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Guidelines for Document Production in China  
& the CIETAC Guidelines on Evidence

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Eventually, civic life requires everyone to produce documents for inspection and approval. As individuals, we need to submit documents in connection with a new bank account, health insurance, job applications, enrollment into an institution of higher learning, occupational licensing, and evaluation for loans. Companies and organizations may have even more occasions and demands placed on them to produce documents. Even so, parties often resist the production of documents while in the throes of a commercial dispute. Perhaps this happens because the opposing party routinely makes the request, and not a neutral third-party. China's institutional rules for arbitration, however, are silent as to whether the parties may request documents, and under what circumstances the parties may do so.

Arbitration in China seems to reflect an overall disposition of reluctance towards the document production process. Leading institutional rules in China offer wide latitude, but little guidance, as to document production procedure. As a practical matter, a China-based Tribunal is likely to order document production only within a narrow and proscribed range. Participants in China-based arbitration may consider whether to forgo the document production phase altogether. After all, the process can incur considerable time and expense. However, such a departure from international norms would also carry risk. If parties decide to exercise document production, it would seem wisest to adopt the CIETAC Guidelines on Evidence, and do so prior to any dispute.

This post introduces document production in commercial arbitration. It turns then to examine how Chinese institutional provisions address the production of evidence through the Beijing Arbitration Commission (BAC, also known as “Beijing International Arbitration Center”) and Chinese International Economic and Trade Arbitration Commission (CIETAC) Rules. The post contrasts these with the more specific language in the CIETAC Guidelines on Evidence. We recommend that parties either state that the CIETAC Guidelines on Evidence will apply in their dispute resolution clause, or simply agree ahead to forgo document production entirely.

#### What is Document Production, Anyway?

Document production, also known simply as disclosure, allows each side to request, and the Tribunal to order, submission of a specific set or class of documents. The document production process does unfold in a fairly regular fashion across many leading jurisdictions. Often, each party makes its request of the other party. Thereafter, objections are issued. The requesting party then issues a reply to the objection. At the end of the process, the Tribunal will order the disclosure of certain documents. Each party will then have a period in which to disclose responsive documents. The parties

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remain under a duty towards the Tribunal to submit all documents which may be responsive to the request, as ordered by the Tribunal.

### Chinese Characteristics Contemplate the Tribunal's Direction of Production of Evidence

Foundationally, the seat of the arbitration determines the document production powers of Tribunals. Nevertheless, most seats endow Tribunals with wide discretion as they observe the procedural autonomy commonly recognized in international arbitration.<sup>1</sup> China's institutional provisions emphasize the Tribunal's power to collect evidence. The parties lack an explicit power to request production. Any such opportunity would fall under provisions originally meant to authorize the Tribunal's inquisitorial function.

The Beijing Arbitration Center Rules and CIETAC Rules grant Tribunals broad powers to collect evidence in any form. Thus, Tribunals may employ document production. This is so even if the Rules either contemplate such disclosure as an occasional feature applicable to particular cases, or have simply failed to contemplate document production at all.

BAC Article 33 provides for the collection of evidence generally upon party application or when "the Arbitral Tribunal considers it necessary according to the particular circumstances of the case ... on its own initiative." The Tribunal must, however, "forward [evidence collected] to both parties for their comments ... before an award is made."

The CIETAC Rules indicate that Article 43 "[t]he arbitral tribunal may, on its own initiative, undertake investigations and collect evidence as it considers necessary." Article 44 endows Tribunals with "the power to request the parties to deliver or produce to the expert or appraiser any relevant materials, documents, or property and goods for checking, inspection and/or appraisal."

Contrast the general powers in the foregoing rules with the CIETAC Guidelines on Evidence's particular provisions for document production. Article 7 headlines 'the Request to Produce' in specific. International practitioners will find the procedure, standard for production ('relevance and materiality'), and grounds for resisting production all quite similar to the International Bar Association's Rules on Evidence. Of course, the CIETAC Guidelines on Evidence are "not an integral part" of CIETAC's Rules,<sup>2</sup> although non-Chinese users would be well-advised to adopt them in relation to

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<sup>1</sup> Gary Born, *International Arbitration: Law and Practice*, Disclosure and Evidence-Taking in Intl Arb, Sec. 9.01[A][4], p. 180 Wolters Kluwer (2012)

<sup>2</sup> See the Preamble to the China International Economic and Trade Arbitration Commission Guidelines on Evidence (2015).

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any China-seated proceedings (including those administered by institutions other than CIETAC).

Recommendation: Either Forgo Document Production Procedure in China, or Adopt the CIETAC Guidelines on Evidence

Parties of any origin or nationality could consider setting aside the document production phase altogether, at least when China is the seat. Its unfamiliarity in China presents special challenges. Chinese parties may not be fully aware of their duty to the Tribunal to produce all documents responsive to a significantly broad document production order. Furthermore, document production imposes steep burdens on both parties. The procedure takes six weeks or even longer to resolve. Either party may request from the other. As such, no party can escape the possible disadvantage accompanying the revelation of unfavorable documents. Indeed, the cost and expense of document production in international arbitration has not escaped international criticism.

Therefore, parties could even agree to do without document production entirely within their agreements to arbitrate within China. A party can simply emphasize the absence or non-production of an important document. With some preparation and design, one party can cast the shadowy reflection of a concealed document in darker ambience than it would appear had it been produced. Such an approach does require skill and subtlety, and in turn poses special risks.

A better approach may be found within the CIETAC Guidelines for Evidence. The Guidelines represent the relatively open disposition towards production found in the IBA Rules for Evidence. The Guidelines' Article 7.1 allows production of a "narrow and specific category of documents." It stops short, however, of IBA Article 3.3(a)'s permit of circumscribed e-discovery.

Nevertheless, should document production commence, employ skill and restraint in the request of entire categories of documents. For the most part, arbitrators in China may deny or limit broad requests for documents by class or type, even though the CIETAC Guidelines on Evidence may seem to support the request. Still, at least the option to request a category of documents remains under the Guidelines for when circumstances truly merit such production.

## Conclusion

Non-Chinese parties have good reasons to select China as a seat for their arbitration. And yet, they should give some early thought as to procedure. Chinese institutional rules may provide too little certainty as to document production. So parties should address procedure in the arbitration clause. The simplest way to do that would be to

renounce document production entirely. An even better path may be to agree to adopt the CIETAC Guidelines for Evidence, regardless of which Chinese institution the parties choose to resolve their potential dispute.