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"Arbitration in China – the Role of CIETAC and Alternatives"

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1. Introduction

Arbitration plays a significant role in international trade, because business partners often are reluctant to use the state courts of one of the party´s countries when disputes arise. Moreover, an arbitral award is much better enforceable in countries that are member states of the New York Convention 1958 whereas the enforcement of a foreign judgement would cause much more difficulties or could end as impossible[1].
The development and current state of legal provisions and practices concerning arbitration shall be considered following in respect of the ways the Chinese government drafted and implemented its respective program.

2. Arbitration Law of the People´s Republic of China

The Chinese Arbitration Law[2] came into force September 1, 1995. It governs international and domestic arbitration. The statutory provisions are supported by the Interpretation of the Supreme People´s Court on Arbitral Matters.[3]

The Chinese Arbitration Law does not provide for ad hoc arbitration. Therefore, an agreement to arbitrate without a reference to an arbitral institution is not valid. The Supreme People´s Court Interpretations express in Art. 6: "*…if the parties fail to agree upon the …arbitration institution, the arbitration agreement shall be invalid."*[4] Therewith, an arbitration agreement must refer to institutional arbitration although ad hoc arbitration is widely recognized in other jurisdictions outside China. The lack of statutory regulations might have a minor impact on the solution of international disputes because the most contractual relationships refer to a specific arbitral institution in order to implement an arbitration clause.

3. Development of the CIETAC Arbitration Rules

One of the most important arbitral bodies is the Chinese International Economic and Trade Commission (CIETAC), which was originally founded in 1956. This institution is in charge of the most arbitral cases and the vast majority of arbitral awards in China. CIETAC's

[1] Edward J. Epstein & Chong Tin Cho, The Legal Reform, in Lo Chi Kin et. Al. China Review (1995), http://www.gongfa.com/falvgaige.htm
[2] Arbitration Law of the People´s Republic of China, adopted by the 9th Meeting of the Standing Committee of the Eight National People´s congress, promulgated by the Order of the President of the People´s Republic of China No. 31, on August 31, 1994, in force since September 1, 1995
[3] Interpretation of the Supreme People´s Court concerning Several Matters on Application of the Arbitration Law of the PRC, promulgated by the Court on August 23, 2006.
[4] Art. 6 of the Interpretation of the Supreme People´s Court concerning Several Matters on Application of the Arbitration Law of the PRC, promulgated by the Court on August 23, 2006.

Arbitration Rules where amended and supplemented several times adopting more and more the standards of international arbitration.[5]

The following examples shall demonstrate the development of the CIETAC Rules within the last 20 years:

In the 1994 Rules of CIETAC the institutional jurisdiction was extended from "international disputes" to "international or foreign-related disputes". This development was caused by court decisions in case of a Sino-Foreign Equity Joint Venture and a domestic enterprise which wasn't recognized as international dispute because both parties were Chinese entities.[6]
Initially, it was doubted that the 1994 extension would be recognized by Chinese Courts as a sufficient stipulation to give CIETAC jurisdiction where two Chinese parties would be in dispute. A court faced with an application for enforcement could still deny jurisdiction of CIETAC with the formal argument that the dispute was not foreign-related because two Chinese entities, a Joint Venture and a domestic company, were involved. This concern was picked up by the amendment of the CIETAC Rules in 2000. The wording in Art. 2 reads as follows: a "dispute ... between a foreign investment enterprise and a Chinese legal person, physical person and/or economic organization" should be solved and heard before the CIETAC.[7] This approach was also pursued by the amendment in 2005 which introduced domestic disputes falling into the jurisdiction of CIETAC as well.[8]

The CIETAC Rules 2000 obliged the parties to choose arbitrators from the arbitrators list issued by CIETAC, Art. 24 CIETAC Rules 2000. The later rules of 2005 opened the choice for the parties to appoint persons not listed but still have to be approved by the chairman of CIETAC, Art. 21 Sec. 2 CIETAC Rules 2005.

The new CIETAC Rules 2005 also intend to tighten the disclosure rules where an arbitrator has or may have an interest in the matter or is in a conflict of interest. This was achieved by Art. 25 CIETAC Rules 2005, which obliges each arbitrator to sign a specific declaration of non-conflicting interests. The former rules only governed the obligation to disclose conflicts of interest not being supported by an obligatory written declaration of the arbitrator himself, Art. 28 CIETAC Rules 2000.

Until today, the CIETAC Rules allow an adversarial and an inquisitorial approach to examine the case, Art. 29 Sec. 3 CIETAC Rules 2005. Accordingly, CIETAC may also investigate the case upon its own initiative, Art. 37 CIETAC Rules 2005. A parallel line can be drawn comparing actions in Chinese Civil Courts because investigations by the court are also allowed, see Art. 65 Chinese Civil Procedure Law.[9] The option given to the arbitral board to act inquisitorial upon the board´s discretion differs from some international standards, especially continental European Law of Civil Procedure and Arbitration. A vast number of international arbitral bodies emphasize the adversarial approach, imposing the burden of proof on the party relying on the respective fact. This approach can be found in Art. 19 para. 1 of the Arbitration Rules of AAA[10] and Art. 20 of the Rules of Arbitration of the International

[5] CIECTAC Rules of 1988, 1994, 2000, 2005
[6] Edward J. Epstein & Chong Tin Cho, see footnote, refer to a decision of the Beijing Intermediate Court of 1992 in: The Legal Reform, in Lo Chi Kin et. Al. China Review (1995), http://www.gongfa.com/falvgaige.htm
[7] http://www.cietac.org.cn/english/rules/rules_3.htm
[8] see Art. 3 No. 3 of the CIETAC Rules 2005, http://www.cietac.org.cn/english/rules/rules.htm
[9] Civil Procedure Law of the PRC, promulgated by order of the President of the PRC No. 44 on April 9, 1991.
[10] International Arbitration Rules of the American Arbitration Association as amended and effective September 1, 2000, http://www.jus.uio.no/lm/american.arbitration.association.international.arbitration.rules.2000/19.html

Chamber of Commerce Paris[11]. The latter rules also emphasize that the parties are obliged to offer evidence but the arbitral body can provide additional evidence directly. The Rules of the German Arbitration Association (DIS) pursue the same approach in Section 27.[12] The Rules of the London Court of International Arbitration take a mediate approach as the arbitral panel needs to seek for the consent of the parties before it conducts own investigations, Art. 22 lit. c Rules of LCIA.[13] The comparison shows that the Chinese approach to allow inquisitorial investigations through the arbitral body is rather unique than common. The empirical determination that "Chinese judicial and arbitral proceedings are inquisitorial in nature"[14] is supported by the CIETAC Rules accordingly. Nonetheless, this approach forms an unusual way of arbitral procedure. Arbitration panels with a majority of people of Chinese nationality associated with the authority to steer the investigations at the panel´s discretion might have a major impact not to choose CIETAC as the appropriate arbitration body.

The CIETAC Rules 2000, Art. 52 oblige the panel to render an award within 9 months after the panel was formed. Art. 42 of the CIETAC Rules 2005 contribute an acceleration of the entire process by the stipulation that the award must be rendered within 6 months.

From these examples could be seen that there is a trend to improve the rules of CIETAC in order to guarantee a higher degree of certainty in procedural justice and enforceability. But it still remains a degree of uncertainty and uncommon procedural rules which affect the characteristic of CIETAC as an appropriate arbitral body.

4. Enforcement of Awards

China became a member of the New York Convention 1958 in April 1987[15]. Although the enforcement of foreign arbitral awards under the rules of the convention should be ensured, in practice there is some resistance to apply the convention to its full extent. While the Hong Kong Courts for example use to enforce CIETAC awards within its territory, the Chinese Courts are rather reluctant to do so within the mainland China cause of local protectionism.[16] Both, the New York Convention as the relevant treaty, and Art. 58 Chinese Arbitration Law, entitle the court to reject the application for recognition and enforcement when the award is against public policy. In the international practice this exemption is usually interpreted very restrictive. In contrast, the understanding of the term "public policy" is applied more broadly by Chinese Courts in order to protect the Chinese party.[17]
Hence, summarizing the aspects discussed above, the most preferable approach to escape that dilemma are arbitration agreements under reference to the Hongkong International Arbitration Commission. Meanwhile, Hongkong is part of the PR China but it will keep its own common law system until 2047. The agreement for arbitration in Hongkong should be accompanied by the choice of Hongkong Law. This approach combines the advantage of a common law

[11] Rules of Arbitration of the International Chamber of Commerce, http://www.jus.uio.no/lm/icc.arbitration.rules.1998/20.html
[12] DIS (Deutsches Institut für Schiedsgerichtsbarkeit) Arbitration Rules 1998, http://www.dis-arb.de/
[13] Rules of the London Court of International Arbitration, Arbitration Rules to take effect from January 1, 1998, http://www.jus.uio.no/lm/lcia.arbitration.rules.1998/22.html
[14] Joseph Reynaud in: Playing Chinese Chess? Fairness and Reform in CIETAC Arbitration Procedure, McGill Faculty of Law Montreal, Canada, January 2006
[15] 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf
[16] Edward J. Epstein & Chong Tin Cho, The Legal Reform, in Lo Chi Kin et. Al. China Review (1995), http://www.gongfa.com/falvgaige.htm
[17] Joseph Reynaud in: Playing Chinese Chess? Fairness and Reform in CIETAC Arbitration Procedure, McGill Faculty of Law Montreal, Canada, January 2006

system with the increasing expectation of recognition and enforcement of the award by Chinese Courts. This assumption is supported by new developments in the regulation between China and its Administrative Region Hongkong to recognize and enforce judgements in civil and commercial matters since 2008.[18] In consideration of this new agreement, even the agreement for jurisdiction of Hongkong Courts could offer a preferable alternative to clauses favouring CIETAC arbitration.

The advantage that the Hongkong Court and the Hongkong International Arbitration Commission are close to China should ease the taking of evidence. Moreover, it can be expected that judges or arbitrators in Hongkong are familiar with the procedures and customs in China, both legally and practically. On the other hand, the application of the Hongkong Law, backed by a long history of English Law, might be much more convenient for foreign investors compared to the application of Chinese Law with some issues of uncertainty in the legal proceedings.

When a European company is involved, issues of practicability and travel expenses could lead to favour an European institution for arbitration like the ICC or the Arbitration Institute of the Stockholm Chamber of Commerce. The choice of an exterritorial arbitral institution in Europe could be agreed when the Chinese partner owns substantial assets outside China. In this case serious difficulties in the enforcement level of China must be focused. Although the greatest importance must be laid on enforcement within China, the agreement for Hongkong as an appropriate place of arbitration or jurisdiction might be first choice.

5. Conclusion

Although a number of problems especially in accordance to local protectionism still have to be focused, the development of the arbitration and especially the CIETAC Rules shows the improvement of the Chinese legal system - the process of strengthening the arbitration governance in accordance with international accepted standards. Therefore, it is important to consider the arbitration/ jurisdiction clause for each contractual undertaking separately taking into account the relevant factors of the specific investment or transfer.

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[18] see Announcement of the Supreme People´s Court or rather the Arrangement on Mutual Recognition and Enforcement of Judgements in civil or commercial matters by Courts of Mainland and Hongkong SAR to agreed jurisdictions by parties concerned. announced on July 3, 2008.