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

A Comparison of CIETAC Arbitration and arbitration under the International Arbitration Rules of the American Arbitration Association [1]

By Anthony Connerty [2]

Introduction

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. Formerly known as the Foreign Trade Arbitration Commission, CIETAC was set up in April 1956 under the China Council for the Promotion of International Trade (CCPIT).

CIETAC has its headquarters in Beijing and has three sub-commissions in Shanghai, Shenzhen, and Tianjin.

Over the past 50 years "CIETAC has made prominent contributions to the legislation of the Chinese Arbitration Law and the development of the arbitration practice in China, has

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[1] Based in part on the author's *"Manual of International Dispute Resolution":* published by the Commonwealth Secretariat, Marlborough House, Pall Mall, London SW1Y 5HX ISBN 13: 978-8-0-85092-837-2
Foreword by Sandra Day O' Connor, Associate Justice of the United States Supreme Court.

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maintained positive relations and cooperation with all the major arbitration institutions across the world and gained the reputation at home and abroad as an independent, impartial and efficient arbitration institution."

There are over one thousand arbitrators on the CIETAC Panel, of whom over 300 are from some 30 foreign jurisdictions.[3]

The current CIETAC Arbitration Rules are the 1995 Rules, in force from May 1, 2005.

The American Arbitration Association was founded in 1926. It is the leading arbitral institution in the United States, where it has over 30 regional offices.

The AAA says that "Increasingly, the international business community is using arbitration to resolve commercial disputes arising in the global marketplace. Supportive laws are in place in many countries that provide a favorable climate for the enforcement of arbitration clauses. International commercial arbitration awards are recognized by national courts in most parts of the world.

"To help parties pursue dispute resolution in an international setting, the AAA has established the International Centre for Dispute Resolution® (ICDR). The Centre is charged with the exclusive administration of all of the AAA's international matters. The ICDR's experience, international expertise, and multilingual staff form an integral part of the dispute resolution process."

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

Some significant CIETAC Rules –and a Comparison with AAA Rules

The Rules of the major international commercial arbitral institutions such as CIETAC, AAA/ICDR, ICC, LCIA, Stockholm and so on, tend to follow a similar pattern, and broadly will cover the following areas:

- commencement of the arbitration;
- constitution of the arbitral tribunal: number of arbitrators, appointment, challenge and replacement of arbitrators;
- duties of arbitrators;
- powers of the tribunal, including *competence / competence* and interim and conservatory measures;
- place and language of the arbitration;
- governing law, and whether the tribunal may decide *ex aequo et bono* or act as *amiable compositeur;*
- pleadings: statement of case, statement of reply, etc;
- documentary evidence and factual and expert evidence;
- provisions as to hearings, which may include provisions relating to the

[3] 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

examination of witnesses;
- provisions as to the award, including correction and interpretation and finality of the award.

However, the rules of different institutions have their particular features. For example, one of the significant features of the CIETAC Rules is the emphasis on the *"combination of arbitration with conciliation"*.

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."

The Article 7 provision may be of relevance in relation to matters such as the discovery and production of documents. There is no express provision in the CIETAC Rules dealing with discovery and production, but Article 29 of the Rules permits the arbitral tribunal to adopt an inquisitorial or adversarial approach when examining the case, and the tribunal has power under Articles 37 and 38 to investigate and to require parties to produce evidence. The Article 7 provision requiring the parties to "proceed with the arbitration in bona fide cooperation" may lend some weight to a party's attempts to obtain documents.

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."

Whilst the power to hold such meetings and to produce terms of reference is available, the extent to which the powers are actually used is not clear.[4]

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": "When any party applies for the preservation of property, the CIETAC shall forward the party's application for a ruling to the competent court at the place where the domicile of the party against whom the preservation of property is sought is located or where the property of the said party is located." Similar provisions apply to the protection of evidence.

[4] "A brief preliminary meeting among the arbitrators prior to hearing is common in Chinese arbitrations. It allows for a preliminary review of the case and an opportunity to confirm that all relevant documents and communications from the parties have been received by each arbitrator. However, preliminary meetings involving the arbitrators and the parties and their representatives are not common in Chinese arbitrations. Nor do Chinese tribunals typically issue procedural directions or formulate terms of reference for the proceedings." *Arbitration in Asia*, Michael J. Moser, Ed. JurisNet, LLC

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. And 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." Such interim measures may be made in the form of an interim award.

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 issues of emergency relief, which is considered next.

Emergency relief

The problems relating to emergency relief raise difficult issues in relation to international commercial arbitration and therefore the rules of various arbitral institutions will be considered.

Emergency Relief: the problem

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 provide that once the tribunal is constituted the ICC Secretariat shall transmit the arbitration file to that tribunal. The tribunal has jurisdiction to order conservatory and interim measures. But prior to the file being transmitted to the tribunal *"and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement…"*

Article 25.3 of the LCIA Rules provides that the power of an arbitral tribunal to order interim and conservatory measures shall not prejudice any party's right *" to apply to any state court or other judicial authority for interim or conservatory measures before the formation of the Arbitral Tribunal…").*

Article 21 of the AAA' s International Arbitration Rules 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." [5]

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 various reasons that may not be an attractive proposition.

Emergency Relief: Some Solutions

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".* The Referee has power to make orders prior to the arbitral tribunal or national court competent to deal with the case *"being seized of it."* The powers of the Referee extend to ordering payment of money and ordering a party to take any step *"which ought to be taken according to the contract between the parties."*

The process is not swift: it requires a Request and an Answer (within 8 days of the Request) and any Order made by the Referee is to be made within 30 days of the file being transferred to him by the ICC Secretariat.

The parties may agree in writing that the Referee shall subsequently act as arbitrator.

A major drawback is that the entire process is dependent on the written agreement of the parties: Article 3.1. To state the obvious, a Respondent determined to delay or frustrate the arbitral process may not agree to the adoption of the Referee Procedure. That procedure is separate from the ICC Arbitration Rules. In other words, a contract containing an ICC arbitration clause does not incorporate the ICC Pre-Arbitral Referee Procedure.

LCIA

The LCIA Rules (the revised Rules, like the ICC revised rules, came into force from January 1998) 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…"* The application is to be made in writing to the LCIA Court, copied to all other parties and is to set out *"the specific grounds for exceptional urgency in the formation of the Arbitral Tribunal."*

The LCIA Court may abridge or curtail any time-limit under the Rules for the formation of the Arbitral Tribunal.

One obvious difference between the ICC Pre-Arbitral Referee Procedure and the LCIA Expedited Formation procedure is that the latter is contained within the LCIA' s Arbitration

[5] Article 26 of the UNCITRAL Arbitration Rules dealing with interim measures of protection contains similar provisions to those in the ICC, LCIA and AAA Rules.

Rules. 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 agreement ....adopted 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: the new Rule is based on the AAA Optional Rules.

The significant difference from the Optional Rules (and from the ICC Pre-Arbitral Referee Procedure) is that Article 37 is part and parcel of the International Arbitration Rules: in any contract in force from 1 May 2006 that provides for disputes to be settled under the ICDR' s International Arbitration Rules, the Article 37 emergency measures procedure will operate *"unless the parties agree otherwise."*

Instead of the parties having to opt in by way of separate agreement made after the arbitration agreement has been concluded - and probably after the dispute has arisen - under Article 37 the parties would have to exclude Article 37 from the arbitration agreement itself. It is difficult to see why they should do so.

The ICDR Article 37 Emergency Measures of Protection

The process is swift-moving: 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"*; matters may proceed by way of telephone conference; and 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 powers of the emergency arbitrator cease on appointment of the tribunal, unless the parties agree that he may be named as a member of the tribunal. [6]

[6] Article 42 of the Arbitration Rules of the Netherlands Arbitration Institute contains provisions for "summary arbitration" in cases of urgency prior to the appointment of the Tribunal. Article 42 (a) of the NAI Rules provides: " In cases where, considering the interests of the parties, an immediate provisional measure is urgently required, a request for such measures may be heard and decided in summary arbitral proceedings, in accordance with the provisions of this section."

Emergency relief: the CIETAC and ICDR positions

The AAA / ICDR Rules in Article 37 therefore provide a wide-ranging process for dealing with emergency relief.

The CIETAC Rules do not contain provisions expressly dealing with emergency relief. However, the Article 17 and18 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. [7]

Combination of arbitration with conciliation

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. [8]

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

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[7] 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.

[8] However, Article 40(5) and (6) of the CIETAC Rules provide that a settlement reached during the course of the arbitration may be recorded as an arbitral award. A similar provision is contained in Article 29(1) of the ICDR Rules.

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.[9]

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.[10]

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

[9] Some years ago I was Counsel acting for a group of Chinese and Hong Kong companies in dispute with a group of Italian companies. The contract provided for ICC arbitration. The governing law was English law. One of the hearings took place in Beijing (in the offices of CIETAC). The sole arbitrator - a retired English Court of Appeal judge - switched with the consent of the parties to act as mediator during the course of the arbitration. Articles on the case have been published in various journals including the journal of the Chartered Institute of Arbitrators: "A Foreign Arbitration Held in China": *Arbitration* (1999) volume 65, No. 3.

[10] 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.

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.

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May 2011