CHAPTER 8

Rules of Evidence in CIETAC International Arbitration

Song Lu

8.1 Introduction

Arbitration is a type of adjudication where adversarial parties argue their respective cases in front of a neutral decision-maker—the arbitral tribunal, the appropriate procedure is followed, and any claims advanced and reliefs sought by a party are granted or denied on the basis of the facts found by the arbitral tribunal hearing the case. The main ammunition of a party in arbitral proceedings to support its factual allegations is the evidence it has produced, which is the key to the success or failure of that party in arbitration.

Given the importance of evidence in arbitration, certain rules of evidence are inevitable to be observed in order that due process principle will be safeguarded in the proceedings. That, however, may find some tension with the inherent feature of flexibility, efficiency and cost-saving in arbitral proceedings which disfavours rigid and comprehensive rules. As a consequence, the arbitration rules of most international arbitration institutions are purposely silent about how evidence should be gathered and presented in any arbitration, leaving room for the parties and the tribunal to tailor the rules for their specific case.

On the other hand, parties, their legal counsel and arbitrators, taking into account of their distinctive cultural and legal background, may find themselves in need of some reasonably detailed rules or guidelines in terms of taking evidence in international arbitration, so as to conduct proceedings and render reasoned awards in an efficient way. This explains the adoption by IBA of its Guidelines on the Taking of Evidence in International Arbitration

---

* Associate Professor of Law, International Law Institute, China Foreign Affairs University, Member of CIETAC and arbitrator of various international arbitral institutions. Prof. Lu can be reached at lusong99@gmail.com. After completion of this article, the CIETAC Guidelines on Evidence came into effect on 1 March 2015, but the comments herein are still valid.

Rules of Evidence in CIETAC International Arbitration

(“IBA Rules of Evidence”), which provides a useful guidance to the participants of international arbitration.

Despite its extensive use in international arbitration, IBA Rules of Evidence are seldom used in arbitrations in China including those administered by China International Economic and Trade Arbitration Commission (“CIETAC”), because most Chinese arbitrators and counsel are not familiar with the IBA Rules of Evidence at the moment and consequently not comfortable with making use of these rules in their arbitrations. Some counsel and arbitrators turn to the court rules of evidence for directions.

This article introduces the recent effort by CIETAC to formulate a set of guidelines of evidence suitable to the particular circumstance of China as a developing country in the area of international arbitration and not incompatible with the current Chinese arbitration law. By doing so, the guidelines will assist the Chinese counsel and arbitrators in dealing with evidence in CIETAC arbitrations. Some of the rules that will be included in these guidelines are explained which shows that CIETAC is bringing itself closer to the prevailing international practice.

8.2 General Approaches towards Disclosure and Investigation of Facts

Generally speaking, the common-law countries and the civil-law countries have adopted different approaches respecting evidence in litigations as well as the role of the judges in relation to the disputed facts.

In the common-law countries, there is usually a formal procedure of disclosure or discovery, as in the case of United States, which requires the parties to make disclosure of relevant evidence, whether they are those on which a party relies for making its case, or those which may adversely affect its positions—a duty of full disclosure, supplemented by rules of privileges. Courts may upon request of a party order the other party to disclose evidence that it did not adduced voluntarily. Failing to observe the court order will result in sanctions. In the civil-law countries, however, there is usually not a formal process of disclosure. The parties have no duty to disclosure but they are required

---

3 The most well known Chinese arbitral institution which was established in 1956.