

Introduction to Commercial Arbitration in China

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I. Chinese Arbitration Act 1994 Arbitration Legislation

Chinese special culture has fostered the fine tradition of resolving disputes through arbitration, one of non-adversial measures. The Chinese law endorses arbitration as a useful method for resolving international commercial and investment disputes. Practice also exhibits a strong preference for arbitration of disputes arising out of business transactions.

The Arbitration Act of the People's Republic of China, the first arbitration act in the history of the PRC, was enacted on 31 August 1994 by the National People's Congress, the legislative body of the PRC. The Act came into effect on 1 September 1995 (the CAA 1994). The CAA 1994 applies to both domestic and international (foreign-related) arbitration in China. It embodies many of the principles of modern arbitration and also clarifies the basic principles of China's arbitration. Under the CAA 1994, arbitration agreement is the basis for arbitration. A valid arbitration agreement is the prerequisite for arbitration bodies to accept the cases. Arbitration agreement between the parties excludes the jurisdiction of courts unless it is void. Arbitration shall be conducted independently and not be subject to any interference from administrative authorities, social organizations or individuals. An arbitral award shall be final and binding on both parties, and has *res judicata* effect. Such awards can be enforced by courts. During arbitral proceedings, the arbitral tribunal may carry out conciliation in accordance with the parties' free will. Arbitration is combined with conciliation. In case a valid arbitration agreement exists, the court shall refer the parties to arbitration and thus ensure the enforceability of arbitration agreement. Upon the request of the parties, the court shall rule on the effect of the arbitration agreement and offer property preservative measures or interim measures of protection of evidence. Courts may, as the case may be, grant or reject the application for setting aside or, stay the setting aside procedure and remit the award to the arbitral tribunal for re-arbitration in order to eliminate the grounds for setting aside. Courts may also grant or refuse the enforcement of an award in accordance with the grounds for refusal prescribed by the law or the Convention which the PRC has acceded to. Thus, the principle of the maximum amount of court assistance with the least interference has also been affirmed by the Act.

Traditionally, arbitration in China is a two-pronged regime: domestic arbitration and international arbitration. The dividing line between them is that the latter involves the foreign elements. One of the salient features of the CAA 1994 is that it accords the international arbitration a special treatment. Before we move to the topic of international arbitration, the domestic arbitration will be dealt with first.

II. Domestic arbitration

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Before the CAA 1994, there existed no uniform arbitration law to regulate the arbitration activities taking place in China. The domestic arbitration was conducted under numerous domestic arbitration institutions that were attached to the State Administration of Industry and Commerce and its subordinate agencies at various levels of government. These arbitration institutions exercised their arbitration jurisdictions over the parties pursuant to the administrative jurisdictions of different regions and levels. No arbitration agreement was required. The arbitral award is also not final. The domestic arbitration, therefore, is of mandatory nature and is just an administrative method to settle economic disputes. Such arbitration is far from the proper concept of arbitration, and, in fact, just a mixture of arbitration, administration and adjudication.

The CAA 1994 has brought fundamental changes to China's domestic arbitration. The former domestic arbitration bodies subordinate to administrative organs ceased to exist on 1 September 1996. They must be reorganized in accordance with the Act. All reorganized arbitration bodies shall be independent from administrative authorities and there shall be no subordinate relationship between arbitration bodies and administrative authorities as well as between arbitration bodies themselves. Up to now, more than 160 arbitration institutions have been set up pursuant to the CAA 1995. In addition to domestic cases, they can also handle foreign-related cases that the parties submit to them by agreement.

III. International arbitration

As far as the international commercial arbitration is concerned, since the 1950s, China has, by international practice, adopted the voluntary arbitration and the final award system. As early as 1956 and 1959, the first two international arbitration institutions, China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC) were founded under the auspices of the China Council for the Promotion of International Trade (CCPIT) /China Chamber of International Commerce (CCOIC). All the international arbitration cases were submitted to CIETAC and CMAC for arbitration. Therefore, before the CAA 1994, the international arbitration in China means no more than the arbitral proceedings conducted by CIETAC and CMAC.

After the CAA 1994, although other arbitration institutions may also accept international cases, almost all the international arbitration cases are still filed to CIETAC for arbitration by the parties. CIETAC, pursuant to the autonomy of the parties and the practical need of the business, extended its jurisdiction further to all domestic cases the parties submit by agreement in its Arbitration Rules 2000 (effective as from 1 October 2000). Both CIETAC and CMAC are always the leading arbitration institutions in China.

IV. CIETAC and its business

China International Economic and Trade Arbitration Commission (CIETAC), also called the Arbitration Court of China Chamber of International Commerce, was established in 1956 with its original name of Foreign Trade Arbitration Commission. In 1980 the Arbitration Commission was

renamed as the Foreign Economic and Trade Arbitration Commission, later in 1988 changed to its current name, and then in the year 2000 adopted the name of the Arbitration Court of China Chamber of International Commerce while keeping the name of CIETAC.

CIETAC established its Shenzhen Sub-Commission and Shanghai Sub-Commission respectively in 1989 and 1990, and five offices in Chongqing, Chengdu, Changsha, Fuzhou and Dalian in 1999 within local branches of CCPIT as professional liaison and promotion institutions, which are not able to take cognizance of or deal with cases by any means. The Beijing Headquarters of the Arbitration Commission, its Shenzhen Sub-Commission and its Shanghai Sub-Commission are one institution. They use the same Arbitration Rules and Panel of Arbitrators and they exercise the same arbitration jurisdiction.

CIETAC has formulated its own rules of arbitration procedure. The Provisional Rules of Arbitration Procedure were formulated when the Arbitration Commission was established. To meet the demands of its development, the Arbitration Commission amended its arbitration rules respectively in 1988, 1994, 1995, 1998 and 2000. The current Arbitration Rules were adopted on October 1, 2000. According to the current Arbitration Rules, CIETAC takes cognizance of cases over international, foreign-related and domestic disputes of a contractual or non-contractual nature in accordance with an arbitration agreement between the parties to submit their dispute to CIETAC for arbitration.

CIETAC has a team of arbitrators and secretaries with professional knowledge and ethics. The current Panel of Arbitrators contains a total of 518 arbitrators, among which 174 arbitrators are from Hong Kong, Macao, Taiwan and foreign countries.

CIETAC resolves by means of arbitration disputes arising from economic and trade transactions of a contractual or non-contractual nature.

Along with the constant perfection of CIETAC rules, the annual growth of CIETAC's caseload is phenomenal. In 1985 CIETAC only handled 37 cases. In 1992, the figure jumped to 267. In 1993, 486 new cases were received and in 1994, the number is approaching 829. In 1995, the cases admitted reached a record number of nearly 1000. The following year 1996 saw 778 new cases, 1997 saw 723 cases, 1998 saw 678, 1999 saw 669, 2000 saw 633 and 2001 saw 731. The recent statistics showed that in half 2002 CIETAC has accepted xxx new applications for arbitration. These cases involved the disputes over general sales of goods, equity and contractual joint ventures, processing and compensation trade, construction contracts, real estate, loans, insurance, barter trade and trademark transfer and so on. The number of cases in respect of equity and contractual joint ventures and real estate had a remarkable increase. In 1992, the number of international cases admitted by CIETAC outstripped for the first time LCIA, SCC and AAA and ranked second, just behind the ICC Court of International Arbitration.

Since 1993, the number of cases taken cognizance of by CIETAC has ranked the first among arbitration institutions in the world. Up to 2001, CIETAC has concluded nearly 8000 cases, the parties of which covered over 40 countries and regions. Currently, the arbitral award made by

CIETAC can be enforced by the competent courts of more than 140 countries and regions, and the impartiality of its awards has been recognized unanimously both at home and abroad.

The current investigation conducted by the author on 4 September 2002 shows that, from January of 1995 to August of 2002, CIETAC accepted 96 arbitration cases in which one of the parties is from Germany. Of these cases, 40 cases involved disputes over general sales of goods, 29 cases over industrial raw materials, 14 cases over industrial machinery and equipments, 9 cases over joint ventures and 4 cases concerned with disputes in other fields.

CIETAC established in 2000 its Domain Name Dispute Resolution Center, which, by the authorization of China Internet Network Information Center (CNNIC), to resolve .CN domain name disputes as well the keyword disputes managed by CNNIC. In 2001, CIETAC further created jointly with Hong Kong International Arbitration Center (HKIAC) the Asian Domain Name Dispute Resolution Center (ADNDRC), which, as approved by Internet Corporation for Assigned Names and Numbers (ICANN), to resolve the disputes arising out of gTLDs for the parties in Asia-Pacific region and even throughout the world. ADNDRC has become the fourth gTLDs dispute resolution service provider in the world, and the first in Asia as well. Its Beijing Office is located in CIETAC.

CIETAC has continuously developed cooperation with other international arbitration institutions. It signed arbitration cooperation agreement with nearly 30 international arbitration institutions such as the Arbitration Institute of the Stockholm Chamber of Commerce, the American Arbitration Commission and the Chartered Institute of Arbitrators, to develop the international status of CIETAC.

V. Some Issues to be Clarified

1. May the foreigner be appointed to act as arbitrator in China?

As pointed out in the above, in the CIETAC present Panel of Arbitrators, 158 arbitrators are from foreign countries, Hong Kong SAR and Macao SAR as well as Taiwan region. The parties have the freedom to appoint foreigners from the Panel to act as arbitrators in China. In fact, in quite a few arbitration cases accepted by the Arbitration Commission, two of the three arbitrators are foreigners, including the presiding arbitrator.

2. Should the presiding arbitrator be the personage whose nationality is different from those of the parties?

According to Chinese norms, even under the circumstances that the arbitrators are appointed by the parties, they must remain neutral and act independently and impartially. Arbitrators shall not represent either party, and shall treat each party equally. The nationality of the arbitrator should not be deemed as the reason to determine whether or not the arbitrator could act independently and impartially. Even if the three arbitrators of the Tribunal are from the same country, they shall conduct the case independently and impartially with respect to the party who appointed them as

arbitrators. Otherwise, the arbitrator shall be requested to withdraw. Hence, in China, it is not required that the presiding arbitrator must be the personage who is from the third country other than those of the parties.

3. Which rules shall be applied to decide the case?

According to the Arbitration Act 1994, arbitrators must decide the case in accordance with the rules of law. In light of Chinese arbitration practice, arbitrators shall, under the precondition that the decision is in compliance with law, fairly and reasonably make the award on the basis of respecting the contractual agreement of the parties and with reference to the international practice. Arbitration *ex equae et bono* is not allowed in China.

4. May the arbitration proceedings be conducted in the place other than the place where the arbitration body sits or abroad?

By virtue of CIETAC Arbitration Rules 2000, the arbitral proceedings may be conducted in any other places (including foreign country) other than the places where CIETAC and its Sub-Commissions are located, i.e. Beijing, Shenzhen and Shanghai. Nonetheless, up to now no arbitration proceedings have taken place in the places other than the three places above-mentioned.

5. How is the practical setting-aside situation of the arbitral award in China?

In accordance with the CAA 1994, an international award can not be set aside on merits, while a domestic award may be set aside on the basis of statutory substantial mistakes.

As far as CIETAC award is concerned, up to now, only one award has been set aside by the court. However, some awards do have been remitted to the tribunal for re-arbitration.

In order to strictly implement the CAA 1994 and the CCPL 1991, and to ensure legitimacy of litigious and arbitral activities, the Supreme People's Court on 23 April 1998 issued the official document concerning setting aside of the award *The Supreme People's Court Notice on the Relevant Issues Concerning Setting-Aside by the People's Court of the Foreign-Related Arbitral Awards*, No. FA/40/1998 ("Notice 40/1998"). By issuing this judicial interpretation, the PRC has established an internal control mechanism—the pre-reporting system, by which the actions for setting-aside of the foreign-related award is effectively monitored. Any People's Court seeking to set aside the foreign-related award must first obtain approval from the superior people's court in the same jurisdiction. Any superior court that decides to uphold a lower court's decision to set aside the foreign-related award must, in turn, report its decision to the Supreme People's Court prior to finalizing the decision to set aside. As such, the Notice 40/1998 is actually a supplement to the CAA 1994.

6. How is the practical enforcement situation of the arbitral award in China?

Enforcement of an international arbitration award is a popular problem involved with many countries in the world, East or West. As I know, Singapore, one of the Asian countries, is doing well in this respect.

In China, similar to the situation of setting aside of the award, an international award can not be refused enforcement on merits, while enforcement of a domestic award may be denied on statutory merit ground.

Moreover, in order to avoid the undue refusal for enforcement, the Supreme People's Court of the P. R. China in 1995 has issued the corresponding judicial interpretation, by which the pre-reporting system concerning the enforcement of the international award has been established. According to this official document, any People's Court seeking to refuse enforcement of an international award or a foreign award must first obtain approval from the superior people's court in the same jurisdiction. Any superior court that decides to uphold a lower court's refusal to enforce an international award or a foreign award must, in turn, report its decision to the Supreme People's Court prior to finalizing the decision to refuse enforcement. By issuing this official document, the PRC has established an internal control mechanism by which undue refusal for enforcement has also been effectively controlled.

Before the pre-reporting system was established, some CIETAC awards and foreign awards did be refused enforcement by the courts. The Arbitration Research Institute (ARI) of China Chamber of International Commerce, in August to September 1997, conducted an investigation concerning the practical enforcement situation of CIETAC awards and foreign awards in China. As far as the enforcement of CIETAC awards is concerned, up to the end of 1996, 164 applications were brought to the Intermediate People's Court for enforcement. Among these, 127 awards were enforced and only 37 applications for enforcement were rejected. The number of the applications for enforcement actually denied by the courts only amounts to 1.04 percent of CIETAC's total caseload in the same period (3,571 cases in total). From 1990 to the end of August 1997, 15 foreign awards in total were filed to the People's Courts for enforcement. Of these, only 2 applications for enforcement were rejected. The ratio of non-enforcement of foreign awards is only 13.33 percent (two out of 15 awards sought to be enforced). The refusal for enforcement of the CIETAC and foreign awards above-mentioned all took place before the establishment of the enforcement pre-reporting system. Most of the arbitral awards could be enforced in China even before the pre-reporting system, though the situation is not so good.

Since the pre-reporting system was established, no award has been reported to be unduly refused enforcement by the court.

7. May ad hoc arbitration take place in China?

Ad hoc arbitration never happened in China. Before the CAA 1995, the Chinese law was silent on *ad hoc* arbitration and the validity of an *ad hoc* arbitration agreement. According to Article 16 and 18 of the CAA 1995, no designated arbitration commission in the arbitration agreement suffices to

invalidate the agreement unless the parties reach a supplementary agreement to that effect. Therefore, an *ad hoc* arbitration agreement is void. In fact, *ad hoc* arbitration is excluded in China. China favors institutional arbitration so that the parties can get the best assistance from the arbitration institutions. However, on the other hand, the narrow criteria for the interpretation of and rigid stipulation requiring the written form of the arbitration agreement have in practice become an undue limitation on the development of commercial arbitration.

8. May ICC Arbitration take place in China?

Chinese law keeps silent with regard to foreign arbitration institutions' conducting arbitral proceedings in China. In theory, ICC International Arbitration Court may conduct its arbitration proceedings in China. On the other hand, the arbitral proceedings of ICC Arbitration must be in compliance with the compulsory provisions of Chinese Law. Under Chinese Arbitration Act, some procedural aspects concerning the validity of the arbitration agreement and the appointment of the arbitrators are different from the counterpart of the ICC Arbitration Rules. If ICC Arbitration takes place in China, its arbitration proceedings would directly violate the compulsory provisions of Chinese Arbitration Act. The present Arbitration Act could not be applied to ICC Arbitration in China unless it is amended accordingly.

Concluding Remarks

Responding to the rapid development in the field of international commercial arbitration, China, by enacting its first arbitration act-the CAA 1994, confirmed and established the proper concept of arbitration as well as the corresponding mechanisms for setting aside and enforcement of arbitral awards, followed by the internal control mechanism-the pre-reporting system, so as to ensure the enforcement of international arbitral awards can be founded upon the solid and reliable basis. It may be said, under Chinese current arbitration system, all arbitration activities can be conducted on a uniform and more reliable basis. However, with the China's entry into WTO, efforts still need to be undertaken by the Chinese government and judicial authorities to offset the negative effects of some obstacles to hamper arbitration such as protectionism so that we may create a more favorable arbitration environment for international traders and investors. In addition, the CAA 1994 is also necessary to be revised so that it may further embody the usual practice and principles of modern arbitration and also further clarify the basic principles of Chinese arbitration.