

CIETAC ARBITRATION: *Arbitration under the Rules of the China International Economic and Trade Arbitration Commission - And a Comparison of CIETAC Arbitration with Arbitration under the Rules of other International Arbitral Institutions*

A conference staged by the British Institute of International and Comparative Law/the China International Economic and Trade Arbitration Commission/ and The IDR Group[®]

“A Comparison of CIETAC Arbitration and arbitration under the International Arbitration Rules of the American Arbitration Association”

By Anthony Connerty

anthonyconnerty@idrgroup.org

www.idrgroup.org

15 April 2011 , Charles Clore House, 17 Russell Square, London WC1B 5JP

The China International Economic and Trade Arbitration Commission

CIETAC - is one of the world's major permanent arbitration institutions. On a case-load basis it is one of the busiest of the arbitral institutions.

- There are over one thousand arbitrators on the CIETAC Panel, of whom over 300 are from some 30 foreign jurisdictions.
- There are 40-odd UK CIETAC and CMAC (China Maritime Arbitration Commission) arbitrators. A CIETAC Foreign Arbitrators' Forum has recently been created. Information from Anthony Connerty: anthonyconnerty@lambchambers.co.uk
- The current CIETAC Arbitration Rules are the 1995 Rules, in force from May 1, 2005

The American Arbitration Association

AAA- was founded in 1926. It is the leading arbitral in the United States, where it has over 30 regional offices

- The AAA/ ICDR's International Dispute Resolution Procedures - including the Mediation and Arbitration Rules, as amended - are effective June 1, 2009.

This Paper will compare some significant provisions in the CIETAC and AAA/ICDR Rules, with an occasional look at the Rules of other major international arbitral institutions:

- Bona Fide Cooperation
- Preparatory Conferences and conduct of the arbitration proceedings
- Interim Relief
- Emergency Relief
- Inquisitorial or Adversarial approach
- Investigation by the Arbitral Tribunal
- Combination of arbitration with conciliation
- Scrutiny of the draft award

Bona Fide Cooperation

- Article 7 of the CIETAC Rules states that the parties are to proceed with the arbitration “in *bona fide* cooperation.”
- There is no equivalent provision in the AAA Rules relating to bona fide cooperation.

Preparatory Conferences and conduct of the arbitration proceedings

- Article 29(5) of the CIETAC Rules provides that the arbitral tribunal may, if it considers it necessary, “issue procedural directions and lists of questions, hold pre-hearing meetings and preliminary hearings, and produce terms of reference, etc., unless otherwise agreed by the parties.”
- Article 16 (2) of the AAA International Arbitration Rules contains the provision - less detailed than the ICC’s Terms of Reference - that the Tribunal in its discretion may hold a preparatory conference with the parties “for the purpose of organizing, scheduling and agreeing to procedures to expedite the subsequent proceedings”.
- Article 16 (3) states: “The tribunal may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.”

Interim Relief

- Articles 17 and 18 of the CIETAC Rules provide for applications for the preservation of property and the protection of evidence. These applications are to be made, not to the tribunal, but to the “competent court”
- The two Rules seem to envisage that such applications for interim relief can be made prior to the constitution of the arbitral tribunal.
- Article 21 of the ICDR Rules deals with interim measures of protection by the more common mode adopted by many international arbitral institutions: namely, by way of applications to the tribunal.
- The provisions are much wider than the CIETAC provisions: power is given to the tribunal to take “whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.”
- Whilst those powers are given to the tribunal, nevertheless application to the courts are permitted: “A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.”
- *That provision would cover the situation where an application has to be made prior to the constitution of the tribunal: a situation relevant to the problems associated with emergency relief.*

Emergency relief

- A party to an arbitration requiring emergency relief - for example an order for the preservation of property - is in difficulty until the tribunal is appointed: there is no tribunal to which a potential Claimant can apply for an order.
- Most international commercial arbitral institutions recognise the problem and provide in their Rules that an application to a national Court prior to the appointment of the tribunal shall not be regarded as an infringement of the arbitration agreement.
- For example, Articles 13 and 23 of the ICC Rules and Article 25.3 of the LCIA Rules – and Article 21 of the AAA’s International Arbitration Rules which provides that the Tribunal may take whatever interim measures it deems necessary “including injunctive relief and measures for the protection or conservation of property” , but that “A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.”
- Such provisions result in the party in need of interim relief having to move outside the comparative confidentiality of the arbitral process and into the public arena of a national court.
- For obvious reasons that may not be an attractive proposition.

The major arbitral institutions have recognised the problem and put forward solutions.

ICC

- In 1990 the ICC brought in its Rules for a Pre-Arbitral Referee Procedure to provide *“rapid recourse to a person (called a “Referee”) empowered to make an order designed to meet the urgent problem in issue, including the power to order the preservation or recording of evidence”*. A major drawback is that the entire process is dependent on the written agreement of the parties.

LCIA

- The LCIA Rules contain a provision for *“Expedited Formation”* of an arbitral tribunal. *“In exceptional urgency, on or after the commencement of the arbitration, any party may apply to the LCIA Court for the expedited formation of the Arbitral Tribunal...”*
- A contract providing for LCIA arbitration therefore includes the expedite procedure: there is no dependence on a Respondent agreeing to sign a separate agreement.

AAA / ICDR

- Linked to its Commercial Arbitration Rules, the AAA provided *“Optional Rules for Emergency Measures of Protection”*. These Optional Rules enabled a party in need of emergency relief - prior to the constitution of the arbitral panel - to apply to the AAA for the appointment of *“a single emergency arbitrator”*: but only if the parties have so provided in their arbitration clause or have *“by special agreementadopted these rules..”*
- As in the case of the ICC Pre-Arbitral Referee Procedure, the AAA Optional Rules suffered from the disadvantage that the express agreement of the parties is needed in order to trigger the emergency measures: and agreement is not likely to come from a Respondent disinclined to help the Claimant.

- Therefore in 2006 the ICDR added to its International Arbitration Rules a new Article 37 dealing with Emergency Measures of Protection.
- Article 37 is part and parcel of the International Arbitration Rules: the Article 37 emergency measures procedure will operate *“unless the parties agree otherwise.”*
- Within one day of receipt of the notice the AAA is to appoint the emergency arbitrator; within two days of appointment the emergency arbitrator is to establish a *“schedule for consideration of the application for emergency relief”*; if the arbitrator is satisfied that *“immediate and irreparable loss or damage will result in the absence of emergency relief”*, he may order the relief in the form of an interim award.
- The CIETAC Rules do not contain provisions expressly dealing with emergency relief.
- **However, the Article 17 and 18 CIETAC provisions would cater for applications to the courts in the limited areas of property preservation and evidence protection.**

Inquisitorial or adversarial approach

- Article 29(3) of the CIETAC Rules provides that, unless the parties have agreed otherwise, the arbitral tribunal “may adopt an inquisitorial or adversarial approach when examining the case, having regard to the circumstances of the case.”
- No such powers are given to a tribunal under the ICDR Rules, although the Article 16(1) provision states that the tribunal may conduct the arbitration “in whatever manner it considers appropriate.”

Investigation by the Arbitral Tribunal

- Article 37 of the CIETAC Rules states that the arbitral tribunal may, on its own initiative, “undertake investigations and collect evidence as it considers necessary.”
- Again, there are no such provisions in the ICDR Rules, but Article 16 contains the very broad provision permitting a tribunal to conduct an arbitration in whatever manner it considers appropriate.
- [Article 22(1)(c) of the LCIA Rules provides that the tribunal may conduct enquiries and may take the initiative in identifying issues and ascertaining the relevant facts.]

Combination of arbitration with conciliation –CIETAC Article 40

- One of the most striking differences between CIETAC arbitration and arbitration under the AAA/ICDR Rules is the provision in Article 40 of the CIETAC Rules for the combination of arbitration with conciliation. Indeed, it is one of the hallmarks of CIETAC arbitration that express provision is made enabling an arbitral tribunal to switch to act as conciliators.
- There is no equivalent provision in the ICDR Rules.
- Article 40 provides that, where both parties “have the desire for conciliation or one party so desires and the other party agrees when approached by the arbitral tribunal, the arbitral tribunal may conciliate the case during the course of the arbitration proceedings.” The tribunal may then conciliate the case “in the manner it considers appropriate.”
- *Other institutions have sought to provide for the use of mediation in cross-border disputes with the aim of providing a mediation procedure prior to arbitration, the arbitral process only being triggered in the event that the mediation process fails to produce a settlement.*

- The great benefit of mediation as part of a “filter process” is that it can take mediation into the cross-border field of dispute resolution, giving the parties to even the most complex and high – value disputes the chance to settle their dispute amicably without being pitched headlong into the expense of a lengthy and costly arbitral process.
- The type of contractual provision that can achieve this result will be along the lines that, in the event of a dispute, the parties will seek to reach an agreement through mediation under the auspices of a named mediation institution, but that, if the mediation fails (a time limit being specified), the dispute will proceed to arbitration under the rules of a named institution.
- LCIA, ICC and WIPO all provide model clauses along these lines.
- ***However, CIETAC may be unique in providing in its Rules that members of a CIETAC arbitral tribunal are entitled to switch to act as mediators during the course of the arbitration.***

Scrutiny of the draft award

- Article 45 of the CIETAC Rules provides that the arbitral tribunal shall submit its draft award to CIETAC “for scrutiny before signing the award. The 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.”
- No such provision is contained in the AAA/ICDR Rules.
- [A scrutiny of award provision is contained in Article 27 of the ICC Rules. That provision, and the provisions for Terms of Reference, are notable aspects of the ICC Rules.]

Some Final Thoughts

- The China International Economic and Trade Arbitration Commission is one of the world's major – and busiest – international arbitral institutions.
- During the course of its 50 year existence it has come to be recognised as a force in cross-border commercial dispute resolution.
- *In one particular respect CIETAC has probably led the world.*
- Its use of conciliation/mediation in the arbitral context is now being followed by other leading international arbitral institutions. Mediation is still viewed by many with suspicion in the U.K., but China has long utilised mediation as a means bringing disputing parties to a settlement.
- Arbitral institutions world-wide have now recognised the importance of mediation in the field of cross-border disputes, and it may be that the use of mediation as a “filter” process will become more common.

“A Comparison of CIETAC Arbitration and arbitration under the International Arbitration Rules of the American Arbitration Association”

By Anthony Connerty

anthonyconnerty@idrgroup.org

www.idrgroup.org