

Asia Field Research Scholarship Program

Swiss Asia Foundation

COMMERCIAL ARBITRATION

IN THE PEOPLE'S REPUBLIC OF CHINA BETWEEN

CHINESE AND FOREIGN ENTITIES

Rashid Bahar

15, chemin des Colombettes

1202 Geneva

Julien Besse

6, rue de Lyon

1201 Genève

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EXECUTIVE SUMMARY

Arbitration is the most popular form of resolution of commercial disputes between Chinese and foreign entities. There are several reasons for this popularity: Arbitration is a quick and efficient dispute resolution method; it is confidential and to a wide extent subject to the autonomy of the parties; Finally, since the entry in force of the New York Convention, it provides a facilitated mean for an internationally recognized and enforceable dispute resolution method.

In international commercial arbitration, parties will alternatively submit their disputes to the Chinese semi-official arbitration body CIETAC or to other internationally recognized institutions, among which the Hong Kong Arbitration Chamber, the Singapore Arbitration Chamber and Stockholm Chamber of Commerce Arbitration play a leading role. Additionally, the International Chamber of Commerce is playing an increasing role. However, *ad hoc* arbitration as well as arbitration situated within the territory of China have experienced problems and are not advisable. Thus CIETAC has in fact a monopoly on international commercial arbitration in China.

In the last decades, CIETAC has evolved from an administrative body to a private arbitration institution. Nevertheless, the historic roots of arbitration in China and of CIETAC are still present in the Arbitration Act and the Arbitration Rules of CIETAC. Indeed, the Commission through its Secretariat maintains decisive powers which enable it to control to a certain extent the formation of the arbitral tribunal and several key issues such as the competence of the arbitral tribunal.

Nevertheless, the ongoing evolution of CIETAC and Chinese arbitration legislation is positive in the way of a conformity with the standards and requirements of the international commercial community. In its present form, anyhow, CIETAC provides an efficient disputes resolution method for low value trade of goods disputes. For that reason, CIETAC today is already the biggest arbitral institution on the basis of its case load.

1. Introduction

China is one of the most promising emerging markets. In spite of the Asian crisis it could boast of a 7.2 % p.a. increase of its GDP for the first quarter of 1998¹. Though it still has a comparatively low GDP per capita, its population enables the People's Republic of China, even with a weak growth, to be certain that it will be one of the big economies of the twenty-first century.

China's foreign economic policy has evolved through coastal open cities and special economic zones such as Shenzhen, Shanghai from an autarchic socialist economy to an opening market-based economy. Thus it is a growing actor in the international economic scene. In 1996, it was the second beneficiary of foreign direct investment². The People's Republic of China has also growing trade relations with the rest of the world. This trend is confirmed by its demand to adhere to the World Trade Organisation.

Though one criticism of foreign direct investment in the People's Republic of China is that the major stakeholders in enterprises on Chinese territory are overseas Chinese, other non-Chinese investors can and do invest in the People's Republic of China. As far as Switzerland is concerned, according to statistics released by the China Customs, trade between Switzerland and the People's Republic of China reached USD 1.351 billion, (Chinese exports to Switzerland: USD 413 million. Chinese imports from Switzerland: USD 938 million). Switzerland is therefore China's biggest trade partner among West European countries, except the European Union. By the end of 1995, the total number of Swiss enterprises in the People's Republic of China reached 234 with the contractual investment of USD 828 million³.

Yet as China's economic reforms transform it into a market economy and open it to international trade, the requirement for effective means of dispute resolution grow. In general, three dispute resolution methods may be distinguished, each with its respective advantages and disadvantages: litigation, commercial arbitration and alternative dispute resolution methods such as mediation or conciliation.

Litigation or court-based dispute resolution is the general type of dispute resolution. If the parties do not decide on anything they must litigate. Such a system has the advantage of being a hands-on type of dispute settlement method. The parties can seize the court without any former agreement to submit and the procedural rules are

¹ The Economist, July 18th-July 24th 1998 .

² S. Bargas, "Direct Investment Positions for 1996", Survey of Current Business, July 1997.

³ Foreign economic relations and trade with countries and regions, p.511.

established by the applicable procedural legislation. The court's decision is directly enforceable and except in exceptional cases cannot be contested by the execution authorities. It is therefore a very efficient method but also a very rigid one. In international disputes, two important problems arise: the court is under the suspicion of bias for it's co-national, the enforcement of foreign court's decision requires an additional procedure called an *exequatur* procedure which may jeopardise the recognition and thus the enforcement of the foreign court's decision. In addition to these criticisms, judges are generally not specialised in international business transactions and therefore do not provide the necessary expertise in such dealings.

On the other side, methods such as conciliation or mediation pursue a win-win settlement of the dispute. Such a solution is attained through a discussion between the parties independently of the legal merits of the case. The mediator is there only to help the parties get along and not to judge whether the claimants have the right to have their claims recognised. In case the parties find a satisfactory solution, the outcome will be an agreement which is legally qualified as a contract. This method generally does not require the use of force to execute the award because the parties accept voluntarily to conclude the agreement and therefore tend to execute it independently of any act of authority. The limitations of such methods are of two kind: not all disputes have a win-win solution and hence can be settled through conciliation or mediation. Besides that, in case of non-execution of the settlement, the parties have to go through the usual litigation type of proceeding to enforce the settlement.

The third kind of dispute resolution is commercial arbitration. Arbitration is often described as private litigation. Arbitration is used only if, before or after any dispute arises, the parties agree to submit themselves to arbitration. If they do so, they will chose arbitrators who will judge the case on its legal merits. Then they will ask a court to enforce the arbitral award. The court will only examine if public policy and essential procedural principles are respected without questioning the substantial merits which will have been settled by the arbitrators. This last method is generally used to settle disputes in international economic transactions. This preference can generally be explained by the flexibility of its proceedings with the certainty of the rule of law for substantial questions, the neutrality and absence of national prejudice of the arbitrators, and the ease of enforceability of foreign arbitral awards

The People's Republic of China is not an exception to this general trend for arbitration. Arbitration is undoubtedly the major dispute resolution system. The China International Economic and Trade Arbitration Commission (CIETAC), a semi-official arbitral board, is the main arbitration institution in China is according to its own statistics is the biggest arbitral commission in the world.

However, CIETAC only handles a part of the disputes resolved through arbitration. The other major players in the field are increasingly interested in taking part in China related dispute resolution. In this move, the International Chamber of Commerce (ICC), a Paris based NGO which is arguably the main international arbitral institution, has established itself in China. Furthermore, other classical institutions are actively promoting their ability to handle disputes in China, and thus benefit from a substantial share in the China related international commercial arbitration. The major players in this class are the Hong Kong International

Arbitration Commission and the Stockholm Chamber of Commerce. Other institutions also re active, but to a lesser extent.

Chinese legal culture has strongly influenced the rules and regulation applicable to commercial arbitration. Thus the People's Republic of China's legislative approach is the result of the clash of two cultures: The Chinese value system has a clear-cut preference to non-contentious forms of dispute resolution such as mediation or conciliation. Western investors, on the other hand, tend to favour certain and sure outcome resulting from the rule of law, among which due process guaranties tend to play an important role.

In addition to this cultural clash, one must remember that until recently People's Republic of China related economic disputes were settled in conformity with the socialist model of a government trade commission, the ancestor of the actual CIETAC. Present Chinese arbitration law is therefore still influenced by reminiscences of the socialist dispute resolution system.

In 1994 and 1995, reforms of the Chinese arbitration legislation decided to give up some typically Chinese elements in favour of a UNCITRAL model law type of legislation. Thus Chinese legislation is getting closer to what is already a standard in arbitration legislation. For instance, the new arbitration legislation has guaranteed the independence of the arbitrator. It has also strongly limited the cases where the arbitral award may be challenged to a few public policy related cases.

Nevertheless, most commentators agree that the reform is not yet complete. And one of the key uncertainties of the Chinese legislation is the status of *ad hoc* arbitration⁴: Though in absence of applicable provisions *ad hoc* arbitration conducted out of China under a non-Chinese arbitration law is generally recognised, a great uncertainty arises from article 6 of the Arbitration Law which provides that parties may chose in their agreement to arbitrate an "arbitration committee" which seems to exclude *ad hoc* arbitration in China.

Our presentation will focus on arbitration in China between Chinese and foreign entities. We intend to analyse the People's Republic of China Civil Procedure Law, the Arbitration Law. Though China recognises and permits other forms of arbitration such as the ICC, the China International Economic and Trade Arbitration Commission (CIETAC), a semi-official arbitral board, is the main arbitration institution in China. Therefore we shall also examine the CIETAC Arbitration rules.

We shall examine the conditions for an acceptable agreement to submit to arbitration, questions related to the jurisdiction and constitution of the arbitral tribunal. Finally we shall present the procedure in front of the arbitral tribunal.

⁴ *ad hoc* arbitration design the arbitral tribunal which is not part of an institution such as the ICC or CIETAC but completely regulated by the agreement to settle and the law applicable to the arbitration.

Our research shall limit itself to jurisdiction and procedural questions, hence excluding all the problems related to recognition and enforcement of arbitral awards.

In addition to the analysis of legal sources, we have interviewed specialists of arbitration such as academics, lawyers, arbitrators and businessmen from China and Switzerland⁵. In so doing, we hope to determine the opinion of actors as well as consumers of Chinese commercial arbitration legislation.

2. Sources

Civil Procedure Act of 9 April 1991

The Civil Procedure Act is the principal statute in judicial matters as such it provides for several provisions on international disputes and for arbitration. In particular, chapter XXVIII of the Act (Art. 257-261 CPA) provides for arbitration of "disputes out of foreign economic, commercial, transport and maritime activities".

People's Republic of China Act on Arbitration of 31 August 1992

This is the main statute on arbitration. In the last years, it was revised on the basis of the UNCITRAL Model Law on International Commercial Arbitration of 21 June 1995. This act which provides for all necessary provisions concerns internal and international arbitration. These provisions resemble and complete the provisions on arbitration in the CPA.

Circular of the General Bureau on the State Council on the application of the Arbitration Act of 8 June 1996

Foreign Economic Contracts Act of 21 March 1985

The object of this statute is to establish a legal framework to international trade of goods and services with the People's Republic. As such, the Foreign Economic Contracts Act provides substantial rules and rules for dispute resolution. Thus, this statute provides for dispute resolution and arbitration in particular arbitration under its Chapter VI.

Commissions Regulation⁶

Arbitration Rules of the China Economic and Trade Arbitration Commission (CIETAC) (ArbR) .

⁵ See temporary list of contacts annexed to the present.

⁶ CIETAC's twin sister the China Maritime Arbitration Commission also has promulgated its own Arbitration Rules.

United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (hereafter "the New York Convention")

Circular letter of the People's Supreme Court on the Application of the New York Convention.

The New York Convention is now an almost universally recognised convention which provides for maximal requirements that States may require to recognise and enforce foreign arbitral award. China ratified the convention on 22 January 1987 and the convention entered in force on 22 April 1987.

Although under the New York Convention, except for violations of due process and/or *ordre public*, the recognition and enforcement of a foreign arbitral award is almost guaranteed on a legal basis, foreign arbitral awards experience severe problems at the lower level courts. In order to curtail the opposition from lower courts, the People's Supreme Court emitted a circular relative to the application of the New York Convention.

3. Notions

3.1. *In International Matters*

Two criteria may distinguished to define the term " international" in the field of international commercial arbitration: the first criteria is to refer to the nature of the dispute⁷; the second to the identity of the parties. The People's Republic of China legislation opted for the first solution^{8 9}.

The Civil Procedure Act of 1991 contains a section on "Rule on foreign related disputes". The Arbitration Act of 1995 also includes a section on "provision applicable to international arbitration"¹⁰. These provisions apply to arbitration of disputes involving a foreign element.

⁷ Cf. Art. 1 Swiss Act on International Private Law.

⁸ Obviously, a dispute involving parties from different states (international according to the second solution) will be of an international nature.

⁹ Redfern/ Hunter/ Smith p. 11.

¹⁰ According to GU p. 821; see also: Guillaumond p. 548: "dans les rapports internationaux", Harpole p.20: "touchant a l'étranger", ChinaExpo ad: part four CPL: "involving foreign elements", Carman p. 219: "involving foreign parties", see Senger/ Xu p.46, 154: "mit Auslandberührung, auslandbezogen".

However, neither the Civil Procedure Act nor the Arbitration Act defines the concept of disputes involving a foreign element. In this context, the Supreme People's Court wrote an Opinion defining the notion of disputes involving a foreign element. This notion is defined by three alternative criteria:

- one or both parties are foreign or apatrid physical persons, foreign firms or a foreign organisation; or
- the legally relevant facts which have caused the creation, the modification or the extinction of private law relationship; or
- the object of the claim is situated in a foreign state.

This definition corresponds substantially to the notion of international under the UNCITRAL model law on international commercial arbitration of 21 June 1995. Indeed, under the provisions of the Model law an arbitration is international, when:

- The parties to arbitral convention have at the moment of the convention their place of business in different states; or
- The place of arbitration is situated out of the state of the place of business of the parties; or
- The place of enforcement of a substantial part of the duty or the place with which the dispute has the closest links is situated out of the state where the parties have the place of business; or
- The parties have expressly provided that the object of the arbitral convention has links with more than one state.

This last question of voluntary internationalisation of a dispute is present only in the model law, the Opinion of the Supreme People's Court does not include any criteria depending on the intention of the parties¹¹.

3.2 Commercial

In general, term qualification of commercial is used to distinguish commercial contracts from contracts with consumers. A commercial contract is, broadly defined, a contract entered to by businessmen in their usual professional practice.

¹¹ In a comparative perspective, the voluntary internationalization of arbitration is more an exception than the rule in international private law (see HAGUE 1955, CISG, Swiss AIPL 1 et 178).

Chinese legislation has two statutes on economic contracts: the Foreign Economic Contract Act and the Domestic Economic Contract Act. Under Art. 8 of the Domestic Economic Contract Act, the scope of the act includes sale of goods, work contracts, processing, transport of goods, supply of energy, deposit, lease, loan and insurance.

However, these definitions are not appropriate insofar as they address exclusively contractual and do not apply to other fields of law such as, in particular, corporate law issues. Thus, a definition which is more specific to arbitration is necessary.

Under the Art. 2 of the Arbitration Rules, disputes arising in economic and commercial affairs are subject to the provisions of the Arbitration Rules. Economic and commercial affairs are defined by a list of examples such as disputes concerning foreign investment companies (Art. 2 para. 3 Arbitration Rules), the use of capital, technologies and services (Art. 2 para. 4 Arbitration Rules).

On ratifying the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (hereafter the "New York Convention"), China limited the scope of the convention to disputes arising out of differences of contractual and non-contractual nature which are deemed commercial under the law of the state where enforcement is sought. In that context, The Supreme People's Court defined the notion of commercial disputes in a Notice drafted in 1987 following the ratification by the People's Republic of China of the New York Convention.

Pursuant to the Notice, commercial disputes are defined under Chinese law "economic relations of right and duties, arising out of contracts, torts or the law". This definition is exemplified by a list encompassing sale of goods, leasing, project elaboration, processing contracts, technology transfer, establishment of equity joint ventures, establishment of contractual joint ventures, exploration and processing of natural resources, insurance, labour, agency, consulting, transportation of passenger and goods by sea, air, rail or road, product liability, environmental torts, maritime accidents, property rights. However, contracts between investors and beneficiary country are not included".

The Model Law on Commercial Arbitration is also applicable to commercial arbitration (Art. 1 para. 1 of the UNCITRAL Model Law). Commercial relations are defined in a footnote to Art.1 para. 1 UNCITRAL Model Law as including, but not limited to, any commercial transaction on "the delivery or exchange of goods or services; distribution agreements; commercial representation; clearing; leasing; construction of plants; consulting services; engineering; licenses; investments; financing; banking transactions; insurance; concession, management agreements: transport of goods or passengers by air, sea, rail or road."

As far as the substantial notion of commercial is concerned, the Chinese notion of commercial under the New York Convention is identical to the definition of the UNCITRAL Model Law. However, the Notice of the Supreme People's Court excludes contracts between investors and beneficiary states. This exception thus

virtually voids the benefits of the ICSID Washington Convention of 18 March 1968 which submits all investment related disputes with a State to arbitration.

4. Arbitral Convention

The arbitral convention permits the parties to submit their disputes to an arbitral tribunal, thus circumventing the jurisdiction state courts.

Three forms of arbitral convention are commonly distinguished. First of all, the parties may incorporate in a contract an arbitral clause¹². A similar form to the incorporation of an arbitral clause is to refer in the contract to a standardised form which submits disputes arising out of or in connection with the dispute to arbitration¹³. Finally, once the dispute has arisen the parties may enter into a contract submitting the dispute to arbitration. In this case, the convention is called an arbitral compromise¹⁴.

However, as the arbitral tribunal is an exception to the general competence of state tribunals, the validity of the convention is subject to strict conditions provided for by art 16 of the Arbitration Act. An arbitral convention is valid when all parties to the convention enter an agreement in due form submitting to arbitration by an Arbitration commission a determined or determinable dispute which may be submitted to arbitration. Out of this provision one must distinguish formal requirements and substantial requirements.

Under article 18 of the Arbitration Act, if the convention is not valid due to the non-fulfilment of one of the conditions, the parties may repair the default by entering into a new convention.

4.1 Formal Requirements

Under Art. 16 para. 1 of the Arbitration Act, the arbitral convention must be in writing. This requirement is conform to the international practice. Indeed, the writing requirement is also provided for under Art. 7 para. 2 UNCITRAL Model Law and Art. II para. 1 and 2 of the New York Convention¹⁵.

The requirement as to writing for an arbitral convention are under the laws of the People's Republic of China identical to the requirements for foreign economic contracts as defined under Art. 7 of the Foreign Economic

¹² Wang p.81.

¹³ Moser/ Wang/ Davis p. 432.

¹⁴ Bucher, p. 36.

¹⁵ This is an autonomous notion; Jan van den Berg, p. 173.

Contracts Act. Pursuant to this provision, letters, telegraphs, telexes, faxes are deemed to be executed in writing.

4.2 Substantial Requirements

4.2.1 Capacity to compromise

In order to enter an arbitral convention, the parties must have the capacity to compromise. In order to have this capacity under Chinese law, the parties must be considered as legal entities. The following are considered legal entities under Chinese law and are thus capable to compromise: foreign individuals, legal persons and other organisms provided they are established under the law, own goods and have an internal organisation¹⁶.

An important issue arises out of the construction of Art. 2 of the Arbitration Act which provides that the dispute must confront equal parties: when a State contract with private individuals or corporation is it an equal party? The generally admitted solution is that a state acting *de jure gestionis* is the equal of a private entity. However, it is not certain whether the arbitral convention is admitted as such as a waiver of immunity¹⁷.

4.2.2 Expression of the intention to submit to arbitration

The intention to submit to arbitration must be manifest (Art. 16 para. 2 point. 1 and Art. 4 para. 1 of the Arbitration Act)¹⁸. Furthermore, this intention should be freely expressed, i.e. it should be entered into without duress (Art. 17 para. 3 of the Arbitration Act).

Except these conditions, there are no further requirements as to the consent of the parties. In particular, there is no possibility to void an arbitral convention entered into if one of the party has no bargaining power¹⁹.

4.2.3 Arbitrability of the dispute

As arbitration is a private form of dispute resolution where governmental intervention is minimal, states tend to limit the scope of disputes which can be submitted to arbitration. In the People's Republic of China, all economic disputes of contractual or patrimonial origin may be submitted to arbitration. This scope

¹⁶ Gu, p. 823.

¹⁷ Wang p. 78.

¹⁸ Moser/ Wang/ Davis p. 432; Min p.38.

¹⁹ Beaumont/ Choi/ Luk p.13 *et seq.*.

encompasses contractual and tort based claims²⁰. However, marriage, adoption, as well as inheritance related disputes may not be submitted to arbitration²¹.

Administrative disputes may not be submitted to arbitration as the law generally provides for specific administrative institutions (cf. Art. 3 of the Arbitration Act). However such institution are not provided for, as a matter of principle, the dispute ought to be arbitrable²².

Furthermore, industrial and intellectual property, bankruptcy and antitrust disputes may not be submitted to arbitration.

Additionally, under Art. 246 of the Civil Procedure Act, Chinese People's Courts have an exclusive jurisdiction on disputes arising out of or in connection with equity and contractual joint-ventures and companies for the exploration and development of natural resources. However, although it is not possible to submit such disputes to the jurisdiction of non-Chinese courts, it is possible to submit such disputes to arbitration.

4.2.4 The object of the dispute

The object of the dispute must be determined (Art. 16 para. 2 point 2 of the Arbitration Act). Under Art. 260 of the CPA, if the dispute was not in the scope of disputes submitted to arbitration in the convention, a court may void the arbitral award.

The purpose of this requirement is derived from the derogatory nature of an arbitral tribunal. Indeed, as an arbitration circumvents the ordinary competent jurisdiction, it is necessary that the occurrences of derogation be known in advance. Therefore, the test is to determine whether a party intended to submit the dispute to arbitration when it entered the contract. Thus, the model arbitral clauses are valid insofar as they submit to arbitration "any dispute arising out of or in connection with" a contract.

4.2.5 Designation of an arbitration institution

Under the provisions of Art. 16 para. 2 point 3 of the Arbitration Act, the arbitration convention must designate an arbitration commission. The arbitration commission – not to be mixed with the arbitral tribunal – is an arbitration institution who will supervise the administrative part of the proceedings of the arbitration.

²⁰ Tort claims are arbitrable only since the entry in force of the Arbitration Act; Chen p. 31.

²¹ These disputes are usually resolved through conciliation with a possibility to refer the case to the judiciary; Beaumont/ Choi / Luk p. 11.

²² Beaumont/ Choi / Luk p. 12.

The origin of this requirement may be explained through a historic approach to arbitration in the People's Republic of China. When the People's Republic of China first started to trade with foreign countries, all the business was conducted by administrative bodies. In case of disputes, these bodies had trade commissions which would decide on the dispute. As China's economic policy evolved into the actual white cat / black cat doctrine²³, the administrative trade commissions were gradually changed into the CIETAC. Through the use of arbitration commissions, Chinese policy makers wanted to provide arbitration to foreign investors and yet to be able to control the arbitration process and maintain certain powers in the hands of the administrators.

In international commercial relations, the CIETAC is the main arbitration commission and enjoys a monopoly position for arbitration conducted in China²⁴. Pursuant to Art. 66 of the Arbitration Act the China International Chamber of Commerce can create other arbitration commissions. However, it has not used this possibility yet, and to our best knowledge does not intend to do so.

Recently, the ICC has become more active in China: since 1994, it has established a Chinese National Committee. However, there is some controversy whether the ICC may be considered an arbitration institution as defined under the of the Arbitration Act. Several issues are pending relative to the admissibility of an ICC arbitration conducted in China: First of all, the administrative competencies conferred onto the arbitration institution by the of the Arbitration Act are not those of the ICC rules²⁵. Secondly, though an ICC arbitration may be conducted in China, the institution would be the international tribunal of the ICC in Paris. Finally, the ICC model clause does not designate an institution but a set of rules. On this basis, a grassroots level courts has refused to consider an ICC arbitration based on the ICC model clause as a valid clause. However, this final issue may be corrected through a slight redrafting of the ICC model clause which designates the ICC as an arbitration institution. In any case two ICC arbitrations have taken place in China²⁶

Additionally, since the 1996 revision to the Arbitration Act and the implementing Circular, Internal Arbitration Commissions may be called upon to handle international arbitration cases²⁷. However, there is some

²³ The white cat / black cat doctrine comes from a saying of Deng Xiao Ping according to which it is not important whether the cat is white or black as long as it catches the mouse. This saying epitomizes the actual Chinese socialist market economy policy.

²⁴ Nedjar, p. 419.

²⁵ Nedjar, p.420.

²⁶ Bulletin CCI 1997, p. 11.

²⁷ Between June 1996 and June 1997, very few cases were signaled; Harpole 1997 p. 46.

controversy as to the applicable arbitration rules²⁸. Indeed, it is not certain whether or not an international arbitration submitted to an Internal Arbitration commission is to be decided following the rules of internal arbitration or the rules applicable to international disputes²⁹.

There are no provisions in the Arbitration Act concerning *ad hoc* arbitration. Nevertheless, one must infer from the necessity to designate an arbitration commission that an *ad hoc* arbitration would be considered as an arbitration convention which does not designate an arbitration commission³⁰. Thus, *ad hoc* arbitration seems not to be admissible in China³¹. Furthermore, this type of arbitration is not compatible with the Chinese approach to arbitration which has strong ties with the administrative and bureaucratic economic system³². Furthermore, the Chinese arbitration legislation would not be able to handle an *ad hoc* arbitration. Indeed, many of the tasks which are generally the competency of the judge of the seat are conferred under the Chinese statutory provisions to the Arbitration Commissions.

4.2.6 *Contesting the validity of the arbitration clause*

Under Art. 20 para. 1 of the Arbitration Act, the party intending to contest the validity of the arbitral clause may file a claim either with the Commission or with the People's Court. When a claim is filed with the Commission, it must be filed at latest before the opening of the first hearing of the arbitral tribunal (Art. 20 para. 3 of the Arbitration Act). However, if the claim is filed with the commission and with a court, the People's court will have the exclusive right to decide on this matter.

The parties may invoke any of the ground mentioned above, such as the absence of consent to the clause, the non designation of the scope of arbitration, the non-arbitrability of the dispute and the non-designation of an arbitral commission.

²⁸ This issue was raised by several practitioners we interviewed.

²⁹ Needless to say, the consequences of the rules applicable are considerable. Domestic arbitration is blatantly less flexible and more subject to judicial review than international arbitration. In particular, an internal arbitral award is subject to appeal whereby the seized court can modify the findings of the arbitral tribunal. Whereas an international arbitral award may only be voided.

³⁰ Which can be examined by the People's Court at anytime according to Art. 20 of the Arbitration Act.

³¹ However, a foreign arbitral award from ad hoc arbitral tribunal would be recognized and enforced under the provisions of the New York Convention.

³² Hughes, p. 70.

However, Chinese law applies the principle of autonomy of the arbitral clause. Pursuant to this principle provided for under Art. 19 para. 1 of the Arbitration Act, the nullity of the contract which contains an arbitral clause is not as such sufficient to void the arbitral clause. Thus, though a contract may be null, any claim falling under the scope of the arbitration will nevertheless belong to the exclusive jurisdiction of the arbitral tribunal. Any state court with whom the dispute is filed will have to declare itself incompetent pursuant to Art. 5 of the Arbitration Act. The logical consequence of the aforementioned rules is to confer to the arbitral tribunal to decide upon the validity of the contract, this principle is codified in Art. 19 para. 3 of the Arbitration Act.

Under Chinese law, the arbitral tribunal does not have the possibility to decide on its own competence, it does not have the *competenz-competenz*. This solution is contrary to most legislations. Indeed, under Art. 16 para. 3 of the UNCITRAL Model Law, as well as under Art. 186 para. 1 of the Swiss Federal Act on International Private Law, the arbitral tribunal is entitled to the competence-competence³³.

The Chinese solution presents several disadvantages. Indeed, the object of submitting a dispute to arbitration is partly to escape state jurisdictions and to refer oneself to more specialised authorities. Furthermore, in case of international disputes, the potentially competent jurisdictions are innumerable and arbitration aims to concentrate the whole of the dispute resolution process to one actor: the arbitral tribunal. By removing the competence-competence from the arbitral tribunal, the Chinese arbitration legislation permits to bring a part of the dispute to other jurisdictions thus breaching the uniformity of solutions.

5. Arbitration Institution

5.1.1 Competence of the CCPIT

Under Art. 66 of the Arbitration Act, Arbitration Commissions may be instituted and organised by the China Council of Promotion of International Trade (hereafter "CCPIT").

The CCPIT is a non-governmental organisation whose object is the promotion of international trade founded in 1952³⁴. Though formally the CCPIT is a private organisation, its role is one of an administrative office and

³³ This expression originates from the German tradition procedure laws where each authority is competent to decide of its competence. Hence, the competence-competence. This system is generally opposed to the French solution of separate authority which must be seized in case of conflicts of competence.

³⁴ Wang p. 25.

acts us as such. The attributions of the CCPIT are the composition of international arbitration commissions, recruitment of commission members and recruitment of arbitrators³⁵.

5.1.2 CIETAC

The CIETAC was first founded in April 1956 under the name of the Foreign Trade Arbitration Commission. In 1980, it was renamed the Foreign Economic and Arbitration Commission and Finally, in 1988, it took its present name of China International Economic and Arbitration Commission.

The seat of CIETAC is in Beijing. It is divided in sub-commissions located in Shanghai and Shenzhen established in 1990 and 1989. There is no territorial repartition of the competence between the commission and the sub-commissions. The only difference among the commission and the sub-commissions is related to the people in charge of the administrative tasks of the commission. The commission and sub-commissions refer themselves to the same rules and list of arbitrators.

Originally, CIETAC predecessors –the Foreign Trade Arbitration Commission and the Foreign Arbitration Commission– were not arbitral bodies, they were administrative commissions to whom the foreign trade related disputes were conferred. However, since 1988, the CIETAC was privatised with the CCPIT and become thus a private arbitration institution comparable to other similar institutions such as the International Chamber of Commerce, the Stockholm Chamber of Commerce, the Hong Kong International Arbitration Court, the London International Arbitration Court. Nevertheless, in spite of the status of a private body, the CIETAC and a relative liberalisation of the legal framework of arbitration in China, the CIETAC is the uncontested leader for arbitration of Chinese related disputes and benefits from a de facto monopoly in arbitration located in Mainland China.

The arbitration rules of the CIETAC in its present form were first adopted in 1988 and were revised in 1994, 1995 and 1998. The arbitration rules are freely modelled on the ICC rules and the UNCITRAL model arbitration rules³⁶.

Since 1995, the CIETAC permitted foreign arbitrators to be on the list of arbitrators. This welcomed evolution lead to the presence of 137 foreign arbitrators among the 417 arbitrators on the list³⁷.

³⁵ Required by the list system of Chinese arbitration law.

³⁶ Unlike the Model Law they are destined to private entities, for their use as rules for the conduct of their disputes submitted to arbitration.

³⁷ See Carman pp. 247 ss.

5.1.3 *China Maritime Arbitration Commission*

The China Maritime Arbitration Commission ("CMAC") is the twin of the CIETAC. It was established in January 1959. The CMAC is since 1988 a non-governmental arbitration institution. The object of the CMAC is dispute resolution of admiralty disputes regardless of their contractual or non-contractual status³⁸.

The rules of the CMAC followed the same evolution as the CIETAC arbitration rules. The only substantial differences between these sets of rules is their scope and the establishment of sub-commissions.

5.1.4 *Internal Arbitration Commissions*

Internal Arbitration Commissions are relevant to disputes between foreign investors in China insofar as an equity joint venture is considered a Chinese legal person, thus a dispute between such a joint venture and another Chinese entity would be considered as a domestic dispute. Until the 1998 amendment of the Arbitration Act, these disputes could only be submitted to the arbitration of international arbitration commissions. Following the aforementioned amendment, these disputes may also be submitted to international arbitration. However there is some controversy whether international arbitration out of the People's Republic of China is also possible and which set of rules are applicable.

The competent department and chambers of commerce have the possibility to institute and organise internal arbitration commissions in the cities were people's government of provinces, autonomous regions and municipalities. 12 arbitration commissions exist in the People's Republic of China³⁹.

Until 1995, the internal arbitration commissions were part of the administrative apparatus as such the rules of procedure could not be modified by the parties. Furthermore, the awards of internal arbitration commissions were not legally binding on the parties⁴⁰. The 1995 amendment sought to separate these institutions from the administrative power and diminish the influence of local government on the domestic arbitral process.

This highly administrative character and the ties of the arbitration with local authorities gave the international arbitration commission a strong reputation of partiality. This reputation in addition to problems linked to the

³⁸ Wang pp. 61 s.

³⁹ Beijing, Tianjin, Shanghai, Shenzhen. Xian, Huhot, Xianmen, Kunming, Fushun, Changsha, Zibo; Wang pp. 27 et seq.

⁴⁰ Wang p. 26.

judicial review and enforcement of internal arbitral awards pushes several lawyers to prefer local courts to internal arbitration commissions⁴¹.

5.2 Role of the Commission

In the rigid framework of institutional arbitration, the powers of the arbitration institution are very broad and thereby restrict those of the arbitral tribunal.

The Role of the commission is foremost a managerial one. The commission which handles all the administrative work related to the arbitration. It is the equivalent of a process server of a state court.

But in addition to these functions, the commission has several key powers during the process.

5.2.1 Before the constitution of the arbitral tribunal

As stated above, the commission and the People's Courts share the power to decide on the validity of the arbitration claim⁴² (Art. 24 of the Arbitration Act). If the parties can't get to an agreement on the place of the arbitration, the commission will choose the place (see Art. 12 Arbitration Rules).

The commission plays a central place in the constitution of the arbitral tribunal: first of all, the commission establishes an exhaustive list of potential arbitrators (Art. 67 of the Arbitration Act, Art. 10 Arbitration Rules). Contrary to the practice of other arbitral institutions such as the ICC, the parties may not choose an arbitrator who is not on the list of the commission.

Then, if the parties are not able to decide on the composition of the arbitral tribunal, the commission will name the arbitrator (Art. 32 of the Arbitration Act). In most of the three arbitrator tribunals, the composition rules do provide that each party names one arbitrator, and the two arbitrators name the chairman of the arbitral tribunal. In CIETAC tribunals, the chairman must be named by both parties. However, the parties will rarely agree on the chairman, thus the commission will generally name the chairman. Thereby, the commission may introduce "its man" in almost every arbitration it handles. From the perspective of the foreign investor, the foregoing elements present a major disadvantage: As the local party will choose a Chinese arbitrator and the foreign party a foreign arbitrator, the commission's choice of a Chinese arbitrator will inevitably lead to a Chinese majority tribunal.

⁴¹ This phenomenon is particularly marked in Shanghai.

⁴² In addition to the examination of the convention's validity, the Commission can address the issue of *res judicata* of an already granted award. (Art. 9 para. 2 of the Arbitration Act); Hughes, p. 69 *et seq.*

5.2.2 *After the constitution of the tribunal*

The Commission maintains most of the competence which would generally be attributed to the arbitral tribunal⁴³. Indeed it has the possibility of requesting from the judge of the seat provisional measures (Art. 28 para.2 of the Arbitration Act). It will also set the dates of the hearings (Art. 41 of the Arbitration Act).

It also has the possibility of refusing to seal the award⁴⁴ if it believes the solution is not satisfactory. However, this provision modelled on the ICC rules seems to be used sparingly and not to cause major problems in spite of the surveillance powers that it confers to the commission.

6. Procedure in front of the CIETAC

Under Art. 7 of the Arbitration Rules, any arbitration in front of CIETAC will be subject to the CIETAC Arbitration Rules unless the parties decide otherwise and the CIETAC expressly accepts the modifications.

Our presentation of the CIETAC procedure shall be threefold: first we shall present the scope of competence of the CIETAC then we shall examine the principal steps of the procedure in front of the CIETAC. Finally, we shall analyse the main characteristics of this procedure.

6.1 *Scope of Competence of the CIETAC*

Under article 2 para. 2 of the Arbitration Rules, the CIETAC is competent *ratione materiae* for settling disputes in economic or commercial regardless of their contractual or non-contractual nature. Furthermore, the dispute must have be of an international nature or involve a foreign element.

Given the scope of disputes having an international nature or involving a foreign element, the scope of competence of the CIETAC contains almost any type of commercial disputes which might arise between a Chinese entity and a foreign entities or between foreign entities⁴⁵.

⁴³ Moser 1998, p. 31.

⁴⁴ On this subject, it is interesting to note what the CIETAC thinks of its function in its website presentation: “ Supervision over cases. The Arbitration Commission adopts the practice of reviewing the draft award, supervising and managing the arbitration proceedings to ensure the impartiality of its awards”; www.arbitration.org.cn/homepage/a76.html. **

⁴⁵ Moser 1998, p. 29.

However, the scope also covers disputes which though they do not have an international nature or involve a foreign element, are related to S.A.R Hong Kong, Macau or Taiwan (Art. 2 para. 2 of the Arbitration Rules) or involve a dispute between a foreign investment enterprise (F.I.E.) and another Chinese entity such as a Chinese physical person, an other F.I.E or any other organisation (Art. 2 para. 3 of the Arbitration Rules).

This latter broadening of the scope was the fruit of the 1998 reform of the Arbitration Rules which was widely acclaimed by most foreign specialists⁴⁶. Indeed, until the amendment, all disputes opposing F.I.E. to Chinese entities were considered as internal disputes, because F.I.E. are Chinese legal persons incorporated and registered in China under the provisions of the Principles of Civil Law Act. Yet, although these entities are formally Chinese legal persons, they are owned and controlled by foreign investors. Thus, on the basis of their formal Chinese ties, the CIETAC refused to claim jurisdiction on the disputes between F.I.E. and other Chinese legal entities⁴⁷. However, as the number of such disputes increased as the popularity of the F.I.E. grew among the foreign investor community, the discontent with this solution became obvious. This discontent led to the 1998 reform.

The types of litigation which the CIETAC arbitral tribunal may have cognisance⁴⁸ of are those concerning project financing, invitations to offer, submissions, construction or any other activity which must be led by a Chinese legal or physical person or any other organisation (Art. 2 para 4 Arbitration Rules) as well as those concerning the use of capital, technology or services of foreign origin, including those originating from international organisations and S.A.R. Hong Kong, Macao and Taiwan (Art. 2 para 4 Arbitration Rules in fine). This paragraph thus includes any dispute involving any Chinese entities (and not only F.I.E.) who use capital, technology or services of foreign origin.

Finally, CIETAC is competent whenever the legislation of the People's Republic of China provide that its Arbitration Rules are applicable. The legal basis for such competence may be of statutory, regulatory origin, it is also to provide in an administrative authorisation⁴⁹.

6.2 *Principal Steps of the Procedure in Front of the CIETAC*

An arbitral procedure in front of the CIETAC starts the day the commission delivers a notice of arbitration (Art. 13 of the Arbitration Rules). This supposes that the claimant has fulfilled all the formalities for the filing

⁴⁶ See *inter alia* Moser 1998 p. 34 s.; Harpole 1998; Tao.

⁴⁷ And even if they were accepted, the enforcement was systematically refused.

⁴⁸ Harpole 1998 p. 9.

⁴⁹ Tao p. 16.

of the claim (art 15 Arbitration Rules). If the claim is not complete the commission may ask the claimant to complete it. The claimant must also pay the advance of fees.

Once the claim is admitted without delay the commission gives notice of the arbitration to the defendant and provides it with the claim, the schedules to the claim as well as the copy of the Arbitration Rules, the list of arbitrators and the arbitration fees. It provides also the claimant with the notice and the aforementioned documents. The commission also names a person in charge of the secretariat of the case.

From that moment on, upon request of one of the parties, file for a preliminary injunction in front of the Intermediate People's Court (Art. 28 of the Arbitration Act and 251 CPA).

The reception of the notice marks the starting point of three delays: the 20 day delay for the composition of the arbitral tribunal, the 45 day delay for the defendant's brief, and the 60 day delay for the filing of a counter claim.

The composition of the tribunal requires some further explanations: the parties have twenty days to name the arbitrators from the list of arbitrator on the CIETAC list of arbitrators (Art. 16 of the Arbitration Rules). Unless the parties have agreed to have a one arbitrator tribunal, (Art. 25 of the Arbitration Rules), the arbitral tribunal will be composed of three arbitrators (Art. 30 para. 1 of the Arbitration Rules).

Unlike most three arbitrator tribunals, where the composition rules provide that each party names one arbitrator⁵⁰, and the two arbitrators name the chairman of the arbitral tribunal, CIETAC rules provide that the chairman must be named by both parties (Art. 24 para. 1 of the Arbitration Rules). However, the parties will rarely agree on the chairman. Thus, pursuant to Art. 32 of the Arbitration Rules, the commission will name the chairman.

Thereby, the commission may introduce "its man" in almost every arbitration it handles. From the perspective of the foreign investor, the foregoing elements present a major disadvantage: As the local party will choose a Chinese arbitrator and the foreign party a foreign arbitrator, the commission's choice of a Chinese arbitrator will inevitably lead to a Chinese majority tribunal. In addition to an inevitable cultural bias⁵¹ and the language problem, it is often observed that the two Chinese arbitrators will tend to "gang" together and will leave the foreigner arbitrator out of the decision making process.

⁵⁰ Though in the following paragraphs we will refer to the arbitrator named by one party as the arbitrator of that party, all arbitrators must be independent and impartial from the parties.

⁵¹ The Chinese arbitrator will have more difficulty understanding the point of view of a foreign investor when the legal dispute is underlined by cultural misunderstandings.

This problem has led several practitioners acting as counsel to foreign investors to use defensive measures such as the express provision that the chairman will be of an other nationality than the other arbitrators or to systematically name a Chinese arbitrator who will be on the same stand as the other party's arbitrator.

6.3 *The Secretariat's Role*

After having served a notice for arbitration to the claimant and to the defendant, the commission designates a member of the secretariat to follow up the procedure (art 15 para. 2 AR). Each commission has a secretariat (Art. 11 para. 2 of the Arbitration Act). It acts as the intermediary between the parties and the arbitrators pursuant to the interdiction of private meetings, given the latter's obligation of neutrality. Additionally, it disposes of a rule of ethics.⁵²

The secretariat is primordial for the purpose of translation of the documentation and of the correspondences⁵³.

Finally, it is through the secretariat that the CIETAC effectively exercises its power and influence on the arbitral proceedings.

6.4 *The Request of Arbitration*

6.4.1 *The filing of the arbitration claim*

Pursuant to Art. 14 of the Arbitration Act, the party filing a request for arbitration with the commission shall provide the commission with the arbitration convention, the presentation of the factual elements essential to the claim, its conclusions, as well as a presentation of the alleged facts and proofs. It shall also justify the competence of the arbitration Commission (Art. 21 3rd hypothesis of the Arbitration Act).

According to Art. 15 of the Arbitration Rules, the commission can then, on its own initiative, react in three different manners: either it accepts the demand and immediately serves a notice for arbitration to the defendant, either it proposes to the claimant to complete the request,

⁵² Wang pp. 131-132.

⁵³ Hughes p. 79.

which it judges incomplete, or it can refuse the claim. In the latter case, it must notify the grounds for the inadmissibility of the claim and expose the motives of its decision.

6.4.2 The defendant's brief and the counterclaim

There are no details in the rules or in the law on the content of the defendant's brief. In the event of a request for modification or supplementing of the request, the commission will easily grant an extension of the delay⁵⁴.

The counterclaim must be formulated by the defendant, must be in connection with the claim, but the litigation must be of a different nature. In the context of a counterclaim, an extension of the delay is only granted for reasonable reasons (Art. 18 para. 1 of the Arbitration Rules). Additionally, the validity of a counterclaim is subject to the same conditions as the main claim (see above). Besides that, it should not be addressed for purely dilatory purposes. The claim is immediately transmitted to the other party which is invited to comment.

6.5. The Arbitration Tribunal

6.5.1 Composition of the tribunal

According to Art. 24 of the Arbitration Rules, each party designates an arbitrator among an exhaustive list established by the commission. If one party fails to do so, the Chairman of CIETAC will name this arbitrator (Art. 26 of the Arbitration Rules).

In addition, during the composition of the Tribunal, if the parties so agree, they may decide whether to opt for a Tribunal of one, two or three arbitrators (Art. 25 of the Arbitration Rules) and whether designate together the third arbitrator or t (Art. 24 para. 1 of the Arbitration Rules). If the parties cannot agree, the Chairman of the CIETAC is competent for the composition of the arbitral Tribunal (Art. 25 para. 2 resp. 24 para. 2 of the Arbitration Rules). The same system can be applied when a new arbitrator must be designed (Art. 31 of the Arbitration Act).

⁵⁴ Wang p. 132.

This designation procedure is problematic⁵⁵, notably due to limitations imposed by the exhaustive list of arbitrators. Furthermore, since the parties often fail to agree in time on the nomination of the Chairman of the arbitral tribunal, the president of the Chinese Commission will personally name the Chairman, who will almost always be chosen among the Chinese arbitrators of the list⁵⁶.

6.5.2 *Challenging of the arbitrator*

The challenge must be filed before the opening of the first audience or, if the facts are known after the first audience, at the closing of the last audience at the latest (Art. 31 of the Arbitration Rules). The decision lies within the competence of the Chairman of the Commission, unless the Chairman is also a member of the arbitral tribunal (Art. 30 of the Arbitration Rules). In the latter case, the commission decides in plenum⁵⁷, in conformity with Art. 36 of the Arbitration Act.

An arbitrator can be challenged if he has personal interests in the case (Art. 28 of the Arbitration Rules). Indeed, such interests would conflict with his duty of independence (Art. 8 of the Arbitration Act). Obviously, the requirements of independence and impartiality are identical for the three arbitrators, notwithstanding that each party may choose one arbitrator.

The arbitrator to be replaced is designated by the same process which was used during the constitution of the arbitration Tribunal. The following part of the procedure depends either on a decision of the arbitration Tribunal on a proposition of the parties or on the initiative of the Tribunal (Art. 31 of the Arbitration Rules). Unlike Art. 14 of the UNCITRAL Arbitration Rules, CIETAC Arbitration rules do not provide for compulsory repetition cases such as the challenge of the sole arbitrator or the chairman of the arbitral tribunal.

⁵⁵ Moser 1998, p. 30

⁵⁶ One might consider including in the arbitral clause a provision on the nationality of the arbitrators; ex. “ a non-Chinese third arbitrator ”; see Hughes, p.76, this was also advised by several lawyers we interviewed.

⁵⁷ Wang p. 120

6.5.3. Responsibility of the arbitrator

According to Art. 38 of the Arbitration Act, the arbitrator is responsible to serious breaches of his duty of independence or gross malpractice. In particular, this provision aims to prevent corruption of the arbitrators by way of gifts or banquets (Art. 34 para. 4 and 38 of the Arbitration Act). These provisions highlight one important though rarely openly addressed problem of arbitration in China: the average case which is submitted to arbitration generally presents a high value to the parties. On the other hand, CIETAC arbitration is comparatively cheap due in particular to the low hourly rates of arbitrators. The discrepancy between the high value of the cases and the low remuneration of the arbitrator opens a door to corruption which is already as such a plague to the Chinese economy.

6.6 Arbitration

6.6.1 The Hearings

As a matter of principle, the arbitrators tend to follow a mixed procedure: as a first step, the parties submit written briefs and other materials then the matter is further examined during oral hearings (Art. 32 of the Arbitration Rules).

The oral hearings are held in private, unless the parties agree otherwise (Art. 36 of the Arbitration Rules). Such an agreement will rarely occur as it is to both parties' benefit to keep the dispute private and not make too much publicity around it. In any case, if a State secret is involved, the parties cannot derogate to the closed session (Art. 40 para. 2 of the Arbitration Act).

The hearings must be recorded either in minutes or tape-recorded (Art. 43 and Art. 48 of the Arbitration Act). In any case, the parties may consult the record of the hearings

The oral hearings take place at the seat of the commission's, unless the secretary-general authorizes to proceed somewhere else (Art. 35 of the Arbitration Rules). The right of the parties to debate is guaranteed by Art. 47 of the Arbitration Act. Additionally, the arbitrators must consult the parties at the end of the hearings.

If in spite of due notification, the claimant who does not appear is deemed to have withdrawn his claim (Art. 42 para. 1 of the Arbitration Act and Art. 42 of the Arbitration Rules). Furthermore, the Arbitral Tribunal will make an award by default, if the defendant fails to appear (Art. 42 para. 2 of the Arbitration Act, Art. 42 of the Arbitration Rules).

The party can be represented by a counsel (Art. 22 of the Arbitration Rules). Although the law doesn't address the question of foreign-nationality lawyers⁵⁸, when arbitration is concerned, foreign counsels are allowed to represent the parties⁵⁹. Indeed, the rules mention a representative of Chinese or foreign nationality (Art. 22 i.f. of the Arbitration Rules).

The hearings take place in the language chosen by the parties in Chinese, (Art. 75 of the Arbitration Rules). However, under the cover of a liberal rule, this rule institutes Chinese as the language of the proceedings. Indeed, as the arbitration opposes generally a foreign party to a Chinese one, it seems unlikely the Chinese parties will accept to truly negotiate on the use of an other language. Therefore, in most cases, Chinese will be used by default⁶⁰. Furthermore, due to the composition of the arbitral tribunal, two out of three arbitrators will be Chinese. Thus, a non-Chinese speaking party will be at a great disadvantage.

6.6.2 *The Proofs*

Under Chinese arbitration law, the fact finding mission is in the hands of the Tribunal pursuant to the inquisitorial maxim. Indeed, although each party must provide evidence for their claims (Art. 43 para. 1 of the Arbitration Act which corresponds to Art. 64 para. 1 LPC), the Tribunal is free to gather the proofs which it estimates necessary (Art. 43 para. 2 of the Arbitration Act and Art. 38 para. 1 of the Arbitration Rules). The point of view of most Chinese arbitrators is radically opposed to that of most western commercial lawyers. Indeed, whereas in most jurisdictions the judge acts only as an empire deciding whether or not the parties are acting fairly, in China (including in arbitration), the judges and arbitrators feel their task to be to

⁵⁸ Foreign lawyers are not admitted to civil trials, even in international matters (Art. 241 Civil Procedure Act).

⁵⁹ Wang p. 129.

⁶⁰ Moser 1998, p. 30.

unfold the truth and consider that lawyers are not contributing to their duty but actually disrupting it. For several arbitrators we interviewed, lawyers do not know all the facts and thus are of no help to resolve the dispute, the main contribution of lawyers is on the legal front where they expose their point of view regarding the law.

The inquisitorial maxim as practiced in China contradicts the international practice. In principle, the parties must provide the evidence, the most an UNCITRAL arbitral tribunal can do is request that one party furnishes additional proofs (Art. 24 of the UNCITRAL Arbitration Rules).

For this purpose the tribunal can consult specialists and experts or appraiser (Art. 39 para. 1 of the Arbitration Rules). It may be a specific technical or legal question, an inspection or tests. A written report shall be summarise the findings of the expert. The Tribunal may determine at its discretion the field of investigation and whether or not to accept the report⁶¹. The parties have the obligation to collaborate on the request of the tribunal (Art. 39 para. 2 of the Arbitration Rules). The parties have the right to examine the evidence during the audience (Art. 45 para. 2 of the Arbitration Act).

6.6.3 *Legal Merits*

Pursuant to Art. 7 of the Arbitration Act and Art. 53 of the Arbitration Rules, the arbitration Tribunal must pronounce itself on the findings concerning the disputed facts in an independent and impartial way, while respecting the applicable law, the signed contract, the international practices and the principles of equity and reason.

The question is to know whether the tribunal can or cannot decide in equity or if his application of the law must be equitable. This is one of the questions most at issue in relation to arbitration in the PRC⁶².

⁶¹ Wang pp. 141 *ss.*

⁶² Beaumont/ Marcus/ Choi p. 20.

6.6.4 *The Conciliation*

The conciliation is truly considered to be a way to resolve disputes. Each year, more than half of the cases accepted by the CIETAC are estimated to be resolved through conciliation of the parties⁶³. Here are the advantages of joining the arbitration and conciliation procedures: the economy of procedure, the greater success in conciliation by the arbitrators than by the conciliators and the possibility of enforcement of the agreement by the tribunals as the solution is incorporated in an arbitral award⁶⁴.

According to the Art. 44 para. 1 and 50 of the Arbitration Rules, the two parties can settle the dispute by a written agreement after the notification of the arbitration proceedings. This transaction will lead either to a withdrawal of the arbitration request or to an award based on the agreement. When the transaction isn't followed by an arbitral award, the parties may proceed later on to a new arbitration request. However the award enters in force the day it is rendered.

In order to reach this agreement, the parties can either directly⁶⁵ negotiate (Art. 44 para. 1 of the Arbitration Rules), or ask for the arbitration Tribunal's mediation (Art. 46 of the Arbitration Rules).

In the latter situation, even if the parties reach an agreement outside the arbitration Tribunal, the conciliation is presumed to have taken place under the auspices of the arbitral tribunal (Art. 49 of the Arbitration Rules). Each party can ask at any time to end the mediation process (Art. 48 of the Arbitration Rules). However, neither the law, nor the Rules provide for a deadline for returning to the arbitration when the parties do not reach an agreement in this context.

According to Art. 47 of the Arbitration Rules, the arbitration Tribunal, when solicited, can lead the mediation in the way which it considers appropriate. In practice, the arbitrators will

⁶³ Gui Guo Wang, p. 28.

⁶⁴ Hou Zhi Tang, quoted by Gui Guo Wang p. 28.

⁶⁵ On the other hand, all intervention of the Arbitration Tribunal isn't excluded, but it limits itself to a passive role.

generally offer to conciliate the parties by examining the facts and to analyzing the rights and obligations of each party⁶⁶.

Although the possibility of settlement through conciliation takes place on a purely voluntary basis, the issue of the confidentiality of the information thereby revealed remains problematic⁶⁷. Indeed, although, Art. 51 specifies that the facts revealed are strictly protected and cannot be used by the other party during any ulterior procedure, the conciliator is the same individual as the arbitrator and his award may be unconsciously influenced by the information disclosed during the conciliation process. Thus, in our view, the conciliation and arbitration ought to be separated one from another.

Generally, as conciliation does not designate a faulty party, it is thought to avoid destroying a good business relationship⁶⁸. However, such an outcome does not necessarily interest a party which is concluding only one synallagmatic contract, neither those who consider an award to have neutral effect on their business relations, nor those who would have anyway ended their relation with or without conciliation⁶⁹. Nevertheless, conciliation generally permits a quick outcome to what could have been a complex dispute.

6.8. *The Award*

According to Art. 9 of the Arbitration Act, the award is granted as a final settlement to the dispute. Art. 57 of the Arbitration Act stipulates that the award should take effect after its adoption by the arbitration Tribunal.

According to Art. 54 of the Arbitration Rules, the decision is taken by majority and the dissenting opinion can be consigned. If no majority can be found, the opinion of the chairman

⁶⁶ Gui Guo Wang, p. 27.

⁶⁷ Moser 1998, p. 33.

⁶⁸ In this context, two models of litigation resolving are distinguished: “zero-sum” models (litigation), when one’s gain is the other’s loss, and “positive-sum” models, in which one’s gain isn’t the other’s loss; Rouland p.444 s.

⁶⁹ Chen, p. 149 s.

of the arbitration tribunal prevails. For comparison, this practice corresponds to the one of arbitral tribunals organised under Swedish or Spanish laws⁷⁰. On the other hand, Art. 29 of the Model Law only provides for the Chairman of the arbitral tribunal's prevailing opinion for procedural questions.

Before the amendment of the Arbitration Act, the parties could appeal against the merits award in front of an appellate arbitral body or the People's Court. This question was strongly discussed during the adoption of the new law⁷¹. As this went against the choice for speed in dispute resolution implied by opting for arbitration⁷², the possibility to appeal was suppressed.

6.9 *The Delay for Granting the Award*

The award must be granted in the 9 months following the day of the constitution of the Tribunal. The secretary-general of the Commission can decide of an eventual prolongation of the delay (Art. 52 of the Arbitration Act).

7. *Setting aside of the Award*

The awards rendered after disputes involving a foreign element granted on PRC's territory are not subject to being voided on the ground of a violation of substantial law⁷³.

In international matters, according to Art. 260 of Civil Procedure Law⁷⁴ via Art.70 of the Arbitration Act, the award can be voided when it is affected by one of the following grounds:

- The parties are not bound by an arbitration convention.

⁷⁰ Chen p. 32.

⁷¹ Gui Guo Wang p. 17.

⁷² Chen p. 32.

⁷³ Chen p. 33.

⁷⁴ This provision is largely inspired from Art. V of the New York Convention.

- The party against whom enforcement is sought was not given due notice of its right to name an arbitrator or of the beginning of an arbitration procedure
- The party against whom enforcement is sought was unable to present his case for reasons for which he is not responsible;
- The arbitration tribunal or the arbitration procedure was not in conformity with the arbitration Rules;
- the matters dealt with by the award fall outside the scope of the arbitration agreement or outside the power of the enforcement of the arbitration tribunal.
- Finally, the enforcement of an award shall be disallowed if the enforcement of it goes against social and public interest⁷⁵.

The people's Tribunal must decide on the validity of the award within two months (Art. 60 of the Arbitration Act).

8. Conclusion

In the light of the various laws and rules, the Chinese legislator wanted to favor the development of arbitration for resolving disputes of international commerce. Conscious of the limits of conciliation, on the one hand, and of process, on the other, the middle way of arbitration revealed itself as the most favorable to the resolving of, quite often complex, disputes in the domain of international commerce.

However, arbitration in China is still far from having reached perfection. Although, one of the major actors in the realm of arbitration, due in great part to the ratification of the New York convention by the People's Republic of China in 1987, the Chinese institutional arbitration doesn't yet seem anything like the minimalist framework of a LDIP where the parties' autonomy deploys all its potential in procedural matters.

⁷⁵ This *prima facie* awkward clause is the classical *ordre public* clause (see Art. V para 2 of the New York Convention.)

Blocked in an intermediate structure, between an administrative organization embodied by the arbitration Commission and the classical arbitral tribunal, the position of the arbitral tribunal is not well defined. Its independence is often jeopardized by the systematic practice of the nomination of the chairman of the arbitral tribunal by the commission's chairman and by the latter's *droit de regard* on the award. Besides that, the communication between the Chinese party and the non-Chinese party, the Chinese arbitrators and the foreign arbitrator, the Commission and the Tribunal and the parties is more or less bad, depending on the cases, which slows down the procedure.

On the other hand, the Commission's role as an intermediary between the Tribunal and PRC's judiciary authorities is fundamental. It is hard to see how the Tribunal could without it find its way, in the bureaucratic maze of the Chinese judiciary organization, to make the competent authority answer to its request.

We shall conclude by saying that the union between the arbitration Commission and the arbitration Tribunal is still a solid one and that the arbitration's restructuring in the PRC is on a gentle way to a form which is more respectful to the autonomy of the parties and the needs of international trade.

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