

China International Economic and Trade Arbitration Commission

Guidelines on Evidence

Preamble

The China International Economic and Trade Arbitration Commission (“CIETAC”) adopts these Guidelines on Evidence (“Guidelines”) in accordance with the Arbitration Law of the People’s Republic of China, the CIETAC Arbitration Rules (“Arbitration Rules”), CIETAC’s arbitration practice, and with appropriate reference to the IBA Rules on the Taking of Evidence in International Arbitration as well as those of the Chinese principles of evidence in civil litigation that are suitable for use in arbitration, in order to assist the parties, their counsel and arbitral tribunals (“tribunal”) in dealing with issues of evidence more efficiently in arbitration proceedings.

The application of the Guidelines is presumably to be more appropriate in an arbitration the seat of which is in Mainland China and where the Arbitration Law of the People’s Republic of China is the law applicable to the arbitration procedure.

These Guidelines are not an integral part of the Arbitration Rules. The application of the Guidelines is subject to the consent of the parties in each case. The parties may agree to adopt the Guidelines in whole or in part, or they may agree to vary them. In case of conflict between the Arbitration Rules and the Guidelines which the parties have agreed to adopt in a specific case, the tribunal shall apply the Guidelines. The tribunal shall deal with any matter on which both the Arbitration Rules and the Guidelines are silent and the parties have not agreed otherwise in such manner as it considers appropriate.

The parties may agree that the tribunal and the parties will use these Guidelines for reference, and not in any binding capacity.

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I. Burden of Proof

Article 1 Assumption of the Burden of Proof

- 1.1 Each party shall bear the burden of proving the facts that it alleges.
- 1.2 Where there is a dispute over the fact of the formation or the coming into force of a contract, the party alleging the same shall bear the burden of proof; the party alleging the modification, rescission, termination or cancellation of a contract shall bear the burden of proving the facts giving rise to the change in the contractual relationship.
- 1.3 Where there is a dispute over the fact of the performance of a contract, the party with the obligation of performance shall bear the burden of proof.
- 1.4 The party claiming for damages or other relief and the party rejecting such claims shall each bear the burden of proving the facts supporting their own claim. The party alleging that the amount of liquidated damages as provided for in the contract is lower or higher than the actual loss suffered shall bear the burden of proving its claim.

Article 2 Facts not Requiring Proof

- 2.1 The tribunal may find the following facts *ex officio* without the need for evidence to be adduced by the parties:
 - (1) Facts not disputed by the parties;
 - (2) Laws of nature and theorem;
 - (3) A well-known fact or common knowledge;
 - (4) A fact that can be inferred from a legal provision, a known fact or generally accepted understanding and practice.
- 2.2 The facts listed in Article 2.1 shall not be established if a party adduces sufficient evidence which proves the contrary.

Article 3 Default of the Respondent

The claimant has the burden of proving its case even if the respondent defaults in the arbitration proceedings without good cause. However, the tribunal may make determination as to the facts based

on the evidence adduced by the claimant and in accordance with the provisions of these Guidelines, and may draw its own conclusions from the fact of the respondent's default.

II. Submission, Taking and Exchange of Evidence

Article 4 Submission of Evidence by the Parties

A party shall disclose and submit to the tribunal and to the other party¹ all evidence on which it relies.

Article 5 Time Period for the Submission of Evidence

- 5.1 The tribunal may fix a reasonable time for the parties to submit evidence, or schedule the submission of evidence into separate phases. The parties shall submit evidence within the time period fixed by the tribunal. The tribunal shall be entitled to refuse to admit evidence submitted after the expiry of the stipulated time period. The submission and exchange of evidence shall in principle be completed before the oral hearing on the merits (the "hearing").
- 5.2 Where a party has any genuine difficulty in submitting evidence within the stipulated time period, such party may apply to the tribunal for an extension before the expiry of the time period by filing a written submission setting out the reasons. The tribunal shall decide whether or not to grant an extension based on the sufficiency of the reasons. Where an extension is granted, the tribunal shall at the same time consider giving an appropriate extension to the other party for the submission of evidence.

Article 6 Documentary Evidence

- 6.1 In addition to documents in printed and hand-written form, documentary evidence includes electronic data (e.g. electronic documents, e-mails) and any other readable evidence in an electronic form.
- 6.2 When submitting documentary evidence, a party may submit a hard copy identical to the original or a printed copy of the electronic data. A party may at the same time submit an electronic version of the documentary evidence.

¹ A party shall be understood, where appropriate, to include all the parties on one side of the arbitral proceedings in a multi-party arbitration.

- 6.3 Unless otherwise agreed by the parties or determined by the tribunal after consultation with the parties, when submitting a document that originates in a jurisdiction outside Mainland China, notarization and certification of that document is not required.

Article 7 Request to Produce

- 7.1 A party may request the tribunal to order the other party to produce a specific document or a narrow and specific category of documents (“request to produce”). The requesting party shall state the reasons for its request, identify in sufficient detail the requested document(s), and explain the relevance and materiality of the requested document(s). The tribunal shall invite the other party to comment on the request to produce. Where the other party does not object to the request to produce, the relevant document(s) shall be produced in accordance with the request to produce. Where the other party objects, the tribunal shall decide whether or not to grant the request to produce.
- 7.2 The tribunal may fix a time period for a party to submit its request to produce and for the other party to submit its comments on the request to produce.
- 7.3 At the request of the other party, the tribunal may dismiss a request to produce for any of the following reasons:
- (1) the document(s) requested lacks sufficient relevance to the case or materiality to its outcome;
 - (2) production of the document(s) may result in violation of the applicable laws or professional ethics;
 - (3) production of the document(s) may impose an unreasonable burden on the producing party;
 - (4) the requested document(s) is not in the possession, custody or control of the producing party, or is likely to have been lost or destroyed;
 - (5) production of the document(s) may result in the divulgence of state secrets, trade secrets or technological secrets;
 - (6) considerations of procedural economy, fairness or equality of the parties.

Article 8 Witnesses of Fact

- 8.1 Where a witness is presented by a party, such party shall identify the witness and the subject matter of his/her testimony to the tribunal in advance. Any person capable of proving the relevant facts of the case may appear as a witness, including a party's employee, representative or agent.
- 8.2 A witness shall submit a written statement prior to the hearing. The witness statement shall contain the name and address of the witness, his/her relationship with the parties, his/her background, a detailed description of the facts related to the dispute, the sources of the witness' information, the date of the witness' statement and the signature of the witness.

Article 9 Expert Opinions

- 9.1 A party may submit an expert opinion on specific issues to support its claims.

An expert opinion shall contain:

- (1) the name and address of the expert, a statement regarding his/her relationships with the parties, and his/her professional background;
 - (2) the facts, documents and other sources of information on which the expert's opinion is based;
 - (3) the expert's personal opinions and conclusions, including the methods employed and grounds relied upon in forming the opinions and arriving at the conclusions; and
 - (4) the date of the expert opinion and the signature of the expert.
- 9.2 The tribunal may appoint one or more experts on its own initiative. The parties shall assist the tribunal-appointed expert, and provide any documents and information that the expert requests. The expert shall issue his/her opinion which shall be forwarded to the parties for comments.
- 9.3 Where a party or the tribunal appoints a professional institution to provide an expert opinion, the expert who actually gives the opinion on behalf of the institution shall be considered as the expert for the purpose of this Article.

Article 10 Inspection and Appraisal

- 10.1 The tribunal may, at the request of a party or on its own initiative, inspect or arrange the inspection by a tribunal-appointed inspector, of sites, goods, documents or other relevant evidence, or arrange the appraisal by a tribunal-appointed appraiser of certain professional or technical issues. The parties shall be notified prior to the inspection and shall have the right to be present. Following the completion of the inspection or the appraisal, the inspector or the appraiser shall issue a report which shall be forwarded to the parties for comments.
- 10.2 Article 9 shall be applicable *mutatis mutandis* to the tribunal-appointed inspectors and appraisers, and to the reports issued by them.

Article 11 Request to Produce or Collection of Evidence by the Tribunal

- 11.1 During the arbitration proceedings, the tribunal may, on its own initiative, require a party to produce any evidence that the tribunal considers necessary. The tribunal shall ensure that the other party has an opportunity to comment on the evidence produced.
- 11.2 At the request of a party and where it is necessary and feasible, the tribunal may itself collect evidence related to the dispute. The evidence collected by the tribunal shall be forwarded to the parties for their comments.

Article 12 Preservation of Evidence

- 12.1 A party may apply to a court of law for the preservation of evidence in accordance with the applicable law.
- 12.2 The tribunal may order the preservation of evidence if the applicable law so permits.

Article 13 Methods of Exchanging Evidence

Evidence submitted by the parties should usually be exchanged through the Secretariat of CIETAC; however, the tribunal may, after consultation with the parties, decide that the evidence be exchanged using other methods.

Article 14 Translation of Documents

- 14.1 The tribunal, in consultation with the parties, may determine whether

documents in other languages should be translated into the language of the arbitration. In determining whether or not a translation is necessary, or whether the translation shall be made in whole or in part, the tribunal shall take into account the linguistic capabilities of the parties, their counsel and the need to minimize costs.

- 14.2 Where the tribunal, after consultation with the parties, determines that translation of documents is necessary, the translated version shall be submitted together with the original, in order for the other party to check the accuracy of the translation.
- 14.3 Where there are discrepancies between the translated version and the original, the tribunal shall adopt a translation that correctly reflects the meaning of the document.

III. Examination of Evidence

Article 15 Parties' Opinions on Evidence

The tribunal shall ensure that each party has an opportunity to express its opinions on the evidence submitted by the other party. The opinions on evidence can be made orally or in writing.

Article 16 Examination of Documents

- 16.1 Where a case is heard by way of a hearing, all documentary evidence submitted shall be exhibited at the hearing and be subject to oral examination by the parties. In order to avoid unnecessary delays, the parties shall present their opinions only on disputed evidence, and identify which document(s) they believe should not be admitted as evidence by the tribunal.
- 16.2 For written documents in respect of which discrepancies are likely to exist between the original and photocopies of the original, a party and the tribunal may request that the original be presented for examination.
- 16.3 For audio-visual materials and physical evidence, the principle on the examination of documentary evidence stated in paragraph 16.1 of this article shall be applicable. The tribunal shall determine, after consultation with the parties, whether audio-visual material shall be played, or played in whole or in part, during the hearing.

Article 17 Examination of Witnesses, Experts, Inspectors and

Appraisers

- 17.1 A witness or an expert shall in principle appear in person at the hearing or by way of videoconferencing, and be questioned by the party who calls him/her (“direct examination”) and by the opposing party (“cross-examination”).
- 17.2 The examination process shall be controlled by the tribunal. Unless otherwise agreed by the parties, a witness or an expert may not be present at the hearing before giving his/her testimony. The tribunal shall ensure that each party has an opportunity to question the witness or the expert, and may limit the time for direct examination or cross-examination.
- 17.3 Examination of witnesses and party-appointed experts shall generally be conducted in the following order: direct examination, cross-examination and re-examination. The tribunal may decide that the witness’ written statement or the expert’s written opinion serve as answer to the direct examination, and proceed to cross-examination directly.
- 17.4 The tribunal-appointed experts, inspectors or appraisers shall appear at the hearing. The tribunal shall ensure that each party has an opportunity to question them.
- 17.5 The tribunal, after consultation with the parties, may arrange expert-conferencing or witness-conferencing.
- 17.6 The tribunal may limit any questions raised by a party, or inform a witness, expert, inspector or appraiser that he/she is not required to respond to a specific question. The tribunal may put questions to a witness, expert, inspector or appraiser at any time.

IV. Assessment of Evidence

Article 18 General Principle

The tribunal, in its sole discretion, shall determine the admissibility, relevance, materiality and weight of evidence.

Article 19 Inadmissibility

- 19.1 The tribunal may, pursuant to rules on the privilege it considers appropriate, decide not to admit certain evidence, particularly confidential communications between a lawyer and his/her client and

evidence related to settlement negotiations between the parties.

- 19.2 Evidence adduced and information disclosed only in the course of mediation proceedings shall not be admissible in the arbitration, and shall not be permitted to form the basis for the arbitral award.

Article 20 Documents without Originals

For disputed documents in respect of which there is no original, the tribunal may, taking into account other evidence, the parties' submissions and the circumstances of the entire case, determine such evidence be admissible.

Article 21 Statement of a Witness Who Fails to Appear for Examination at the Hearing

The statement of a witness who fails to appear at the hearing for examination without good cause shall not independently serve as the basis for the establishment of a fact.

Article 22 Factual Statement Prejudicial to the Party Making the Statement

The tribunal may accord probative value to a factual statement that a party has made in writing or orally during the arbitration proceedings if the statement is prejudicial to that party's own interest, unless there is sufficient evidence to the contrary to overturn the finding of the fact.

Article 23 Adverse Inferences

Where a party refuses, without justifiable reasons, to produce the document(s) pursuant to a request to produce granted or directly ordered by the tribunal, the tribunal may draw adverse inferences against the party refusing to produce the document(s).

Article 24 Standard of Proof

- 24.1 Where conflicting evidence has been adduced by the parties in respect of a particular fact, the tribunal may make a determination of the fact pursuant to the principle of the preponderance of evidence.
- 24.2 The tribunal shall make a finding of fraud only if clear and convincing evidence exists to support the fact.

V. Supplementary Provisions

Article 25 Interpretation

25.1 The headings of the articles in these Guidelines shall not be construed as interpretations of the contents of the provisions contained therein.

25.2 These Guidelines shall be interpreted by CIETAC.

Article 26 Coming into Force

These Guidelines shall be effective as of March 1, 2015.