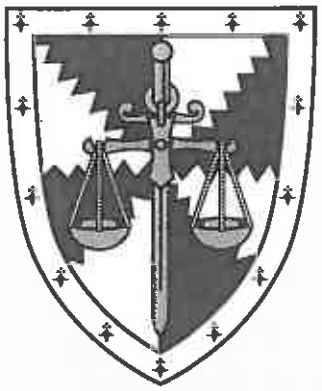

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China's Arbitration System: Changes in Light of the CIETAC Arbitration Rules 2012 and the Civil Procedure Law 2012

William Leung

1. Historical and Constitutional Background

Since the founding of the People's Republic of China in 1949, two separate arbitration regimes have developed: the domestic arbitration regime and, in the 1950s, the foreign-related arbitration regime.

Before the enactment of the Arbitration Law 1994, the domestic arbitration regime developed in a number of stages. From 1955 to 1966 economic contract disputes could only be resolved by arbitration through economic arbitration commissions. These commissions were hierarchical and there was no involvement by the courts. In the second stage (1966–1976, the years of the Cultural Revolution) there was no arbitration at all. During the third stage (1978–1982) all economic contract disputes were required to go through a two-tier hierarchy of arbitration commissions administered by the State Administration for Industry and Commerce (SAIC) and its departments before they could be brought before the courts for litigation. The fourth stage began in 1982, when the Economic Contract Law was enacted and the Economic Contract Arbitration Regulation set up the economic contract arbitration system through the establishment of the Economic Contract Arbitration bodies. At that time parties could choose between arbitration and litigation and, further, could choose after arbitration to bring disputes before the courts for litigation. A new Economic Contract Law was enacted in 1993, heralding the start of the fifth stage when parties were required to choose either arbitration or litigation and were precluded from taking disputes that had already been submitted to arbitration before any court.

For several decades before the enactment of the Arbitration Law 1994, China's domestic arbitration bodies were affiliated with the State administration (and indeed most were internal branches of administrative bodies). Furthermore, China's then arbitration system was fragmented and its main focus was on "administrative arbitration" to satisfy the requirements of the then planned economy. Thus, the concept of the independence of arbitration bodies from administrative bodies and the concept of party autonomy were alien to the arbitration system then in place.

The Civil Procedure Law (CPL) 1991 did not refer to domestic arbitration; its only reference to arbitration was to its being foreign-related. It was not until 1994 that the statutory framework for a full-scale domestic arbitration regime was put in place.

The Arbitration Law of 1994 signified the modernisation of arbitration laws in China through:

- the unification of the fragmented arbitration system;
- the establishment of principles and systems of consensual arbitration agreement;
- the choice of either arbitration or court proceedings;
- the finality of the arbitral award;
- the independence of arbitration commissions, etc.

The Arbitration Law 1994 art.1 states the scope of the domestic regime to be "arbitration of economic disputes"; and art.2 specifies that "contractual disputes and other disputes over

rights and interests in property between citizens, legal persons and other organisations ... may be arbitrated".

Thus, any "economic disputes" may be resolved by way of arbitration before local arbitration commissions, of which there are hundreds within China (with at least one being set up within the location, and with the assistance, of local municipal governments). However, "economic disputes" have not been defined and may arguably cover a wide spectrum of (or any) disputes having economic value (and not just monetary value). Thus, ostensibly under the auspices of the Arbitration Law 1994, various laws and regulations have specified arbitration to be a means to resolve disputes in particular areas, in addition to mercantile disputes and those between business people. An example is the Land Contracts in Rural Areas Law 2002:

> "Where a dispute arises over the contractual management of land, the two parties may settle the dispute though consultation and may request the villagers' assembly or the township (town) people's government to help settle the dispute through mediation. Where the parties are not willing to have it settled through consultation or mediation or consultation or mediation is not successful, they may apply to an arbitral body in charge of rural land contracts for arbitration, or directly bring a suit in the People's Court."[1]

The Mediation and Arbitration of Rural Land Contract Disputes Law 2009 goes further, specifying the scope of its application to be for "settling the disputes over contracted management of rural land"[2] and:

> "The ... arbitration of disputes over contracted management of rural land shall be governed by this Law. Disputes over the contracted management of rural land include: (1) disputes arising from the conclusion, fulfillment, modification, cancellation and termination of rural land contracts; (2) disputes arising from the sub-contract, lease, interchange, transfer, holding of shares and other means of turnover of contracted management rights to rural land; (3) disputes arising from the withdrawal and adjustment of the contracted land; (4) disputes arising from the confirmation of contracted management rights to rural land; (5) disputes arising from impairment to the contracted management rights to rural land; and (6) other disputes over contracted management of rural land as prescribed in law and regulations."[3]

Another example is the Labor-Dispute Mediation and Arbitration Law 2007:

> "Where a labor dispute arises and the parties are not willing to have a consultation, or the consultation fails, or the settlement agreement reached is not performed, they may apply to a mediation institution for mediation. Where the parties are not willing to have mediation, or the mediation fails, or the mediation agreement reached is not performed, they may apply to a labor-dispute arbitration commission for arbitration. Where they are dissatisfied with the arbitral award, they may initiate a litigation to a people's court, unless otherwise provided for in this Law."[4]

The mediation-arbitration process (Med-Arb Process) has almost become a standard procedure and a prerequisite for a whole variety of dispute resolution activities in China's domestic arbitration regime. Because of the diversity of this regime, plus the absence of

[1] Land Contract in Rural Areas Law 2002 art.51. Available at *http://www.npc.gov.cn/englishnpc/Law/2007-12/06/content_1382125.htm* [Accessed February 11, 2013].

[2] Mediation and Arbitration of Rural Land Contract Disputes Law 2009 art.1. Available at *http://www.cietac.org/index.cms* [Accessed February 11, 2013].

[3] Mediation and Arbitration of Rural Land Contract Disputes Law 2009 art.2. Available at *http://www.cietac.org/index.cms* [Accessed February 11, 2013].

[4] Law of the People's Republic of China on Labor-Dispute Mediation and Arbitration 2007 art.5. Available at *http://law.npc.gov.cn:87/page/browseotherlaw.cbs?rid=en&bs=269706&anchor=0#go0* [Accessed February 11, 2013].

formal requirements for Med-Arb Process activities, such activities may take place in such an informal manner that Westerners without much direct experience of how the regime functions in China may be confused and may mistakenly conclude that there is a lack of due process. Even a Hong Kong High Court judge has expressed unease about the way in which mediation was conducted in China and thus held in *Gao Haiyan v Keeneye Holdings Ltd*[5] that an unsuccessful mediation by an arbitral tribunal formed under the auspices of the Xian Arbitration Commission which took place over dinner in the Xian Shangri-La hotel would cause "a fair-minded observer to apprehend a real risk of bias".[6] This decision was subsequently overturned by the Court of Appeal.[7] The judgment of Tang VP reads, inter alia:

> "With respect, although one might share the learned Judge's unease about the way in which the mediation was conducted because mediation is normally conducted differently in Hong Kong, whether that would give rise to an apprehension of apparent bias, may depend also on an understanding of how mediation is normally conducted in the place where it was conducted. In this context, I believe due weight must be given to the decision of the Xian Court [in Xian Province, China] refusing to set aside the Award."

In contrast to its domestic arbitration system, China's foreign-related arbitration system prior to the enactment of the Arbitration Law in 1994 underwent far fewer changes and was more in line with international developments. The "Decision Concerning the Establishment of the Foreign Trade Arbitration Commission Within the China Council for the Promotion of International Trade (CCPIT)" was adopted at the 215th session of the Government Administration Council on May 6, 1954, and in April 1956, the CCPIT set up the "Foreign Trade Arbitration Commission" (the predecessor of CIETAC).

In the 1980s, to meet China's rapidly developing economic and trade relations with foreign countries after the adoption of the late Deng Xiaoping's "reform and open-door" policy, the "Foreign Trade Arbitration Commission" was renamed, first, the "Foreign Economic and Trade Arbitration Commission"[8] and, in 1988, the "China International Economic and Trade Arbitration Commission".[9] Since 2000, CIETAC has also been known as the "Arbitration Court of the China Chamber of International Commerce" (CCOIC).

2. Statutory Framework

The statutory framework of China's arbitration system comprises the Arbitration Law 1994 (and its statutory and judicial interpretations); the CPL 1991 (as amended in 2007 (CPL 2007) and 2012 (CPL 2012) (and its statutory and judicial interpretations)); and various specific laws and regulations (including, for example, the Contract Law 1999) that specify arbitration as a means of dispute resolution in China.

3. The Present Arbitration System in China

China's arbitration system, as one of the means to resolve disputes in China, is twofold: the foreign-related arbitration regime and the domestic arbitration regime. Any dispute which involves a "foreign-related" civil relationship is a "foreign-related" dispute and, if it is to be resolved by arbitration, it falls within the foreign-related arbitration regime. Any dispute which does not involve a "foreign-related" civil relationship is a domestic dispute

[5] HCCT 41/2010 (CFI).

[6] *Gao Haiyan v Keeneye Holdings Ltd* HCCT 41/2010 (CFI) para.53, Reyes J. (as he then was).

[7] [2012] 1 HKLRD 627.

[8] Pursuant to the State Council Notice Concerning the Conversion of the Foreign Trade Arbitration Commission Into the Foreign Economic and Trade Arbitration Commission.

[9] Pursuant to the State Council Official Reply Concerning the Renaming of the Arbitration Commission the "China International Economic and Trade Arbitration Commission" and Amendment of its Arbitration Rules.

and, if it is to be resolved by arbitration, it falls within the domestic arbitration regime. A "foreign-related" civil relationship is one that comprises at least one of the following elements: (1) at least one of the parties is "foreign" (Hong Kong is deemed a "foreign" jurisdiction for this purpose); (2) the subject matter of the contract is or will be wholly or partly outside Mainland China; and (3) civil rights and obligations the "occurrence, modification or termination" of which lie outside Mainland China.[10]

The significance of differentiating between disputes falling within the foreign arbitration regime and those falling within the domestic arbitration regime is that the People's Courts enjoy a much wider supervisory jurisdiction over the domestic arbitration regime than over its foreign counterpart, in terms of (at the least) setting aside an arbitral award; and refusal to enforce an arbitral award.

4. The Foreign-related Arbitration Regime

The focus of the foreign-related arbitration regime is "[any] dispute arising from the foreign economic, trade, transport or maritime activities of China"[11] and its activities concern "[the] arbitration of disputes arising from economic, trade, transportation and maritime activities involving a foreign element"[12] which are disputes that are mercantile in nature. The Arbitration Law 1994 provides that: "Foreign-related arbitration commissions may be organized and established by the China Chamber of International Commerce".[13]

It is the latter provision which provides the legal authority for the formation of the China International Economic Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC), which are the only foreign-related arbitration commissions in the country. Both CIETAC and CMAC, with their headquarters in Beijing, have sub-commissions in some other cities (notably Shanghai, Shenzhen, Chongqing). For the sake of simplicity, the following discussion of foreign-related arbitration commissions refers only to CIETAC.[14]

China's Supreme People's Court (SPC) has specified a hierarchical reporting system within China's judicial system,[15] within which the SPC monitors how the various local People's Courts throughout China conduct their supervisory jurisdiction over the foreign-related arbitration regime.

A People's Court may wish to accept a foreign-related case because, despite the existence of an arbitration clause in the contract between the disputing parties or of an agreement between them to arbitrate, it considers the arbitration clause concerned to be "null and void, invalid or unenforceable by virtue of ambiguous contents". Before doing so, however, it must

> "report to the higher People's Courts within its jurisdiction for review; and if the higher People's Courts consent to [its] accepting the case, it shall report its review opinion

[10] The Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (Trial Implementation) 1988 art.178. Available at *http://www.cietac.org/index.cms* [Accessed February 11, 2013].

[11] CPL 2012 Ch.26 art.271. Available at *http://law.npc.gov.cn:87/treecode/home.cbs?rid=code* (in Chinese) [Accessed February 11, 2013]. Translation by the present author.

[12] Arbitration Law 1994 Ch.5 art.65. Available at *http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm* [Accessed February 11, 2013].

[13] Arbitration Law 1994 Ch.5 art.66.

[14] The reason for restricting the discussion to CIETAC alone is that two matters have recently become controversial and unclear: (1) the precise relationship between CIETAC's headquarters in Beijing (hereinafter CIETAC Beijing) and two of its sub-commissions, CIETAC Shenzhen and CIETAC Shanghai; and (2) whether the term "foreign-related arbitration commissions" relates only to CIETAC and CMAC. Discussion of these issues is beyond the scope of this paper.

[15] In "Circular of the Supreme People's Court on Issues in the People's Courts' Handling of Foreign-related Arbitrations and Foreign Arbitrations" (1995) 18 *Fa Fa*, August 28 (SPC Circular).

> to the SPC. [Acceptance of the] case may be suspended ... [until] the SPC makes its reply."[16]

In addition, whenever a party applies to a People's Court for either (1) enforcement of an award already made by a foreign-related arbitration institution in China or (2) recognition and enforcement of an award made by a foreign arbitration institution, the People's Court must consider (a) whether the award made by such institution may have violated one of the Four Procedural Grounds of Serious Procedural Irregularities (discussed further below) and thus may not be enforced or (b) whether the foreign arbitration institution may not have complied with the "provisions of the international conventions which China has acceded to or the reciprocity principle" and thus the award may not be recognised and enforced. In such situations it is mandatory for the People's Court concerned, before deciding whether to enforce or refuse to recognise and enforce the award, to

> "report to the higher People's Courts within its jurisdiction for review; and if the higher People's Courts consent to not enforce or refuse to recognize and enforce the same, it shall report its review opinion to the SPC. A decision on not to enforce or [to] refuse to recognize and enforce the award may only be made after the SPC makes its reply".[17]

Thus, even if powerful local economic or political interests may be strong enough to influence the proper functioning of the judicial system at the level of the local People's Courts, this hierarchical reporting system serves to prevent them from exerting similar influence all the way up to the SPC or from attempting to influence the proper operation of China's foreign-related arbitration regime.

The Intermediate People's Courts have supervisory jurisdiction over foreign-related arbitration disputes on the grounds of four serious procedural irregularities. They may: (1) set aside an arbitral award; and (2) refuse to enforce an arbitral award.[18] These grounds are:

> "(1) the parties have not had an arbitration clause in the contract or have not subsequently reached a written arbitration agreement;
> (2) the party against whom the application for enforcement is made was not given notice for the appointment of an arbitrator or for the inception of the arbitration proceedings or was unable to present his case due to causes for which he is not responsible;
> (3) the composition of the arbitration tribunal or the procedure for arbitration was not in conformity with the rules of arbitration; or
> (4) the matters dealt with by the award fall outside the scope of the arbitration agreement or which the arbitral organ was not empowered to arbitrate."

These are known as the "Four Procedural Grounds of Serious Procedural Irregularities". There is also one additional ground (the "Public Policy Ground In the Foreign Regime"):

> "If the people's court determines that the enforcement of the award goes against the social and public interest of the country, the people's court shall make a written order not to allow the enforcement of the arbitral award."

The Four Procedural Grounds of Serious Irregularities are (almost) the same as the first four grounds for refusal of recognition and enforcement of an arbitral award specified in

[16] SPC Circular art.1.
[17] SPC Circular art.2.
[18] Arbitration Law 1994 art.70 and CPL 2012 art.274; or CPL 1991 art.260, available at *http://www.npc.gov.cn /englishnpc/Law/2007-12/12/content_1383880.htm* and *http://law.npc.gov.cn:87/page/browseotherlaw.cbs?rid=en &bs=97585&anchor=0#go0* [Both accessed February 11, 2013]; CPL 2007 art.258, available at *http://www.npc.gov .cn/englishnpc/Law/2009-02/20/content_1471601.htm* and *http://www.cietac.org/index.cms* [Both accessed February 11, 2013].

the New York Convention 1958[19] (and are also (almost) the same as the first four grounds for refusal of recognition and enforcement of an arbitral award specified in the UNCITRAL Model Law on International Arbitration 1985[20]).

China's judicial system supports the use of arbitration in foreign-related disputes, as may be seen in, for example, the fact that the Intermediate People's Courts can indirectly make interim measures by way of: (1) an application by the party concerned to CIETAC; and (2) CIETAC referring the same application to the Intermediate People's Court for a decision. The CPL 2012 provides for the preservation of assets:

> "If a party has applied for property preservation measures, the arbitral organ of the People's Republic of China handling cases involving a foreign element shall refer the party's application for a decision to the intermediate people's court of the place where the party against whom the application is made has his domicile or where his property is located."[21]

Likewise, the Arbitration Law 1994 also provides for the preservation of evidence in the foreign regime:

> "If a party to a foreign-related arbitration applies for preservation of the evidence, the foreign-related arbitration commission shall submit his application to the intermediate people's court in the place where the evidence is located."[22]

However, the laws in China do not provide for the arbitral tribunal directly to make an order for interim measures in both the foreign and the domestic arbitration regime.

5. The Domestic Arbitration Regime

The domestic arbitration regime, which comprises hundreds (if not thousands) of local domestic arbitration commissions, is broad, diverse and less focused than the foreign-related regime. As a result its relationship and interaction with China's judicial system is less clear or even to a certain extent subordinate thereto, and this may, arguably, hamper its own development.

The People's Courts enjoy a much wider supervisory jurisdiction over the domestic arbitration regime than over its foreign counterpart. They may set aside an arbitral award on one of the six grounds specified in the Arbitration Law 1994:

> "(1) There is no arbitration agreement;
> (2) the matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission;
> (3) the formation of the arbitration tribunal or the arbitration procedure was not in conformity with the statutory procedure;
> (4) the evidence on which the award is based was forged;
> (5) the other party has withheld the evidence which is sufficient to affect the impartiality of the arbitration; or
> (6) the arbitrators have committed embezzlement, accepted bribes or done malpractices for personal benefits or perverted the law in the arbitration of the case."[23]

[19] New York Convention 1958 art.V, available at *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html* [Accessed February 11, 2013].
[20] UNCITRAL Model Law on International Arbitration 1985 art.36, available at *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html* [Accessed February 11, 2013].
[21] CPL 2012 art.272.
[22] Arbitration Law 1994 art.68.
[23] Arbitration Law 1994 art.58.

The additional ground is: "If the people's court determines that the arbitration award violates the public interest, it shall rule to set aside the award."

Grounds (1) to (3) mirror the Four Procedural Grounds of Serious Irregularities in the foreign arbitration regime (discussed above) whereas grounds (4) to (6) concern serious irregularities involving substantive and personnel issues (hereinafter referred to as the Two Grounds of Serious Substantive Irregularities and One Ground of Personnel Irregularity).

The People's Court has as wide a supervisory jurisdiction over the domestic arbitration regime as over the foreign regime; it may refuse to enforce an arbitral award on one of the six grounds specified in the Arbitration Law 1994 art.63,[24] all of which are exactly the same as the six grounds specified in the Arbitration Law 1994 art.58 (discussed above).

Even though the grounds for setting aside an arbitral award and refusing to enforce an arbitral award are exactly the same, there are two separate supervisory jurisdictions (under two separate provisions of the law) to be exercised by the People's Court and the losing party has the opportunity to object to the arbitral award by, first, applying for the setting aside of an arbitral award in the People's Court in one place and, if unsuccessful, by subsequently applying for refusal to enforce upon the winning party's commencing enforcement proceedings in the People's Court of another place. Sometimes the decisions of the two People's Courts may differ. Thus, the losing party may be able to abuse the two separate supervisory jurisdictions of the People's Court and seriously delay the enforcement of a winning arbitral award and thereby diminish the chances of its succeeding.

By way of contrast, the People's Court has a much narrower supervisory jurisdiction over the foreign-related arbitration regime by way of refusing to enforce a foreign-related arbitral award on the first three (of the aforesaid six) grounds under the CPL 2012 art.274 (identical to the Arbitration Law 1994 art.71).

China's judicial system supports arbitration in the domestic regime by the provision of interim measures. In the past, interim measures could be obtained only indirectly, either by the party concerned applying to the domestic arbitration commission or by a domestic arbitration commission referring the same application to the Intermediate People's Court for its decision. The Arbitration Law 1994 provides for the preservation of assets:

> "A party may apply for property preservation if it may become impossible or difficult for the party to implement the award due to an act of the other party or other causes. If a party applies for property preservation, the arbitration commission shall submit the party's application to the people's court in accordance with the relevant provisions of the Civil Procedure Law. If an application for property preservation has been wrongfully made, the applicant shall compensate the person against whom the application has been made for any loss incurred from property preservation."[25]

The drawback of these provisions is that the processes involved are complex and perhaps time-consuming, and by the time the asset preservation order is made, the assets concerned may have already long been dissipated.

The CPL 2012 has now greatly strengthened judicial support for asset preservation in arbitration[26] by providing that an application for an asset preservation order may even be made at a local People's Court, apart from those that already have jurisdiction under the CPL 2012 Ch.2, that is, those within the jurisdiction of which the asset to be preserved was located even *prior* to the commencement of arbitration (i.e. when the arbitral tribunal had not even been formed). Such application will, no doubt, greatly enhance the chance of success of any asset preservation order to be made and hence the chance of reaping the fruit of the arbitral award to be made by the arbitral tribunal in due course.

In addition, the Arbitration Law 1994 also provides for the preservation of evidence:

[24] CPL 2007 art.213(2); CPL 2012 art.237(2).
[25] Arbitration Law 1994 art.28.
[26] CPL 2012 Ch.9 art.101.

"Under circumstances where the evidence may be destroyed or lost or difficult to obtain at a later time, a party may apply for preservation of the evidence. If a party applies for preservation of the evidence, the arbitration commission shall submit his application to the basic people's court in the place where the evidence is located."[27]

6. The Recent Development of China's Foreign-related Arbitration Regime

The most interesting development of China's foreign-related arbitration regime is the introduction of the CIETAC Arbitration Rules by CIETAC on May 1, 2012 (CIETAC 2012 Rules). These replaced the CIETAC 2005 Rules. It is apparent that the CIETAC 2012 Rules were written with a view to CIETAC's extending its reach not just within but also outside China. In addition, there are a number of the changes which may have a significant impact on the conduct of CIETAC proceedings in the future.

Major changes introduced by the CIETAC 2012 Rules are discussed below.

Arbitral tribunals to grant interim measures

The CIETAC 2012 Rules provide for the arbitral tribunal to make direct orders for conservative and interim measures as follows:

"(2) At the request of a party, the arbitral tribunal may order any interim measure it deems necessary or proper in accordance with the applicable law, and may require the requesting party to provide appropriate security in connection with the measure. The order of an interim measure by the arbitral tribunal may take the form of a procedural order or an interlocutory award."[28]

The laws in China do not provide for arbitral tribunals directly to make interim measures orders in either the domestic or the foreign arbitration regime. It is not clear how an interim measure ordered by an arbitral tribunal is to be recognised by the People's Court and, even if so recognised, to be enforced by the People's Court. Arguably, this provision may be applicable in a situation where the CIETAC arbitration concerned is seated outside mainland China and in a place where an arbitral tribunal is permitted to grant interim measures, for example Hong Kong.[29] Even so, it is doubtful if the mainland court will give effect to an interim measures order made by an arbitral tribunal if enforcement of such order is to take place in China. It therefore remains to be seen whether the CIETAC 2012 Rules art.21.2 will ever be invoked in CIETAC arbitration proceedings.

There seems to be a mismatch between the pace of making laws by China's legislature (the National People's Congress and its Standing Committee) and the desire of foreign-related arbitration institutions in China to create arbitration rules: there is a lack of legal provisions to empower judicial bodies to provide the judicial support needed even under the new CPL 2012. This being so, CIETAC should lobby China's National People's Congress (and/or its Standing Committee) to include, in the future Arbitration Law that will replace the Arbitration Law 1994, a provision ensuring the smooth operation of the CIETAC 2012 Rules art.21.2.

[27] Arbitration Law 1994 art.46.
[28] CIETAC 2012 Rules art.21(2). Available at *http://www.cietac.org/index.cms* [Accessed February 11, 2013].
[29] Under the Arbitration Ordinance s.35, which more or less reproduces the UNCITRAL Model Law 1985 art.17.

Expert witnesses required to give oral evidence

Both the earlier 2005 Rules and the new CIETAC 2012 Rules afford a broad discretion to an arbitral tribunal to conduct its proceedings "in any way that it deems appropriate".[30] However, the CIETAC 2012 Rules now provide that

> "[a]t the request of either party and with the approval of the arbitral tribunal, the expert or appraiser shall participate in an oral hearing and give explanations on the report when the arbitral tribunal considers it necessary".[31]

Consolidation of parallel proceedings

The CIETAC 2005 Rules did not provide for the consolidation of arbitration. The CIETAC 2012 Rules now provide a mechanism for parallel proceedings, with related issues to be consolidated into a single arbitration: CIETAC may consolidate two or more arbitrations pending under these Rules into a single arbitration.[32] In doing so, CIETAC may take into account "any factors it considers relevant" including factors like:

1. "whether all of the claims in the different arbitrations are made under the same arbitration agreement";
2. "whether the different arbitrations are between the same parties"; or
3. "whether one or more arbitrators have been nominated or appointed in the different arbitrations".

These factors mirror the consolidation requirements laid down in the ICC 2012 Rules.[33]

Seat of arbitration outside China

The seat of an arbitration determines both the law governing the arbitration procedure and the courts which will retain supervisory jurisdiction over the arbitration. The CIETAC 2012 Rules allow CIETAC to decide that the seat be "another location having regard to the circumstances of the case", and this could be a city outside Mainland China.[34] This is an example of CIETAC's friendly attitude towards users of international arbitration in extending its reach outside China by making it possible for a CIETAC-administered arbitration to have its seat outside China. This seems to be in line with ICC's arbitration practice.

Use of language other than Chinese

Under the old CIETAC 2005 Rules, in the absence of party agreement on the language of the arbitration, the arbitration must be conducted in Chinese. The new CIETAC 2012 Rules allow CIETAC to determine that the language of arbitration shall be "any other language ... having regard to the circumstances of the case".[35]

Default provision for administration by CIETAC Beijing

Under the old CIETAC 2005 Rules, where no particular sub-commission of CIETAC was designated for administering a dispute, the party commencing proceedings was entitled to express a preference. The other party, however, had the right to object, and occasionally

[30] CIETAC 2012 Rules art.33.
[31] CIETAC 2012 Rules art.42.3.
[32] CIETAC 2012 Rules art.17.1.
[33] ICC 2012 Rules art.10. Available at *http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/* [Accessed February 11, 2013].
[34] CIETAC 2012 Rules art.7.2.
[35] CIETAC 2012 Rules art.71.1.

this could cause delay if parties were unable to reach a consensus on the entity to be appointed. The CIETAC 2012 Rules therefore provide that if a CIETAC arbitration clause does not specify a particular sub-commission, CIETAC Beijing will administer the arbitration.[36]

It is possible that art.2.6 may have caused the rift referred to earlier[37] between CIETAC Beijing and two of its sub-commissions, CIETAC Shenzhen and CIETAC Shanghai.

Use of arbitration rules of other arbitration institutions in CIETAC-administered arbitrations

The new CIETAC 2012 Rules provide that

> "[w]here the parties agree to refer their dispute to CIETAC for arbitration but have agreed on ... the application of other arbitration rules",[38]

CIETAC "shall perform the relevant administrative duties". In other words, CIETAC will administer not only ad hoc arbitrations under, for example, the UNCITRAL Arbitration Rules, but also proceedings commenced under the rules of other arbitral institutions. This shows CIETAC's friendly attitude towards users of international arbitration.

Even so, not all the rules of other arbitral institutions may be smoothly administered by CIETAC. There may be situations where it may not be practicable and/or it may even be unworkable for CIETAC to do so. One example is the ICC Arbitration and ADR Rules 2012 (the ICC 2012 Rules) which stipulate that only the ICC Court is authorised to administer ICC arbitration proceedings.[39] It is not advisable for arbitration clauses to specify that one arbitral institution be permitted to administer arbitral proceedings to be brought under the rules of another arbitral institution.

Appointment of arbitrators in multi-party disputes

The CIETAC 2005 Rules provide only for the appointment of an arbitrator for the party in default. Under the CIETAC 2012 Rules, CIETAC will, in multi-party cases where there are multiple claimants and/or multiple respondents in any proceedings and the multiple claimants and/or respondents are unable to jointly nominate an arbitrator, appoint all members of the tribunal and designate the presiding arbitrator.[40] The objective of the new rule is believed to be to minimise the risk of a challenge to the arbitral award on the grounds of unfair treatment.

Conciliation/mediation in CIETAC arbitrations

The CIETAC 2012 Rules allow CIETAC (instead of the arbitral tribunal itself) to "assist" the settlement of disputes "in a manner and procedure it considers appropriate" including through the process of mediation part-way through arbitral proceedings, if requested to do so by the parties.[41] However, the CIETAC 2012 Rules do not indicate who will be responsible for the mediation (i.e. whether this is to be conducted by the administrative staff of CIETAC or whether CIETAC will engage professional mediators on the parties' behalf). Even so,

[36] CIETAC 2012 Rules art.2.6.

[37] The reason for restricting the discussion to CIETAC alone is that two matters have recently become controversial and unclear: (1) the precise relationship between CIETAC's headquarters in Beijing (hereinafter CIETAC Beijing) and two of its sub-commissions, CIETAC Shenzhen and CIETAC Shanghai; and (2) whether the term "foreign-related arbitration commissions" relates only to CIETAC and CMAC. Discussion of these issues is beyond the scope of this paper.

[38] CIETAC 2012 Rules art.4.3.

[39] ICC 2012 Rules art.1(2).

[40] CIETAC 2012 Rules art.27.3.

[41] CIETAC 2012 Rules art.5.8.

this new provision is in line with enhancing the status of mediation within the civil procedural framework in China's recent civil procedure reform (see below).

China's recent civil procedure reform may also further strengthen the existing "arb-med" procedures which arbitral tribunals already have a wide discretion to conduct in settling parties' disputes.[42]

Appointment of arbitrators by CIETAC Chairman

The CIETAC 2012 Rules outline the criteria which the Chairman of CIETAC, in the absence of party agreement, may take into consideration when appointing arbitrators:

1. the law of the contract;
2. the place of arbitration;
3. the language of arbitration;
4. the nationalities of the parties; and
5. "any other factors considered to be relevant".[43]

The CIETAC 2012 Rules do not, however, require that the presiding or sole arbitrator be of a different nationality to the parties. If this is desirable, therefore, parties should make express provision for this in their arbitration agreements.

Summary procedure

Under the CIETAC 2005 Rules, parties may apply for a "summary procedure" (arguably a form of fast-track arbitration) if the amount in dispute is below the threshold of RMB 500,000. Cases heard under the summary procedure will be determined by a sole arbitrator unless otherwise agreed by parties and the time limit for rendering an award is three months from the constitution of the tribunal, as opposed to six months under the standard procedure.

Under the CIETAC 2012 Rules, the relevant threshold for the summary procedure has been increased from RMB 500,000 to RMB 2 million. Furthermore, if the amount in dispute later exceeds the threshold because of, say, amendments to claims or counterclaims, the summary procedure will continue to apply unless otherwise agreed by the parties.[44] This replaces the CIETAC 2005 Rules requirement that whenever a case exceeded the RMB 500,000 threshold, it would automatically be transferred to the standard procedure unless otherwise agreed.

7. China's Recent Civil Procedure Reform and its Impact on the Domestic and Foreign-related Arbitration Regimes

The CPL 2012 makes no provisions to enhance the status of either the domestic or the foreign-related arbitration regime or to unify them. So the existing division between the two regimes will remain as it is in the near future. Thus, the People Court's wide supervisory jurisdiction over the domestic arbitration regime by way of setting aside an arbitral award on one of the Four Procedural Grounds of Serious Irregularities[45] and the Two Grounds of Serious Substantive Irregularities and One Ground of Personnel Irregularity will also remain. Likewise, the People Court's wide supervisory jurisdiction over the domestic arbitration regime by way of refusing to enforce an arbitral award on one of the six grounds discussed earlier[46] will also remain. This situation may, arguably, hamper the healthy growth of the

[42] CIETAC 2012 Rules art.47(7).
[43] CIETAC 2012 Rules art.28.
[44] CIETAC 2012 Rules art.54.
[45] Arbitration Law 1994 art.58.
[46] Arbitration Law 1994 art.58 and art.63; CPL 2007 art.213(2); and CPL 2012 art.237(2).

domestic arbitration regime in China.[47] Likewise, the broad and diverse nature of the domestic arbitration regime will also remain.

The CPL 2012 does contain provisions to strengthen the arbitration process and hence to enhance the status of arbitration as a mean of dispute resolution. I now discuss some of the relevant changes.

Enhancing the status of mediation within the civil procedural framework

The status of mediation within the civil procedural framework is enhanced by, first, making it compulsory for parties to take part in mediation after legal proceedings have commenced and, secondly, recognising the legal status of any agreement reached by the parties after mediation by way of streamlining the procedure for converting such agreement to a proper court order with a view to enforcing it.[48]

Witnesses are required to give oral evidence if called to do so by the People's Court

The CPL 2007 provides only that "[a]ll units and individuals who have knowledge of a case shall be under the obligation of giving testimony in court."[49]

However, this requirement falls short of making the obligation mandatory, with the corresponding legal sanction whenever such obligation is not complied with. The CPL 2012 provides that "[u]pon the People's Court's notification, witnesses should attend the Court in testifying".[50]

This development is in line with and expands the CIETAC 2012 Rules art.42.3 that "[e]xpert witnesses [are] required to give oral evidence if called to do so by the Arbitral Tribunal."

Scope of interim measures expanded

The old "property preservation" order[51] has now been expanded to become a "preservation" order;[52] the scope of interim measures has been expanded to include, not just "property preservation" orders, but also Mareva injunctions (orders prohibiting the taking of actions) and mandatory injunctions (those ordering the taking of action). These powers will greatly strengthen the scope and variety of interim measures in achieving justice for parties by catering for different circumstances.

Thus, the mechanism for indirectly obtaining an interim measures order in China by applying to the People's Court during arbitration[53] has now been expanded because the People's Court has ordered that the scope of an interim measures order be enlarged.[54]

Pre-arbitration asset preservation

The CPL 2012 provides that pre-arbitration asset preservation, as well as pre-action asset preservation, is now also possible.[55] This provision mirrors the new ICC 2012 Rules art.29

[47] The experience of the Guangzhou Arbitration Commission, a domestic arbitration commission in Guangzhou, China, may shed some light on the present situation and future development of local domestic arbitration commissions in China. See *http://www.ccarb.org/news_detail.php?VID=581* [Accessed February 11, 2013].

[48] CPL 2012 Ch.15 art.122 and arts 194–195.

[49] CPL 2007 art.70.

[50] CPL 2012 art.73.

[51] See CPL 2007 Ch.9 arts 92–99.

[52] In CPL 2012 Ch.9 arts 100–105.

[53] As laid down in the Arbitration Law 1994 art.68 (for the foreign regime) and art.46 (for the domestic regime).

[54] CPL 2012 Ch.9 arts 100–105.

[55] CPL Law 2012 art.101.

(Emergency Arbitrator). Rather surprisingly, the CIETAC Rules 2012 do not include any such provision and in this regard, therefore, should be updated.

8. Conclusion

With the advent of globalisation, international arbitration activities have expanded markedly in recent years. Major international arbitration centres have modernised their arbitration rules to meet rapidly changing business needs and demands, in particular those of users of international arbitration. Examples include the Hong Kong International Arbitration Centre (HKIAC) in 2008; and the ICC in 2012, which produced its ICC 2012 Rules. However, while it is essential for international arbitration centres to revise their arbitration rules, it is equally essential that the domestic laws of their home countries are updated to ensure that they are able to provide appropriate judicial support for arbitration. Any mismatch in the pace of modernising arbitration rules and domestic laws may prevent arbitration from functioning effectively.

In China's foreign-related arbitration regime, CIETAC has kept pace with the global development of international arbitration by introducing the CIETAC 2012 Rules. CIETAC clearly aims to meet the needs of users of international arbitration, to compete with other international arbitration institutions and to extend its reach outside China. This being so, there is a corresponding need for the revision of relevant Chinese laws to support China's foreign-related arbitration regime in meeting the requirements of international arbitration. The strengthening of the foreign-related arbitration regime has become even more necessary. The recent enactment of the CPL 2012 has gone some but not all the way to achieve this end. The National People's Congress (and/or its Standing Committee) may see that the solution is to enact a new Arbitration Law to replace the Arbitration Law 1994 in the near future.

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