Comparison between SCC arbitration and CIETAC arbitration

by Dai Wen¹ and Linn Bergman²

General Comparison

The rules of the SCC and the CIETAC are similar in many ways. Both rules respect party autonomy, and are flexible to be modified by agreement between the parties. Under both sets of rules, the arbitral tribunal may conduct the arbitration in a manner as it considers appropriate (SCC Article 19 and CIETAC Article 29). The structure and the wording of both sets of rules are also similar.

Both rules reflect to a certain extent the law of the country where the respective institution has its seat although this is truer for the CIETAC Rules than the SCC Rules. While the Swedish Arbitration Act is inspired by the UNCITRAL Model Law and is thus in line with the laws of most countries where arbitration is a frequently used dispute resolution method for business, the Chinese Arbitration Law contains some mandatory provisions particular to China which by necessity must be reflected in the CIETAC Rules. These mandatory legal requirements have influenced the formulation of the CIETAC Rules on issues such as jurisdiction, composition of the arbitral tribunal, interim measures, language, and seat of arbitration. As a consequence, CIETAC also limits the scope of party autonomy (see above) by excluding party agreements when in conflict with mandatory provisions of the law of the seat of arbitration (CIETAC Article 4.2).

For the user, one of the more notable differences is the level of institutional involvement in the various stages of arbitration. While both SCC and the CIETAC are much involved during the initial phase of arbitration, the picture changes when a case has been referred to the arbitral tribunal. In CIETAC Arbitrations, the secretariat continues to be the centre of the arbitration. All communications between the parties and the arbitral tribunal must be sent through the secretariat. The case manager also acts as the secretary to the arbitral tribunal, a task which includes attending hearings and deliberations, taking notes and setting up workable time tables. The case manager will also assist in scrutinizing awards. The SCC has another take on this. Under the SCC Rules, the mandate to act is divided between the SCC and the arbitral tribunal. After the case has been referred to the arbitral tribunal, the SCC’s mandate to act is limited to issues regarding when the final award is to be made, challenges to arbitrators, advance on costs, and final costs. However, this does not mean that the SCC loses sight of the arbitration. The secretariat keeps an eye on the arbitration and works continually with reminders in order to keep pressure on the arbitrators to push the case forward. Thus, CIETAC has more interaction with the parties and the arbitral tribunal, and through this interaction, CIETAC has a heavier case administration.

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The SCC Rules and the CIETAC Rules compared

1. Jurisdiction decision

The SCC Board decides whether the SCC manifestly lacks jurisdiction over a dispute. This means that the SCC may only dismiss a case if there is a manifest lack of jurisdiction. Examples of manifest lack of jurisdiction are that the arbitration clause invoked is an ad hoc clause, that the clause clearly refers to a different arbitration institution, or that the claimant does not even claim to have a valid arbitration clause. If any doubt exists as to whether there is a valid arbitration clause the question has to be decided by the arbitral tribunal. The threshold for *prima facie* jurisdiction under the SCC Rules is thus very low. (SCC Rule Article 9 (i))

According to the Chinese Arbitration Act, article 20, it is the institution not the arbitral tribunal that has the initial power to decide jurisdictional issues. Thus, CIETAC not only has the power to determine the jurisdiction issue by *prima facie* evidence but also has the power to make a new decision on jurisdiction based on facts and evidence found by the arbitral tribunal during the arbitration proceedings if inconsistent with *prima facie* evidence, CIETAC may also authorize this power to the arbitral tribunal if necessary. In practice, if the grounds for objection to jurisdiction grounds are closely related to the substantive issues, CIETAC usually authorizes such power to the arbitral tribunal. For example, where the objection is that the arbitration agreement has been assigned to a third party or that one arbitrating party is not a signatory. In recent years, CIETAC has been authorizing this power to the arbitral tribunal in more and more cases. (CIETAC Rule Article 6)

2. Appointment of arbitrator

a. Appointment of presiding arbitrator

Under the SCC Rules, where the Arbitral Tribunal has to consist of more than one arbitrator, each side appoints one arbitrator and the Chair is appointed by the SCC Board under Article 13.3. The parties may also agree on a different appointment procedure, and it is not uncommon that the parties agree to appoint the Chair jointly. The situation where the parties agree to have the party appointed arbitrators appoint the Chair is quite uncommon.

The CIETAC Rules also gives the parties autonomy on the arbitrator appointing procedure. Parties may agree freely that the presiding arbitrator should either be appointed by two sides or two co-arbitrators or by any other procedure they prefer. In the absence of such agreement, CIETAC provides parties with four methods to appoint the presiding arbitrator (Article 22).
The parties may appoint the presiding arbitrator jointly.
The chairman of CIETAC may appoint the presiding arbitrator upon the parties’ joint authorization.
The parties may recommend a presiding arbitrator, in which case their common candidate will be the Chair, while if there is more than one common candidate, the chairman of CIETAC may choose one as the presiding arbitrator.
Failing the above three methods, the presiding arbitrator would be appointed by the chairman of CIETAC.

b. Multi party appointment

In cases with more than one party on one side, the Board appoints the entire arbitral tribunal if either side of the parties fails to make a joint appointment under the SCC Rules, Article 13.

Under the CIETAC Rules, Article 24, each side appoints an arbitrator jointly. The procedure for the appointment is in all other aspects the same as in arbitrations between two parties only. (CIETAC is considering revising this article)

c. Nationality of the presiding arbitrator

Under SCC Rule Article 13.5 the nationality of the sole arbitrator or the chair of the arbitral tribunal must be of a different nationality from the parties, unless the parties have agreed otherwise or unless otherwise deemed appropriate by the Board. The reasons behind this article are to ensure the independence and impartiality of the arbitral tribunal and to build trust into the system.

The CIETAC Rules do not have such an article. The reason is that Chinese is the default language of arbitration under the CIETAC Rules (see below). It is thus in many cases necessary for the chair to speak Chinese which many times makes it necessary to appoint a Chinese national as chair even in international cases. Also, according to the “Implementing the ‘Administration of Representative Offices of Foreign Law Firms in China Regulations’ Provisions”, a foreign lawyer cannot act on behalf of a Chinese client in arbitrations in China, so almost all the attorneys in the arbitration are Chinese. It is therefore considered more suitable, on a practical level, to have a Chinese national appointed as chair. This practice also makes CIETAC arbitration less expensive as fees for Chinese arbitrators are lower than those of foreign arbitrators.

3. Interim Measures and Emergency Arbitrator

Under the SCC Rules, once a case has been referred to the arbitral tribunal, the arbitrators have power to grant interim measures. As of 1 January 2011 the SCC Rules also make available interim measures before the case has been referred to the arbitral tribunal, even before arbitration has been commenced, through a procedure which allows for an Emergency Arbitrator to be appointed with the power to grant interim measures. An
Emergency Arbitrator may be appointed up until the case has been referred to the arbitral tribunal. An article on practice in this regard is available on the SCC Website. In addition to interim measures as part of the arbitration, the parties have the option of requesting a court to grant interim measures.

Interim measures cannot be granted by an arbitral tribunal under the CIETAC Rules, reflecting the China Arbitration Act, Article 28, which exclusively gives the power to grant interim measures to national courts. Before arbitration has been commenced, a party must submit a request directly to the court and after commencement of the arbitration the submission must be sent through the CIETAC secretariat (CIETAC Rules, Articles 17-18).

4. Time limits

The SCC Rules contain almost no fixed time limits. There are two exceptions:
- when the case is to be decided by one arbitrator, the parties are given 10 days within which they are given an opportunity to jointly appoint that arbitrator
- a final award must be made within 6 months from the date when the case has been referred to the arbitral tribunal.

The intention behind this lack of fixed time limits is to ensure flexibility and avoid unnecessary delay and show-stoppers during the arbitration. Any time limits given may also be extended by the SCC or the arbitral tribunal, as the case may be.

Although the CIETAC Rules also respect party autonomy and give the tribunal power to conduct the proceedings on its own, with the purpose of promoting efficiency of arbitration proceedings they also set some specific time limits. For example, in international cases, the Respondent must submit its statement of defence and or counterclaim within 45 days (Article 12). In practice, these time limits are not mandatory; they can be modified by the arbitral tribunal after consulting with the parties. CIETAC also sets some time limits for the case manager to administer cases. For example, a notice of oral hearing should be sent out by the secretariat at least 20 days in advance of the oral hearing date (Article 30.1). Besides, the arbitral tribunal must render the final award in domestic cases within 4 months as from the date on which the arbitral tribunal is formed (Article 65.1), 6 months in international cases (Article 42.1). If the summary procedure applies, the time limit for rendering the final award is 3 months (Article 56.1). The time limit may also be extended by the CIETAC chairman.

5. Consolidation

Under the SCC Rules, Article 11, if an arbitration is commenced concerning a legal relationship in respect of which an arbitration between the same parties is already pending, the Board may, at the request of a party and after consulting the parties and the arbitral tribunal, decide to consolidate the new claims with the pending proceedings. Although this rule is very narrow, the article has been applied a number of times since its introduction in January 2007. While the parties need to be the same in both arbitrations, the phrase “legal relationship” has been given a wide interpretation by the SCC Board,
encompassing not only disputes under the same contract, but also disputes under other, although somehow related contracts.

The CIETAC Rules do not provide any articles on consolidation. (*CIETAC is considering adding a consolidation article in its Rules*)

6. Default Rules

If a party fails to comply with a request for further details, the SCC Board may, under Article 6 of the SCC Rules, dismiss a claim or counterclaim or set-off. Further, under Article 30 of the SCC Rules the arbitral tribunal may terminate the proceedings if the claimant fails to submit a statement of claim, while the arbitral tribunal may proceed with the arbitration when a party fails to avail itself of the opportunity to present its case and it may draw inferences of failure by a party to comply with any requirement or order.

Under the current CIETAC Rules, Article 34, if either party fails to appear at an oral hearing without showing sufficient cause for such failure, or withdraws from an ongoing oral hearing without the permission of the arbitral tribunal, that party may be deemed to have withdrawn its claim (counterclaim).

7. Mediation during the arbitration

The CIETAC Rules also contain rules on conciliation. These provide that the parties may ask the arbitral tribunal to conciliate the case during the arbitration. If conciliation fails, the arbitral tribunal must proceed with the arbitration and render an award.

While the SCC Rules do not contain any rules on conciliation/mediation, the SCC has mediation rules which may be agreed upon at any stage by the parties. An arbitration can thus be stayed at any point if the parties wish to try to resolve their dispute by mediation. The SCC Mediation Rules prohibit the mediator from acting as arbitrator in the same matter unless the parties agree otherwise.

8. Arbitrators

Neither the Swedish Arbitration Act nor the SCC Rules provide any requirement of arbitrators as long as they are independent and impartial. While the SCC keeps a record of arbitrators previously appointed and their skills and knowledge, the SCC does not have any fixed panel of arbitrators. The parties are free to appoint any person of any profession as long as that person is neutral in relation to the dispute, the parties, and the counsel involved. Arbitrators are selected on the basis of their experience in arbitration and knowledge of the applicable law, the language of the dispute, the nationalities of the parties, and the seat of the arbitration.
The CIETAC Rules require disclosure of circumstances likely to give rise to justifiable doubts as to the impartiality or independence of an arbitrator. In addition, the Chinese Arbitration Act, article 13.1, stipulates that arbitrators must fulfil one of the following conditions:

- they have been engaged in arbitration work for at least eight years;
- they have worked as a lawyer for at least eight years;
- they have been a judge for at least eight years;
- they are engaged in legal research or legal teaching and in senior positions;
- they have legal knowledge and are engaged in professional work relating to economics and trade, and in senior positions or of the equivalent professional level.

In order to carry out the requirements in the Chinese Arbitration Act, CIETAC keeps a panel of arbitrators. All the arbitrators on the panel fulfil the requirements of the Chinese Arbitration Act. A party may also appoint an arbitrator who is not listed but such appointment is only valid with formal confirmation by the Chairman of CIETAC that the person appointed is qualified under the Chinese Arbitration Act.

9. SCC Rules for Expedited Arbitrations vs. CIETAC Summary procedure

The SCC has rules for Expedited Arbitrations which provide for a summary procedure. These rules only apply when specifically referred to in the arbitral agreement, which can be done either by referring to the SCC Rules for Expedited Arbitrations, or preferably by using a combination clause which provides for arbitration under the Expedited Arbitration Rules unless the SCC Board decides that the case should be settled under the Arbitration Rules due to the circumstances of the case.

The CIETAC Rules provide (Article 50) that the summary procedure applies to a case if the disputed amount does not exceed RMB 500,000 yuan, unless otherwise agreed by the parties. The summary procedure is thus an incorporated part of the CIETAC Rules and as such the default procedure for disputes is of lower value. *(CIETAC is considering revising this article)*

10. Scrutiny

The SCC Rules do not provide for scrutinizing the draft award. The award is considered to be the product of the arbitrators and as such out of the scope of the SCC mandate. If the secretariat finds any formal mistake in the award, the secretariat may bring this to the attention of the arbitral tribunal in order to enable them to consider whether an amendment should be made or not.

Under Article 45 of the CIETAC Rules, the arbitral tribunal must submit its draft award to CIETAC for scrutiny before signing the award. CIETAC may remind the arbitral tribunal of issues in the award on condition that the arbitral tribunal's independence in rendering the award is not affected.
11. Confidentiality

Under SCC Rule Article 46, unless otherwise agreed by the parties the SCC and the Arbitral Tribunal must maintain the confidentiality of the arbitration and the award. Neither the rules nor the Swedish Arbitration Act contain any rule regarding confidentiality vis-à-vis the parties. The fact that the parties are not obligated to keep the arbitration confidential under the SAA has been confirmed by the Swedish Supreme Court in the so called Bulbank case. Hearings are in practice always held in private.

The CIETAC Rules (Article 33) have two steps regarding this issue. First, the hearing should be held in private. If both parties agree to have a public hearing, the arbitral tribunal has discretion to decide whether or not make the hearing public. Second, for cases heard in private, it is not only the institution and tribunal, but also the parties, their representatives, witnesses, interpreters, experts consulted by the arbitral tribunal and appraisers appointed by the arbitral tribunal who must not disclose to any outsiders any substantive or procedural matters of the case.

12. Seat of arbitration

Both the SCC Rules and the CIETAC Rules give the parties power to decide the seat of arbitration.

However, in the absence of such agreement, under the SCC Rules (Article 20), the Board decides the seat of arbitration. While Stockholm is the most frequently used seat in SCC Arbitrations, the seat can be anywhere in the world.

Under the CIETAC Rules (Article 31), it is deemed that the seat of arbitration should be in the location of CIETAC or any of its sub-commissions. (CIETAC is considering revising this article)

13. Language of arbitration

Both the SCC Rules and the CIETAC Rules give parties the power to decide the language of arbitration.

However, in the absence of such agreement, under the SCC Rules (Article 21), the Arbitral Tribunal will decide the language of arbitration. In international cases, English is the most frequently used language although the SCC regularly also handles cases in Russian, Chinese (usually bilingual) and German. Under the CIETAC Rules (Article 67), Chinese should be the language of arbitration. (CIETAC is considering revising this article)
**Conclusion**

While many of the articles in the SCC Rules and the CIETAC Rules are similar, the reflections of mandatory requirements of the Chinese Arbitration Act in the CIETAC Rules make them very Chinese, which reduces the scope for party autonomy. The current CIETAC Rules contain many default rules relating to China which make the rules less internationally adaptive than the SCC Rules. However, it is good news that CIETAC is now making effort in revising its Rules to better accommodate developments in domestic and international arbitration. Another important difference is the level of administrative involvement of the respective secretariats where the SCC has a light approach and the CIETAC a greater level of involvement, extending to tasks like submitting requests for interim measures to the competent court and acting as secretaries to the tribunals.