the Latest Development in CIETAC Arbitration

China's rapid economic development continues unabated in 2008 and much of this growth has been driven by foreign investment and other business transactions between Chinese and foreign companies. A natural consequence of all this economic activity has been a steady rise in the number of disputes between Chinese and foreign parties and commercial arbitration has become a preferred dispute resolution. China's history of arbitration can be traced back to 1950s, when the foreign-related arbitration institutions, currently known as China International Economic and Trade Arbitration Commission (CIETAC) was founded. In 1994, China promulgated its first ever arbitration statute, which has embraced most modern principles underlying commercial arbitration and is regarded as a milestone in China's history of arbitration. The past ten years have witnessed a fast increase of the arbitration caseload. The success shall be attributed to the introduction of the arbitration statute and

China's policy in favor of resolving disputes through arbitration.

Today my presentation will focus on the latest development in CIETAC arbitration, highlighted by the introduction of CIETAC Rules 2005.

1. History and Structure of CIETAC

CIETAC is the single leading arbitration institution in China in terms of its international caseload, overall amount involved in its cases, highly internationalized procedure and reputation in the world.

CIETAC was set up in 1956 under the China Council for the Promotion of International Trade (CCPIT). It handled only foreign-related (international) disputes before 1998, but has accepted both domestic and foreign-related disputes since then.

CIETAC has its Headquarters in Beijing , the Shanghai Sub-Commission in Shanghai and the South China Sub-Commission located in Shenzhen. Making up one institution, they use the same arbitration rules and Panel of Arbitrators and they exercise the same arbitration jurisdiction. From 2008, CIETAC has just opened an International Economic and Financial Arbitration Center in Tianjin and the Southwest Sub-Commission located in Chongqing.

In order to meet the growing needs for arbitration service across China, CIETAC has also opened 22 liaison offices in different regions of China or in conjunction with specific business associations to provide parties with convenient arbitration services.

Apart from its arbitration business, CIETAC also established a Domain Name Dispute Resolution Center (also known as the Online Dispute Resolution Center) with an aim to provide dispute resolution services in the area of intellectual property and information technology. The Center has formulated separate procedural rules for resolving disputes over .CN domain names and generic top-level domain names. The domain name dispute resolution proceedings administered by CIETAC shall be conducted via the Internet. CIETAC is competent to provide the parties with the expeditious cheap effective online dispute resolution service.

2. Panel of Arbitrators

Cietac has revised the panel of Arbitrator in 2008.The new panel of Arbitrator came into effect as from May 1,2008.It composed of roughly 1000 arbitrators, who are domestically or internationally renowned experts in arbitration or in a particular trade. Among them, nearly 300 foreign arbitrators are from more than 30

jurisdictions. *There are 12 Aus Arbitrators in the cietac' panel of Arbitrators. The criteria to be a CIETAC arbitrator is subject to provisions of Chinese arbitration law. Parties may impose additional qualifications to arbitrators.*

3. The Caseload

In its history of over 50 years, CIETAC has handled over 14,000 cases in total involving parties from over 40 countries and regions, most of which are foreign-related (international) cases. In terms of caseload, CIETAC is one of the busiest arbitration centers in the world. In recent years, CIETAC's caseload remains stable at an annual number of 800 to 1000 cases and demonstrates a steady increasing trend. In 2008, CIETAC established a new record by accepting 1230 new cases and resovled a total of 1097 cases, with a total claim amount of RMB 20.9bil. There are 4 cases involved AUS parties. The increasing caseload has to do with both China's rapid economic growth and CIETAC's efforts in bringing its procedure into compliance with international norms.

The past twenty years ,disputes that have been submitted to cietac for arbitration have grown in categories. At the moment, CIETAC is administering disputes arising from transactions in the following business

sectors: international trade, joint venture (investment), processing and compensation trade, construction, real estate, finance, insurance, intellectual properties, advertising, etc. The growth in CIETAC's international cases has placed it in the major leagues of arbitration institutions, along with the Arbitration Institute of Stockholm Chamber of Commerce, the Arbitration Court of International Chamber of Commerce, the American Arbitration Association, and the London Court of International Arbitration.

4 .CIETAC Rules 2005

CIETAC has revised its Procedural Rules for six times in its history and the current Rules came into force on May 1 2005. They represent the most major revision of the arbitral rules in the past quarter century. The changes made are designed to respect the party autonomy at a higher level, to streamline the procedure for greater efficiency and economy and to fill in certain gaps. They also serve to increase the transparency of the arbitral process for the benefit of the parties. As a matter of fact, the CIETAC Rules 2005 are in general compliance with the international norms and standards, for instance, parties are free to agree upon a variety of matters, such as the language of arbitration, the seat of arbitration, the applicable law and the nationality of arbitrators, and the parties are even free to agree on the application of arbitration rules other than the CIETAC

Rules or on any modification of the CIETAC Rules. The Rules 2005 have not only been warmly welcomed by the legal community, but also set an example for other Chinese arbitration institutions.

Let me now briefly review some significant changes that make the CIETAC Rules 2005 unique in mainland China.

1. Jurisdiction

(1) Scope of Cases

Under Article 3 of the 2005 Rules, CIETAC may accept the following three categories of cases in terms of origins of the parties:

a. International or foreign-related disputes;

b. Disputes related to the Hong Kong SAR, the Macao SAR or the Taiwan region;[1]

b. Domestic disputes.

As a matter of fact, the ambit of CIETAC's jurisdiction has not been enlarged by the 2005 Rules. Article 3 simply re-categorizes cases that

[1] These disputes are deemed foreign-related ones under the Chinese law as these regions, though renegade parts of China, are different jurisdictions.

CIETAC has been assuming jurisdiction in order to avoid confusion caused by the six categories that were more or less ambiguously defined in Article 2 of the Rules 2000.[2]

(2) Deciding Challenges to the Jurisdiction

In most modern arbitration statutes and the majority of institutional arbitration rules, arbitrators have the jurisdiction to determine their own jurisdiction in the first place,[3] which is known as the "*Kompetenz-Kompetenz*" principle. China's Arbitration Law 1994, however, allows a party to challenge the validity of an arbitration agreement either before the arbitration institution or before the court. An arbitral tribunal has no power to decide its own jurisdiction under the law.

CIETAC Rules 2005 made some progress in this regard. Under Article 6.1 of the Rules, CIETAC "shall have the power to determine the

[2] Under the Rules 2000, CIETAC resolves, by means of arbitration, disputes arising from economic and trade transactions of contractual and non-contractual nature, which include:
(1) International or foreign-related disputes;
(2) Disputes between foreign investment enterprises or between a foreign investment and a Chinese legal person, physical person and/or economic organization;
(3) Disputes between foreign investment enterprises or between a foreign investment enterprise and a Chinese legal person, physical person and/or economic organization;
(4) Disputes arising from project financing, invitations to tender and bidding submission, project construction or other activities conducted by a Chinese legal person, physical person and/or other economic organization which utilize capital, technology or services from foreign countries, international organization or from the Hong Kong SAR, the Macao SAR and the Taiwan region;
(5) Disputes that may be taken cognizance by CIETAC in accordance with special provisions of, or upon special authorization from, the laws or administrative regulations of the People's Republic of China; and
(6) Any other domestic disputes that the parties have agreed to arbitrate by CIETAC.

[3] Such determination is preliminary as the court may eventually review the jurisdiction issue in the proceedings for setting aside or enforcing the award.

existence and validity of an arbitration agreement and its jurisdiction over an arbitration case," but may "delegate such power to the arbitral tribunal" when necessary. This fresh move evidences CIETAC's efforts in advancing the "*Kompetenz-Kompetenz*" principle and is the most pragmatic method conceivable to achieve that purpose under the current legislation.

2. Arbitration Agreement: the Written Form

China's Arbitration Law 1994 requires that the arbitration agreement should be in writing. However the law and the previous CIETAC Rules did not define the term "in writing."

The Rules 2005, in Article 5.3, list several forms of agreement that are considered to be "in writing." An arbitration agreement is in writing if it is contained in a tangible form of a document such as a contract, letter, telegram, telex, facsimile, EDI or email. This definition is in full compliance with the definition of the same term in China's Contract Law 1999.[4]

In addition, according to the same Article, an agreement shall be deemed

[4] According to Article 11 of the law, "written form" means any form which renders the information contained in a contract capable of being reproduced in tangible form such as a written agreement, a letter, or electronic text (including telegram, telex, facsimile, electronic data interchange and e-mail).

to exist if its existence is asserted by one party and not denied by the other in the exchange of their first round of documents on merits, namely the claimant's Request for Arbitration and the respondent's Statement of Defense. In such a situation, the exchanged documents are sufficient to constitute an arbitration agreement in writing.

3. The Tribunal and Arbitrators

(1) Appointment from outside the Panel

CIETAC adopted a "panel system," under which the parties and the Chairman of CIETAC could only appoint arbitrators from within the panel (list) of arbitrators. While the panel system still plays a major role in CIETAC arbitrations, CIETAC now does honor parties' agreement to appoint arbitrators or have arbitrators nominated from outside the panel.[5] Such appointment or nomination is subject to the confirmation by the Chairman of CIETAC "in accordance with the law."

(2) Appointment of Arbitrators

The Tribunal shall be composed of one or three arbitrators.[6] Basically,

[5] See Article 21.2 of the new Rules.
[6] See Article 20 of the new Rules.

for a three-member tribunal, each side shall appoint one arbitrator and the two sides (instead of the two party-appointed arbitrators) shall jointly appoint the presiding arbitrator. For a one-member tribunal, the two sides shall jointly appoint the sole arbitrator. Under Article 22.3 of the 2005 Rules, the parties may each submit a list of up to three recommended candidates for the presiding arbitrator so as to increase chances of successful joint appointment of the presiding arbitrator. If there is one common candidate in the lists, that candidate shall be the presiding arbitrator. Where there is more than one common candidate in the lists, the Chairman of CIETAC shall choose one from them. Under Article 23, the sole arbitrator shall be appointed through the same procedure.

4. The Proceedings

(1) Commencement of Arbitration

Under the former CIETAC Rules, the arbitral proceedings commence on the date on which CIETAC issues a Notice of Arbitration to the parties,[7] which CIETAC will not do until the claimant files a Request for Arbitration and hands in a fee as the deposit for the arbitration fee. Now according to the 2005 Rules, the proceedings shall commence on the date

[7] The rule that the arbitration commences on the date on which CIETAC issues the Notice of Arbitration has survived several revisions of CIETAC rules. It was contained in Article 13 of the Rules 2000.

on which CIETAC receives a Request for Arbitration.

(2) Conduct of Hearing: Inquisitorial or Adversarial?

China is a country under the Civil Law influence and that explains why arbitrations taking place in China are conducted with an inquisitorial approach. While that is still appropriate for domestic arbitration, it has been realized that a large number of the parties in the international arbitrations by CIETAC are from Common Law jurisdictions and they or their counsels naturally prefer to an adversarial approach. Hence the 2005 Rules grant parties an option for the adversarial approach. Parties now may in an agreement provide which approach, inquisitorial or adversarial, shall be adopted. Even in the absence of such an agreement, the arbitrator may in its own discretion "adopt an inquisitorial or adversarial approach when examining the case, having regard to the circumstances of the case."[8]

(3) A More Active Tribunal

In addition to deciding the approach for the oral hearing, the tribunal may hold deliberation at any place or in any manner that it considers

[8] See Article 29.3 of the new Rules.

appropriate. The tribunal may also, if it considers necessary, issue procedural directions and lists of questions, hold pre-hearing meetings and preliminary hearings, and prepare terms of reference, etc.[9] We believe a more active role on the part of the tribunal will better facilitate the conduct of arbitration.

5. Making of the Award

(1) Dissenting Opinion

For a three-member tribunal, the award shall be made in accordance with the majority opinion, or in the case where there is no majority opinion, in accordance with the presiding arbitrator's opinion. The dissenter may or may not sign his name on the award. China's Arbitration Law 1994 does not require the inclusion into the award of the opinion of the dissenting arbitrator, but states that it may be put into the file.[10] Under the former CIETAC Rules, the dissenting opinion was not made available to the parties, as the file should not be open to them. While these remain valid under the 2005 Rules, the 2005 Rules go further to allow the attachment of the dissenting opinion to the award, although it shall not form a part of

[9] See Articles 29.4 and 29.5 of the new Rules.
[10] See Article 53 of the Arbitration Law 1994. See also Articles 54 and 56 of the new Rules.

the award.[11]

(2) Scrutiny of Draft Award

CIETAC has an inner mechanism for scrutinizing draft awards. The Rules 2000 imposed on the tribunal a duty to submit the draft award to CIETAC for scrutiny, whereby CIETAC may remind the arbitrators of "any issue related to the form of the award."[12] This mechanism proved to be effective in that it reduced to large extent irregularities that might otherwise undermine the enforceability of the award. The scrutiny shall in no way impair the arbitrators' independence in decision-making, as it only offers suggestions, not mandatory requirements. Under Article 45 of the 2005 Rules, CIETAC may "remind the arbitral tribunal of issues in the award." The omission of "the form" part in the new Rules is deliberate and it implies that CIETAC can now scrutinize the award on both the form and the contents, hence the substantive issues. CIETAC shall still refrain from interfering with arbitrators' independence.

(3) Compensation of the Winning Party's Expenses

Under the former Rules, the winning party's reasonable expenses,

[11] See Article 43.4 of the new Rules.
[12] See Article 56 of the Rules 2000.

including the attorney's fee, shall be compensated by the losing party, but such compensation shall not exceed ten percent of the amount he is awarded.[13] The 2005 Rules have removed the ten percent restriction. The party overwhelming on the merits can expect to have all his expenses compensated by the losing party, although such compensation is subject to the test of reasonableness. In measuring the reasonableness, the tribunal shall take into account "such factors as the outcome and complexity of the case, the workload of the winning party and/or its representative(s), and the amount in dispute, etc."[14]

6. Time Limits

In order to streamline its procedure, CIETAC has in the 2005 Rules substantially shortened the time limits in the proceedings, as may be seen from the following chart.

Timelimit	Context	Rules 2000	Rules 2005
Filing of Defense/ Counterclaim	Foreign-related, Ordinary Procedure	45 days/60 days	45 days/45 days
(calculating from the date the	Foreign-related, Summary Procedure	30 days/30 days	20 days/20 days

13 See Article 59 of the Rules 2000.
14 See Article 46 of the new Rules.

respondent receives Notice of Arbitration)	Domestic, Ordinary Procedure	30 days/45 days	20 days/20 days
	Domestic, Summary Procedure	30 days/30 days	20 days/20 days
Appointment of Arbitrators (calculating from the date the parties receive Notice of Arbitration)	Foreign-related, Ordinary Procedure	20 days	15 days
	Foreign-related, Summary Procedure	15 days	15 days
	Domestic, Ordinary Procedure	15 days	15 days
	Domestic, Summary Procedure	15 days	15 days
Notification of First Oral Hearing [15] and Parties' Request for Postponement (before the actual hearing date)	Foreign-related, Ordinary Procedure	30 days/12 days	20 days/10 days
	Foreign-related, Summary Procedure	15 days	15 days/7 days
	Domestic, Ordinary Procedure	15 days	15 days/7 days
	Domestic, Summary Procedure	15 days	15 days/7 days

[15] The date concerned here is only for the notice of first oral hearing. Notice of subsequent oral hearings is subject to no time restrictions.

Making of Award (calculating from the date of composition of the tribunal)	Foreign-related, Ordinary Procedure	9 months	6 months
	Foreign-related, Summary Procedure	90 days[16]	3 months
	Domestic, Ordinary Procedure	6 months	4 months
	Domestic, Summary Procedure	90 days[17]	3 months

Conclusion

After over 50 years' continuous endeavor, CIETAC is now one of the busiest and most well-known arbitration centers in the world. Responding to the rapid development in the field of international commercial arbitration, CIETAC arbitration Rules 2005 offer the parties the most autonomy possible under the current Arbitration Act. As a result, the arbitral proceedings administered by CIETAC are much more flexible than before. All these make CIETAC arbitration much more attractive to the international business community.

[16] For a summary procedure case, no matter foreign-related or domestic, the timelimit for making of award under the Rules 2000 is 1 month after the last oral hearing, or 90 days in case of hearing on the basis of documents only.
[17] Id.

Article 13
The arbitration commission shall appoint fair and honest person as its arbitrators.
Arbitrators must fulfil one of the following conditions:
1. they have been engaged in arbitration work for at least eight years;
2. they have worked as a lawyer for at least eight years;
3. they have been a judge for at least eight years;
4. they are engaged in legal research or legal teaching and in senior positions; and
5. they have legal knowledge and are engaged in professional work relating to economics and trade, and in senior positions or of the equivalent professional level.
The arbitration commission shall establish a list of arbitrators according to different professionals.
Article 67
A foreign arbitration commission may appoint foreigners with professional knowledge in such fields as law, economic and trade, science and technology as arbitrators.