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Arbitration and Conciliation: Resolving Commercial Disputes in China

SHI WEISAN*

I. ARBITRAL BODIES

In order to meet the needs of China's developing foreign trade and ocean shipping business, the China Council for the Promotion of International Trade (CCPIT) set up the Foreign Trade Arbitration Commission (FTAC) in 1956 and the Maritime Arbitration Commission (MAC) in 1959. These agencies were set up in accordance with two decisions adopted by the former Government Administration Council in 1954 and the State Council in 1958, respectively. In February 1980, to keep pace with the further expansion of China's economic and trade relations with foreign countries, the State Council renamed the Foreign Trade Arbitration Commission as the Foreign Economic and Trade Arbitration Commission (FETAC). Along with the name change, FETAC's jurisdiction was enlarged, and its members increased in number. FETAC handled disputes arising from foreign trade and economic transactions with foreign countries. It also resolved any disputes arising from foreign trade with agencies created to purchase or sell merchandise. Among the disputes under FETAC's jurisdiction were those regarding material processing, parts assembly, compensation and trade. Although FETAC was allowed to handle a wide scope of disputes, it heard only those cases in which an arbitration agreement had been concluded between the disputing parties.

On June 21, 1988, the State Council of the People's Republic of China approved the renaming of FETAC as the China International Economic and Trade Arbitration Commission (CIETAC). CIETAC's jurisdiction covers all disputes arising from international economic and trade transactions.¹ On the same date, the Maritime Arbitration Commission was renamed as the China Maritime Arbitration Commission (CMAC).

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1. See Appendix, *infra*, for a more detailed discussion and comparison of the rules under FETAC and CIETAC.

A. Practice

Arbitration is rather popular in China. Most sales contracts and investment contracts signed between Chinese and foreign parties include arbitration clauses. Many arbitration cases between Chinese and foreign parties occur inside and outside of China.

Two arbitration commissions and one conciliation center exist in China for the purpose of settling international commercial and maritime disputes. They are CIETAC, CMAC, and the Beijing Conciliation Centre (BCC).

CIETAC currently has a subcommission in the Shenzhen Special Economic Zone in the south of China which handles local cases involving foreign interests. It will soon have another subcommission in Shanghai. CIETAC is now handling more than 250 arbitration cases. This figure exceeds the number of cases being handled by most of the other international arbitration bodies. In addition, CMAC is arbitrating thirty cases and BCC is conciliating eleven cases. These cases are all international cases involving parties from the United States, West Germany, the United Kingdom, Canada, France, Japan, Italy, Poland, Czechoslovakia, Yugoslavia, Norway, Cuba, Liberia, Singapore, Peru, Pakistan, India, Spain, Hungary, East Germany, Austria, Thailand, Fiji, Lebanon, Panama, Hong Kong and the Macao regions.

B. Arbitration Agreements, Arbitrators, and the Arbitration Tribunal

Under Chinese law, an arbitration agreement can be made in any form, but it must be expressed in writing. Letters, telexes, telegrams or telefaxes are all sufficient writings. An agreement to submit an existing dispute to arbitration and an arbitration clause in a contract relating to future disputes are both recognized as valid arbitration agreements. In practice, however, the Chinese arbitration commissions exercise jurisdiction over any case in which one party applies for arbitration and the other party responds. This is true even if the parties have not previously concluded an arbitration agreement.

The claimant and the respondent may each appoint an arbitrator, or entrust the chairman of CIETAC to appoint one on their behalf. Both parties, however, must use an arbitrator from CIETAC's Panel List. The Panel List of CIETAC is a list of arbitrators who have special expertise or practical experience in the fields of international trade, scientific technology, or law. These arbitrators may be of either Chinese or foreign citizenship.

The use of foreigners as arbitrators is a major development in the new rules. According to the old Provisional Rules of Arbitration, only Chinese citizens could be arbitrators. The new amendment, however, takes into account the practice of international commercial arbitration and expands the list of arbitrators to include foreign citizens. Foreign citizens therefore can be invited to act as arbitrators in China. Undoubtedly, this would give the parties, especially the foreign parties, a much wider choice in appointment of arbitrators, and would strengthen foreign parties' confidence in conducting arbitration in China.

The arbitration tribunal is usually composed of three arbitrators, but a sole arbitrator will also suffice. According to Article 14 of the Rules of Arbitration, where the tribunal is composed of three arbitrators, each party appoints one arbitrator from the Panel List, or authorizes the Chairman of the Arbitration Commission to appoint an arbitrator on his behalf. The third, and presiding, arbitrator is then selected by the Chairman of the Arbitration Commission. These three arbitrators form an arbitral tribunal to hear the case. Should the respondent refuse to choose an arbitrator within the time specified, the Chairman of the Arbitration Commission has the right to appoint the arbitrator for the respondent.

In Article 15, it is provided that if the parties agree to have a sole arbitrator hear the case, the parties should jointly choose, or authorize the Chairman of the Arbitration Commission to appoint, a sole arbitrator from the members on the Panel List. Should the parties fail to agree upon the sole arbitrator within the specified time limit, the Chairman of the Arbitration Commission should make the appointment.

C. The Withdrawal of Arbitrators

Articles 18 through 21 provide for the withdrawal of the arbitrators. These provisions are significant additions to the new Rules of Arbitration. The object of these provisions is to ensure impartiality by avoiding any possible bias in arbitration by interested arbitrators.

According to the Rules of Arbitration, if the appointed arbitrator has an interest in the case, he should petition the Arbitration Commission for withdrawal. The parties also have the right to make such a petition in writing to the Arbitration Commission for the withdrawal of the arbitrator. Requests for withdrawal should be submitted prior to the first hearing. However, if the reason for withdrawal

arises or becomes known after the first hearing, the request may be made after the first hearing, but before the conclusion of the arbitration. The Chairman of the Arbitration Commission makes the decision concerning the withdrawal of arbitrators. In those cases where an arbitrator is unable to perform his duties due to withdrawal or other reasons, the party who chose the withdrawing arbitrator should appoint a new one according to the original procedures.

II. THE MAIN FEATURES OF CHINA'S FOREIGN ECONOMIC AND TRADE ARBITRATION

One of the unique characteristics of Chinese international economic and trade arbitration is the integration between conciliation and arbitration. The tradition of using conciliation to settle civil disputes in China dates back to the ancient past. CIETAC, and formerly FETAC, have carried forward this tradition. Conciliation is preferred in settling disputes whenever possible, but it is neither a necessary nor compulsory step in the arbitration proceeding. If conciliation is successful, a settlement agreement will be reached and the case will be closed by the disputing parties. If a settlement agreement cannot be reached after a reasonable period of time, or if one party is not willing to go on with the conciliation proceedings, the process of conciliation stops, and the arbitration tribunal will initiate a hearing according to the arbitration procedure.

Conciliation in China may be conducted in two ways. One is to have the secretariat of CIETAC preside over the conciliation before the arbitration tribunal is formed. Alternatively, after the arbitration tribunal has been set up, the tribunal may preside over conciliation.

In the absence of an arbitration agreement or clause, the secretariat may also accept the application for conciliation upon the request of the parties. This differs from cases where there is an arbitration agreement or clause. In those cases, where conciliation fails or where one party refuses to go on with conciliation, the Arbitration Commission has no jurisdiction to conciliate the case.

Not too long ago, FETAC, together with arbitration institutions of other countries, developed a new form of conciliation, known as "joint conciliation." Under this procedure, if the parties to a dispute were willing to conciliate, the Chinese party applied to FETAC and the foreign party applied to the corresponding arbitration institution in its own country for joint conciliation. Upon such application, FETAC and the foreign arbitration institution each appointed one

conciliator to jointly conciliate the case. If the conciliation succeeded, the dispute was then settled with the signing of a conciliation agreement. However, if it failed, the dispute would thereafter be referred to arbitration in accordance with the arbitration clause of the contract.

In the past few years, FETAC has successfully settled several disputes involving large amounts of money in Sino-United States trade by joint conciliation. An agreement has been concluded between FETAC and the American Arbitration Association (AAA) that the two institutions shall cooperate in "joint conciliation." A similar agreement has also been signed between FETAC and the Italian Association of Arbitration.

To promote further use of conciliation in settling international trade disputes, FETAC established the "Beijing Conciliation Center" in May 1987, and the Federal Republic of Germany established the "Beijing-Hamburg Conciliation Center" in Hamburg. These two centers drafted the Beijing-Hamburg Rules of Conciliation and signed a bilateral cooperation agreement. In the agreement, both sides agreed to encourage the parties to include a conciliation clause in their contracts and submit their disputes to conciliation. Conciliations are to be conducted according to the Beijing-Hamburg Rules of Conciliation in either Beijing or Hamburg. To date, the two centers have conducted more than ten conciliation cases.

Since their establishment, FETAC and CMAC have settled numerous international trade and maritime disputes. In the early 1980s, the two commissions handled approximately thirty arbitration cases and 100 conciliation cases each year. During the mid-1980s, their caseload greatly increased. In 1987 alone, FETAC handled 194 arbitration cases and CMAC handled thirty-nine arbitration cases. These figures demonstrate that with the development of international trade in China, increasingly more trade disputes arise. However, these figures also reflect the willingness of both the Chinese and foreign parties to submit their disputes to FETAC (or now CIETAC) for arbitration when disputes do arise. This is due, in part, to the fact that FETAC has won great international prestige.

III. ARBITRATION PROCEDURAL RULES AND ARBITRATION AWARDS

A. Application, Pleadings, and Counter-Claims

Application for arbitration is a legal requirement to begin the

arbitration procedure. In accordance with Article 6 of the Rules of Arbitration, the Arbitration Commission will only hear a case upon the written application of the claimant. At the time of application, the claimant shall appoint an arbitrator from the Panel List or authorize the Chairman of the Arbitration Commission to appoint the arbitrator. Furthermore, the claimant has to deposit arbitration fees as provided by the Tables of Arbitration.

According to Article 8 of the Rules of Arbitration, the respondent should, within twenty days after receipt of the application, appoint an arbitrator from the Panel List, or authorize the Chairman of the Arbitration Commission to appoint an arbitrator on his behalf. Within forty-five days after receipt of the application, the respondent must submit his written pleadings and evidence to the commission. If the respondent has any counter-claim in the case, the counter-claim should be made within the same time limit set for the submission of pleadings. In the counterclaim, the counterclaimant must specify its claims and the supporting facts and evidence. The counterclaimant must also pay a deposit of arbitration fees according to the relevant provisions.

Both the claimant and respondent may confer with the arbitration commission on matters related to the proceedings either in person or by attorney. The attorney may be either a Chinese or foreign citizen, but he or she must submit a letter of authorization to the Arbitration Commission.

B. Interim Measures of Protection

Interim measures of protection are temporary compulsive measures restricting the property of the respondent during the arbitration procedure. According to Chinese law, the decision to take interim protection measures can only be made by Chinese courts of law. However, Article 13 of the Rules of Arbitration provides that the Arbitration Commission may, upon request of the parties or according to provision of Chinese law, submit the matter to a Chinese court near the respondent's property or near the arbitration tribunal, for a ruling authorizing such measures.

C. Hearings

According to Article 22 of the Rules of Arbitration, the arbitral tribunal should normally hold one or more hearings. Upon the request of both parties, or with their consent, the case may also be arbi-

trated without a hearing, and handled through the written pleadings alone. The latter applies to cases where the facts are simple, and written materials alone would suffice to ascertain the liabilities of the parties. Hearings are closed to the public.

The arbitration tribunal, in consultation with the secretariat, will decide the date of the hearing and notify both parties thirty days prior to the hearing. Parties with justifiable reasons may ask for postponement of the hearing, but such requests must be submitted to the secretariat twelve days prior to the hearing. The Arbitration Commission will jointly decide, after consultation, whether postponement will be permitted and notify the parties accordingly. The hearing normally takes place in Beijing where the Arbitration Commission is located, but the case may also be heard elsewhere in China, subject to the approval of the chairman of CIETAC.

According to Article 26, the parties shall produce evidence in support of the facts upon which their claims or pleadings are based. In other words, the claiming or pleading party bears the burden of proof, but the tribunal may also investigate and collect evidence on its own initiative when it deems it necessary. Reliability of the evidence shall be judged by the arbitration tribunal.

The Rules of Arbitration also provide that the arbitration tribunal may engage experts for consultation on issues requiring expert knowledge. These experts, or authenticators, may be Chinese or foreign citizens, or foreign institutions.

Article 29 of the Arbitration Rules provides that during the hearing, if one party or his agent fails to appear before the tribunal, the tribunal may, upon the request of the other party, proceed with the hearing and enter a default judgment against the absent party. The objective of this article is to prevent situations where one party, especially the respondent, refuses to appear at the hearing and obstructs the tribunal from performing its functions.

The Civil Procedural Law provides: "If some of the facts in a case being tried by the people's court are already evident, the court may pass judgment on those facts first." Accordingly, partial and interim awards in arbitration may be made when the facts are evident and the arbitration tribunal deems it necessary.

The award is decided by majority vote if the tribunal is composed of three arbitrators. Reasons for the decision must be stated, and the award must be in writing. No time limit for granting an award is

specified in the existing rules. An arbitral award need not be registered in the court, but the award is final, and no appeal is permitted.

If the Chinese party fails to comply with the award made by the Chinese Arbitration Commission, the foreign party may apply to the Intermediate People's Court in the location of the Arbitration Commission. The foreign party, in order to enforce the award, may also apply to the Intermediate People's Court where the property in question is located.

If an award is made to a foreign party outside of China, but in a country that is a member of the 1958 New York Convention, and the Chinese party fails to execute the award, the foreign party may apply to the Intermediate People's Court where the property of the Chinese party is located. The party may also apply to the Intermediate People's Court where the Chinese party is dwelling for enforcement of the award in accordance with the 1958 New York Convention. However, it must be mentioned that China made both a "Reciprocity Reservation" and a "Commercial Reservation" when it acceded to the Convention. Moreover, application for recognition and enforcement of foreign arbitral awards in China is limited to those arbitral awards made in other contracting states after April 22, 1987, the date on which the Convention came into effect in China.

The Chinese and foreign parties to a sales contract are free to choose which substantive law will govern their dispute. If they are silent as to their choice of law, the arbitration tribunal shall decide which law to apply. The arbitration tribunal must apply the law which has the closest connection with the contract. Thus, the controlling law of the jurisdiction where the contract was concluded or performed, or the controlling law of the jurisdiction where the arbitration body is located may apply. Chinese law, however, must be applied to contracts for investment in China as this is the world-wide practice.

APPENDIX

LAW AND RULES

On May 6, 1954, the People's Republic of China (PRC), through the Administration Council of the Central People's Government, adopted a decision to set up an arbitration commission in China. Basic rules of arbitration were laid down in that decision. In 1956, the Foreign Trade Arbitration Commission was established, along with detailed arbitration rules of procedure. In 1980, the name of the

Commission was changed to the Foreign Economic and Trade Arbitration Commission (FETAC), but its rules remained unchanged. In 1982, the PRC implemented, on a trial basis, its Civil Procedure Law which set forth important provisions for arbitration involving foreign interests. The relevant provisions are as follows:

Article 192. When a dispute arises from the foreign economic, trade, transport or maritime activities of China, if the parties have reached a written agreement to submit the dispute for arbitration to the foreign affairs arbitration agency of the PRC, they shall not bring a suit in a people's court

If a dispute arises between foreign enterprises or organizations concerning economic, trade, transport or maritime activities, the parties may, in accordance with their written agreement, submit the dispute for arbitration to the foreign affairs arbitration agency of the PRC

Article 193. Once an arbitration award has been made on a case by the foreign affairs arbitration agency of the PRC, the parties shall not file a suit in a people's court.

Article 194. When the foreign affairs arbitration agency of the PRC, upon the application of a party, considers it necessary to take preservative measures, it shall request an order from the Intermediate People's Court in the locality of the property of the person against whom such action is directed or from the Intermediate People's Court in the place where the arbitration agency is located.

Article 195. If one party fails to comply with the award made by the foreign affairs arbitration agency of the PRC, the other party may apply to the Intermediate People's Court in the place where the arbitration agency is located, or to the Intermediate People's Court in the locality of the property in question for enforcement of the award in accordance with the relevant provisions of this law.

Many other laws and regulations of the PRC have provisions concerning arbitration involving foreign interests. Examples include: the Law on Chinese-Foreign Equity Joint Ventures; the Regulations on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises; and the Law on Economic Contracts Involving Foreign Interests. According to these laws and regulations, the parties to a sales contract or an investment contract are free to negotiate and decide whether to conduct their arbitration inside or outside China.

In September 1988, the Foreign Economic and Trade Arbitration Commission was renamed the China International Economic and

Trade Arbitration Commission (CIETAC) and its arbitration rules of procedure were amended. The amended rules came into force on January 1, 1989. Major changes in the rules include the following:

1. The jurisdiction of the Commission is enlarged to take cognizance of cases between Chinese and foreign parties, and between foreign parties and between Chinese parties involving foreign factors.

2. Non-Chinese citizens will be able to join the panel of arbitrators of the Commission.

3. The presiding arbitrator in the arbitration tribunal shall be appointed by the Chairman of the Commission instead of being chosen by the appointed arbitrators.

4. Hearings shall be conducted in closed sessions instead of open sessions as previously done in accordance with the old rules.

5. Provisions are laid down for challenging arbitrators by the parties.

6. Consolidated arbitration can be carried out according to the new rules.

7. The Commission and the arbitration tribunal may conciliate the cases under their cognizance and if conciliation is successful, the arbitration tribunal shall make an award in accordance with the contents of the settlement agreement reached by and between the parties through conciliation.

Fora for the Resolution of International Business Disputes When Doing Business with the People's Republic of China

DANIEL M. KOLKEY*

It is an unfortunate fact of legal life that dispute resolution clauses are often given little thought during negotiations leading up to an international commercial agreement. The content of a dispute-resolution clause, however, can very well determine the outcome of a claim, and may even deter litigation of the dispute itself. If the clause provides for the selection of arbitrators who are more attune to the

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