.

Issue 1: Appointment of Arbitrator(s)

Parties A, B, C, D are middle-east companies (registered in middle east and also ultimately owned by middle east businessmen), and Party E is a company domiciled in Hebei, China. ICC arbitration rules provide for a sole arbitrator unless otherwise agreed to by the parties. The ICC court initially appointed a Singaporean arbitrator who is fluent in both English and Chinese. However, since parties objected to the appointment, the ICC court then appointed an Australian arbitrator as the sole arbitrator. The Australian arbitrator does not speak Chinese.

In the CIETAC Arbitration, the hearing notice received by Parties B, C and D showed three arbitrators were appointed[2]. All of them were Chinese nationals residing in Beijing. All three arbitrators were appointed by CIETAC as per CIETAC rule.

It is interesting to note that while both the arbitration rules of ICC[3] and CIETAC[4] provide that the nationality of the parties should be considered when appointing arbitrator(s) by the institution, there were quite differences in the appointment results in this pair of cases.

After noticing the appointment of three Chinese nationals as arbitrators, given that there had been no substantive submissions and evidences other than the Request for Application filed by Party E, Parties B, C and D believed that the tribunal should have not spent much time and efforts on the matter, Parties B, C and D wrote to CIETAC stating, among others, that the proper tribunal for the circumstance of the dispute should include non-Chinese national arbitrator. In response, Party E emphasized that CIETAC has the power to appoint the three Chinese nationals as arbitrators. Parties B, C and D stated that having the power to appoint arbitrators is something different from using proper and sound judgment to exercise the power. However, CIETAC finally rejected the point by stating that since the arbitration clauses in the disputed contracts do not provide for specific requirements on nationality of arbitrator, "the appointment of three Chinese nationals to constitute the tribunal complies with Arbitration Law and the Rules of Arbitration".

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[2] There are currently different understandings by parties regarding whether Parties B, C and D had fair opportunities in the process. That point is not relevant for the current note regarding practice of appointing arbitrator(s) in terms of nationality preference.

[3] Article 9(1) of ICC arbitration rules (1998 version) provides: *"In confirming or appointing arbitrators, the Court shall consider* ***the prospective arbitrator's nationality****, residence and other relationships with the* ***countries of which the parties or the other arbitrators are nationals*** *and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with these Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 9(2)." (emphasis added)*

[4] Article 28 of the CIETAC rules (2012 version) provides: "*When appointing arbitrators pursuant to these Rules, 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.*" *(emphasis added)*

Issue 2: Language of Arbitration

Article 16 of the ICC arbitration rules provides: "*In the absence of an agreement by the parties, **the Arbitral Tribunal shall determine the language or languages of the arbitration**, due regard being given to all relevant circumstances, including the language of the contract.*" In the ICC arbitration, Parties A, B, C and D proposed that the language of arbitration would be English based on, among others, the following reasons: (i) "*The CKD and Agency Agreement and the TCA*[5] *are both written in English*"; and (ii) "*All correspondences and communications between the parties are in English, only a very small portion with Chinese translation. All Chinese documents have English translation*".

Party E proposed the language of arbitration should be exclusively Chinese, or Chinese and English based on the following reasons: (i) "*the applicable laws…are Chinese laws, and the official language of China is Chinese*"; (ii) "*the languages in relevant agreements and technical data under this CKD project are both in Chinese and English*"; and (iii) "*the counsels of both parties are Chinese, their native language is Chinese*".

Apparently to facilitate and maximize all the parties' participation, the ICC tribunal determined that the language of arbitration would be English and Chinese, subject to the following qualifications[6]:

> *"a) All written submissions and correspondence from Parties' Counsel shall be in English; b) Parties' Counsel may elect to provide oral evidence at a hearing in English or Chinese; c) Witness may give evidence in English, Chinese or Arabic; d) The parties shall be responsible for arranging either simultaneous or sequential translation and the cost shall be a cost of the arbitration; and e) The Final Award shall be produced in English, with a Chinese translation provided"*

By comparison, Article 71 (1) of the then effective CIETAC arbitration rules provides: "*Where the parties have agreed on the language of arbitration, their agreement shall prevail. In the absence of such agreement, the language of arbitration to be used in the proceedings **shall be Chinese or any other language designated by CIETAC having regard to the circumstances of the case***." (emphasis added) In contrast to ICC rules, CIETAC rules enpowers CIETAC (not the tribunal) to decide the language of the arbitration.

CIETAC notified that the language of the arbitration shall be Chinese. Subject to their

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[5] "*TCA*" is an abbreviation for "*Technical Cooperation Agreement*," which is another agreement executed between Parties A, B, C, D and E in performance of the CKD Agreement.

6 The arbitrator does not speak Chinese.

reservations on jurisdiction and procedures, Parties B, C and D requested CIETAC to change the language of the arbitration to English based on the followings:

(1) All alleged "smaller" Sales Contracts are in both Chinese and English, and expressly providing for English version prevails;
(2) Most of parties' communications and correspondences in their business cooperation were in English. Party E admitted in a related ICC arbitration that no substantive communication between parties was solely in Chinese;
(3) None of Parties B, C and D's current employees (let alone management team) can read or speak Chinese. Parties B, C and D's business team participation is critical for the trial of the case;
(4) Party E's application to CIETAC specifically refers to the closely related ICC Arbitration, which applies English. In addition, even the key evidence submitted by Party E itself in its Request For Arbitration to CIETAC was in English only.

Nevertheless, CIETAC finally decided below without more details:

> *"since parties did not provide for the language of arbitration in the arbitration clauses, according to Article 71 of the Arbitration Rules 'In the absence of such agreement, the language of arbitration to be used in the proceedings shall be Chinese', and taking into consideration of the circumstances of this case, CIETAC decides that the language of this arbitration shall be Chinese."*

…to be continued.

Any question regarding this article could be directed to yangwantao@zhonglun.com.

About the author: Wantao Yang, qualified in PRC and Illinois, the U.S. Mr. Yang has extensive experience in both China related M&A and complex dispute resolutions. He is known for master of "a comprehensive knowledge of regulations, practices and business cultures on a local and international basis" and for "his ability to come up with objective, effective solutions". He has been consistently ranked as a leading lawyer by various industry journals for years. In arbitration sector, he has served as lawyer, arbitrator and expert witness in many China related arbitration proceedings.